

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

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

**STATES' MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

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TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	6
ARGUMENT	10
I. The States are Likely to Succeed on the Merits.....	10
A. The Federal Agencies violated their grant of authority.....	10
B. The Federal Agencies failed to comply with APA requirements.....	14
1. The Rule is arbitrary and capricious.....	14
2. The Rule is not a “logical outgrowth” of the proposed rule.	16
C. The Rule violates state sovereignty and the Clear Statement Canon.....	17
II. The States Will Suffer Irreparable Harm if the WOTUS Rule is Implemented.	19
III. The Balance of Harms Tilts in Favor of an Injunction.	21
IV. The public Interest Favors an Injunction.	22
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page</u>
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156 (1962)	14, 15
<i>Canal Auth. of State of Fla. v. Callaway</i> , 489 F.2d 567 (5th Cir. 1974).....	10
<i>Connection Distrib. Co. v. Reno</i> , 154 F.3d 281 (6th Cir. 1998).....	22
<i>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council</i> , 485 U.S. 568 (1988)	19
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982)	18
<i>Friends of the Everglades v. EPA</i> , 699 F.3d 1280 (11th Cir. 2012).....	5
<i>Hess v. Port Auth. Trans-Hudson Corp.</i> , 513 U.S. 30 (1994)	18, 20
<i>Kansas v. United States</i> , 249 F.3d 1213 (10th Cir. 2001).....	19, 21
<i>Long Island Care at Home, Ltd. v. Coke</i> , 551 U.S. 158 (2007)	16
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)	14
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006)	9, 11, 12, 13, 18, <i>passim</i>

Page

Small Refiner Lead Phase-Down Task Force v. U.S. E.P.A.,
705 F.2d 506 (D.C. Cir. 1983)16

Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng’s,
531 U.S. 159 (2001) 9, 11, 18, 19, 20, *passim*

Southerland v. Thigpen,
784 F.2d 713 (5th Cir. 1986).....11

Texas v. United States,
787 F.3d 733 (5th Cir. 2015).....21

Constitution:

U.S. CONST., amend. X.....17

Statutes:

5 U.S.C. §§ 551 *et seq.*5

5 U.S.C. §§ 553 (b)-(c).....16

5 U.S.C. § 706(2)(A)14

33 U.S.C. § 1251(a).....21

33 U.S.C. § 1251(a)-(b).....11

33 U.S.C. § 1251(b)..... 6, 18, 19, 20

Tex. Water Code

§§ 26.011 *et seq.*.....21

Rules & Regulations:

33 C.F.R. 328 (1986).....22

79 Fed. Reg. 22,208-0917

79 Fed. Reg. 22,264.....17

80 Fed. Reg. 37,054.....1, 2, 4, 21

80 Fed. Reg. 37,056.....11

80 Fed. Reg. 37,101.....6, 18, 19

80 Fed. Reg. 37,102.....10

	<u>Page</u>
80 Fed. Reg. 37,104	6, 7
80 Fed. Reg. 37,105	6, 7, 12, 14, 16
80 Fed. Reg. 37,106	6, 8, 12, 14
 Other:	
Corps and EPA, <i>Tech Supp. Document for the Clean Water Rule: Definition of Waters of the United States</i> (May 27, 2015)	14
U.S. Army Corps of Engineers, <i>Memorandum for Deputy Commanding General for Civil and Emergency Operations</i> (Attn: MG John W. Peabody), <i>Through the Chief Legal Counsel</i> (Attn: David R. Cooper), <i>From Lance Woods, Assistant Chief Counsel, Environmental Law And Regulatory Programs, Regarding Legal Analysis of Draft Final Rule on Definition of Waters of the United States</i>	2
U.S. E.P.A. and Corps, <i>Memorandum for Deputy Assistant Administrator for Water Regional Administrators (Regions I-X) Chief of Engineers Division and District Engineers</i> (July 7, 2015)	10
U.S. EPA and Corps, <i>Economic Analysis of Proposed Revised Definition of Waters of the United States</i> (May 20, 2015)	8
11A Charles Alan Wright et al., <i>Federal Practice and Procedure</i> § 2948.3 (3d ed.2014)	11

TO THE HONORABLE UNITED STATES DISTRICT COURT:

The State of Texas, Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, Texas Water Development Board, along with the States of Louisiana and Mississippi (“States”), by and through undersigned counsel and pursuant to Southern District of Texas Local Rule 7, respectfully submit this Memorandum in Support of Motion for Preliminary Injunction.

INTRODUCTION

The States request that this Court enjoin the effectiveness of the final agency rule titled “Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed. Reg. 37,054 (June 29, 2015) (“Rule”), promulgated jointly by the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (collectively, “Federal Agencies” or “federal government”), pending the outcome of litigation. The States seek a preliminary injunction at this time because: (1) the Rule is now in effect; (2) the Rule immediately impacts the States’ sovereignty over their lands; (3) the failure of the Federal Agencies to respond to the States request to stay its Rule; and (4) the revelation of newly public memoranda from the U.S. Corps of Engineers, stating the agency’s conclusion that the Rule will not survive judicial scrutiny. At least one federal U.S. district court judge has issued a preliminary injunction, enjoining implementation of the Rule in 13 states.

On June 29, 2015, the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (collectively, “Federal Agencies” or “federal government”) took final agency action by publishing in the Federal Register the rule titled

“Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed. Reg. 37,054 (June 29, 2015) (“Rule”). The Rule seeks to “clarif[y]” the federal government’s definition of “the waters of the United States” within the meaning of the Clean Water Act (“CWA”)—*i.e.*, the scope of the federal government’s jurisdiction over those waters. Far from accomplishing that goal, the Rule further complicates the scope of federal jurisdiction over waters and even grants the Federal Agencies *additional* jurisdiction over numerous dry-land and water features. In so doing, the Rule violates the CWA, the Administrative Procedure Act (“APA”), and the United States Constitution.

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

On or around July 30, 2015, the U.S. House of Representatives Committee on Oversight and Reform released a set of documents authored by the Corps regarding the Rule.¹ In one of the documents, the Corps noted shortly before the Rule was to be published that it is “not likely to survive judicial review in federal courts.” *See* U.S. Army Corps of Engineers, *Memorandum for Deputy Commanding General for Civil and Emergency Operations (Attn: MG John W. Peabody), Through the Chief Legal Counsel (Attn: David R. Cooper), from Lance Woods, Assistant Chief Counsel, Environmental Law and Regulatory Programs, Regarding Legal Analysis of Draft Final Rule on Definition of Waters of the United States*, at 10, attached as **Exhibit A**. The States agree. The Corps acknowledged, further, that:

It will be difficult, if not impossible, to persuade the federal courts that the implicit, effective determination that millions of

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

acres of truly isolated waters (which have no shallow or confined surface connection to the tributary system of the navigable or interstate waters) do in fact have a “significant nexus” with navigable or interstate waters.

Id. Again, the States agree.

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

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

On August 28, 2015, the Rule became effective, and the States now turn to this Court to protect their sovereign interests and enjoin the Federal Agencies from implementing the Rule pending judicial review.

The States seek an injunction, because implementation of the Rule will drastically reconfigure the landscape of federal-state cooperation in implementing the CWA and impermissibly infringe on the States’ sovereign authority to regulate land and water use

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

The U.S. District Court for the District of North Dakota already issued a preliminary injunction against the Federal Agencies. *See* Exhibit D. In granting a preliminary injunction enjoining the Rule’s effectiveness pending litigation, the Court concluded that “[t]he States are likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the Rule.” *Id.* at 9. The Court also determined that the “States have a fair chance of success on the merits” that the Rule is likely to be arbitrary and capricious. *Id.* at 12. The Court also found that the “States here have demonstrated that they will face irreparable harm in the absence of a preliminary injunction” citing a “loss of sovereignty” and “unrecoverable monetary harm.” *Id.* at 15-16. Lastly, the Court determined that the balance of harms and the public interest favored

an injunction. *Id.* at 17-18 (“[T]he public would benefit from [a] preliminary injunction because it would ensure that federal agencies do not extend their power beyond the express delegation from Congress.”). The States of Texas, Louisiana and Mississippi ask now for this Court to follow the precedent set by the District of North Dakota.²

In light of the Corps documents, and in light of the North Dakota PI, which provides immediate relief from the Rule for 13 other states (one of which—New Mexico—borders the State of Texas), the States ask this Court to enjoin the Federal Agencies from implementing the Rule pending outcome of this litigation.

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

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

BACKGROUND

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

The Rule declares that “[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide” as well as “[a]ll interstate waters, including interstate wetlands” and “the territorial seas” are also *per se* jurisdictional waters. *Id.* at 37,104. These waters are referred to herein as “traditional waters,” because the jurisdictional test for all other waters is based on a relationship to one of these three categories of waters. All intrastate “tributaries” of traditional waters are *per se* jurisdictional waters. *Id.* The Rule defines “tributary” as “a water that contributes flow, either directly or through another water” to a primary water and “is characterized by the

presence of the physical indicators of a bed and banks and an ordinary high water mark.” *Id.* at 37,105. A water is defined as a tributary even if it has man-made or natural breaks, “so long as a bed and banks and an ordinary high water mark can be identified upstream of the break.” *Id.* at 37,106. An “ordinary high water mark” (“OHWM”) is defined as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means.” *Id.*

The Rule’s definition of tributary sweeps within the Federal Agencies’ authority ephemeral streams and channels that are usually dry. It also makes man-made features such as ditches—which are not all explicitly excluded—*per se* jurisdictional by sweeping them into the definition of tributary. Under the Rule, all intrastate waters that are “adjacent” to traditional waters, impoundments, or tributaries are *per se* jurisdictional. *Id.* at 37,104. “[A]djacent waters” are waters “bordering, contiguous, or neighboring” primary waters, impoundments, or tributaries. *Id.* at 37,105. The category includes “waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.” *Id.* It also includes wetlands within or abutting the ordinary high water mark of an open water, such as a pond or lake. *Id.*

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

ordinary high water mark of such water.” *Id.* “Neighboring” also includes “[a]ll waters [at least partially] located within 1,500 feet of the high tide line.” *Id.*

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

The case-by-case test the Federal Agencies will apply under the Rule is whether waters alone or in combination with “similarly situated waters in the region . . . significantly affect[] the chemical, physical, or biological integrity” of a traditional water. *Id.* at 37,106. “Region” is defined as “the watershed that drains to the nearest [primary water].” *Id.* Waters with only a shallow sub-surface connection or no hydrologic connection whatsoever to a primary water, impoundment, or tributary can satisfy this test. The Federal Agencies admit in their economic analysis of the Rule that these definitions will increase the jurisdictional scope of the CWA over existing practice. *See* US EPA and Corps, *Economic Analysis of Proposed Revised Definition of Waters of the United States*, at 5-6

(May 20, 2015) (hereinafter “Economic Analysis”). If the Rule is implemented, this expansion of federal jurisdiction will harm the States in their capacity as partners and regulators in implementing programs for which the States have direct and delegated authority under the CWA. As acknowledged in the Federal Agencies’ Economic Analysis, the Rule will result in an increased volume of permit applications, water quality certifications, and other administrative actions that the States will have to address. *Id.* at 53. This poses an enormous and immediate burden on the States.

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

Further, the Rule will significantly impact water supply, agricultural, oil and gas, and mining operators as they attempt to toe the line between established state regulatory programs and the Federal Agencies’ new burdensome and conflicting federal requirements. This uncertainty threatens states like Texas, Louisiana, and Mississippi, who rely on

revenues from industry development to fund a wide variety of state programs for the benefit of their citizens.

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

ARGUMENT

I. The States are Likely To Succeed on the Merits.

The first consideration in the preliminary injunction analysis is the likelihood that the plaintiff will prevail on the merits. The Fifth Circuit has stated that the likelihood of success required in a given case depends on the weight and strength of the other three factors. *See Canal Auth. Of State of Fla. v. Callaway*, 489 F.2d 567, 576–77 (5th Cir. 1974). Although some doubt has been cast on this “sliding scale” approach, it is clear that, at a

minimum, the plaintiff must demonstrate a “substantial case on the merits.” *See, e.g., Southerland v. Thigpen*, 784 F.2d 713, 718 n.1 (5th Cir. 1986). Thus, to meet the first requirement for a preliminary injunction, the States “must present a prima facie case,” but “need not show a certainty of winning.” 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.3 (3d ed. 2014) (hereinafter “Wright & Miller”).

In the present case, the States will likely succeed on the merits because, in promulgating the Final Rule, the Federal Agencies: (1) violated their grant of authority by Congress; (2) failed to comply with the APA; and (3) violated the 10th Amendment and the Clear Statement Canon.

A. The Federal Agencies violated their grant of authority.

In the preamble to the Final Rule, the Federal Agencies make clear that “[a]n important element of the agencies’ interpretation of the CWA is the significant nexus standard . . . first informed by the ecological and hydrological connections the Supreme Court noted in *Riverside Bayview*, developed and established by the Supreme Court in *SWANCC*, and further refined in Justice Kennedy’s opinion in *Rapanos*.” 80 Fed. Reg. at 37,056. However, in developing its “significant nexus” standard, the Final Rule relies almost exclusively on Justice Kennedy’s concurrence for its authority. This reliance is misplaced. The Federal Agencies would have been more prudent to rely on the *Rapanos* plurality’s holding that wetlands not directly abutting a traditional navigable-in-fact water had to have a “continuous surface connection” to a navigable-in-fact water. *Rapanos* at 782. This standard is more expressly consistent with the goals of the CWA, *see* 33 U.S.C. §§ 1251(a)-(b), Congress’s commerce power, and the underlying precedent in *Riverside*

Bayview and *SWANCC*. Although there is substantial uncertainty that the Federal Agencies' adoption of a jurisdictional standard embraced by a single Justice is appropriate, or that extrapolation of that standard beyond wetlands is permissible, the Final Rule fails to satisfy Justice Kennedy's significant nexus test.

Justice Kennedy's analysis begins by emphasizing that the purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the [traditional navigable interstate] waters." *Rapanos* at 779. Accordingly, the Agencies' jurisdiction over waters that are not traditionally navigable depends upon the existence of a significant nexus between the [waters] in question and traditional navigable waters. *See Rapanos* at 780. By Justice Kennedy's reasoning, without this "significant nexus," isolated waters will not significantly affect the chemical, physical, and biological integrity of traditional waters, and thus fall outside the regulatory jurisdiction of the Federal Agencies.

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

[T]he breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.

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

The definition of “tributary” in the Final Rule is strikingly similar to the definition rejected by Justice Kennedy in *Rapanos*. The Final Rule defines “tributaries” as “a water that contributes flow . . . to a traditional water that “is characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark.” 80 Fed Reg. 37,105-106. A water meets this definition regardless of whether its contribution of flow is direct or measurable, or even if the required “physical indicators” are interrupted by man-made or natural breaks “of any length.” *Id.* So, the definition set forth under the Final Rule allows for regulation of any area that has a trace amount of water so long as “the physical indicators” of a bed and bank and high water mark exist, regardless of whether it actually has a significant nexus to a traditional navigable water. Accordingly, this standard fails Justice Kennedy’s significant nexus test.

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

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

1. The Rule is arbitrary and capricious.

A court must set aside a final agency rule if it finds that the rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5. U.S.C. § 706(2)(A). The scope of this “standard is narrow and a court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). However, the agency has a duty to “examine the relevant data and articulate a satisfactory explanation for its action.” *Id.* An agency must base its explanation on a “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Under its *per se* jurisdictional definitions, the Federal Agencies will automatically determine that any water has a significant nexus to a traditional navigable water, so long as the water fits within the definition of a “tributary,” as defined under the Rule. The Federal Agencies’ rationale for this position stems from scientific literature showing that “tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches are integral parts of river networks.” *See* Corps and EPA, *Tech. Supp. Document for the Clean Water Rule: Definition of Waters of the United States*, 243 (May 27, 2015). However, the waters described in the scientific literature cited by the Agencies are only a subset of the waters broadly defined as a “tributary” under the Rule. The Rule provides that tributaries are any water “that contributes flow” to a traditional navigable water that “is characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark.” 80 Fed Reg. 37, 105-106.

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

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

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

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

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

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

Therefore, the Rule is arbitrary and capricious in violation of the APA and must be vacated. The Rule conflates waters described in the scientific literature with a broader category of waters defined as of “tributaries,” and it arbitrarily establishes geographic jurisdictional distances.

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

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

The definition of “neighboring” under the Final Rule is not a logical outgrowth of its definition in the Proposed Rule. The Federal Agencies materially altered the definition in the Final Rule by substituting ecological and hydrological concepts with geographical distances. The Proposed Rule defined waters of the United States as “includ[ing] waters

located within the riparian area or floodplain of a [primary water, impoundment, or tributary], or waters with a shallow subsurface hydrological connection or confined surface hydrological connection to such a jurisdictional water.” 79 Fed. Reg. 22,264. However, the Final Rule, as adopted, defines “neighboring” as including any water which is at least partially “located within 100 feet of the ordinary high water mark of [a primary water, impoundment, or tributary]” and any water which is at least partially located within 1,500 feet of the ordinary high water mark of a primary water, impoundment, or tributary which is also located within the 100-year floodplain of that water. 80 Fed Reg. 37,105.

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

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

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

Under the Tenth Amendment, “[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people.” U.S. CONST.,

amend. X. Under the Rule, the Federal Agencies admit to an increase in control of traditional state-regulated waters of between 2.84 to 4.65 percent. 80 Fed. Reg. 37101. Therefore, the Rule encroaches upon the rights of the states to regulate lands within their borders. Land-use planning, regulation, and zoning are not enumerated powers granted to the federal government. They are the basic, fundamental functions of local governmental entities. Authority over these functions is reserved, traditionally, to the states under the Tenth Amendment. *See SWANCC*, 531 U.S. at 174 (recognizing the “States’ traditional and primary power over land and water use”); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“Among the rights and powers reserved to the States under the Tenth Amendment is the authority to its land and water resources.”); *FERC v. Mississippi*, 456 U.S. 742, 768, n.30 (1982) (“regulation of land use is perhaps the quintessential state activity”); *see also* 33 U.S.C. § 1251(b).

The courts traditionally expect “a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority.” *Rapanos*, 547 U.S. at 738 (*citing BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)). The phrase “the waters of the United States” does not constitute such a clear and manifest statement. *Id.* On the contrary, the Clean Water Act instructs the Federal Agencies to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources” 33 U.S.C. § 1251(b). Thus, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is

plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Rule violates the Constitution by asserting authority over isolated, intrastate waters and displacing the States’ sovereign rights. The Supreme Court in *SWANCC* rejected the Federal Agencies’ assertion that certain isolated waters were “waters of the United States” because, *inter alia*, this would “alter[] the federal-state framework by permitting federal encroachment upon” the States’ “traditional and primary power over land and water use.” 531 U.S. at 173-74. The Rule covers not only the isolated waters at issue in *SWANCC*, but also many other isolated waters and sometimes wet lands. The Rule thus violates the States’ sovereign rights under the Tenth Amendment to manage and protect their intrastate waters. *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001)

Therefore, the Final Rule violates the Tenth Amendment, the Clear Statement Canon, and 33 U.S.C. § 1251(b).

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

To obtain a preliminary injunction, the States must establish that they will suffer irreparable harm. Absent a preliminary injunction, the States will immediately lose their sovereignty over intrastate waters that will instead be subject to the scope of the CWA. The Federal Agencies admit to an increase in control of traditional state-regulated waters of between 2.84 to 4.65 percent. 80 Fed. Reg. 37101.

When filing their complaint on June 30, 2015 (almost two months prior to the Rule becoming effective on August 28, 2015), the States originally chose to not seek a preliminary injunction. This calculus changed in light of a number of post-Complaint activities, namely: (1) the Rule is now in effect; (2) the Rule is currently impacting the States' sovereignty over their lands and waters; (3) failure of the Federal Agencies to respond to the States' request to stay the Rule; (4) the revelation of newly public correspondence from the Corps to the EPA, stating its conclusion that the Rule will not survive judicial review; and (5) the issuance of an injunction against the Federal Agencies for its harm on the sovereign rights of 13 states, including New Mexico, with whom Texas shares a border. In light of these and other post-Complaint developments, and in tandem with the Rule's chilling effect, the States are now certain that, absent a stay, they will suffer clear, irreparable harm.

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

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b).

Moreover, States have a constitutional right to maintain their “traditional and primary power over land and water use.” *SWANCC*, 531 U.S. at 174; *see e.g., Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (holding that “regulation of land use

[is] a function traditionally performed by local governments”). Consistent with that authority, the States have enacted comprehensive regulatory schemes to protect, maintain, and improve the quality of waters in their borders, consistent with the CWA’s mission to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a); *see e.g.*, Tex. Water Code §§ 26.011 *et seq.*

Because the States’ sovereign interests in controlling their own waters and lands are put at stake by the Rule, the States will be irreparably harmed if the Rule is implemented without the States having “a full and fair opportunity to be heard on the merits.” *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).

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

The balance of harms tilts in favor of an injunction because enjoining implementation of the Rule pending outcome of the litigation will not cause the Federal Agencies any harm. As demonstrated above, the States will suffer imminent and irreparable harm from the implementation of the Rule. In contrast, the Federal Agencies will not be able to demonstrate imminent, irreparable harm, as an injunction will merely force them to maintain the same jurisdiction over waters they’ve been bound by under the CWA, as informed by *Rapanos*, and *SWANCC*. *See, e.g., Texas v. United States*, 787 F.3d 733, 766 (5th Cir. 2015) (Finding that the balance of harms tilts in favor of the states when the federal government cannot show it will be harmed by a stay.) The Federal Agencies’ stated purpose in promulgating the Rule is to “increase CWA program predictability and consistency by clarifying the scope of ‘waters of the United States.’” 80 Fed. Reg. at 37,054. Rushing implementation of the Rule before its legal sufficiency is established is

contrary to this goal. The Corps' own attorneys noted that the Rule fails to "include an adequate provision for . . . transitioning from the existing rule to the new rule." Ex. A at 7. Therefore, delaying implementation of the rule will actually benefit the Federal Agencies by providing them an opportunity to develop the tools necessary to implement the Rule. *See, e.g.*, Exhibit E.

IV. The Public Interest Favors an Injunction.

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

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on September 8, 2015, a copy of the foregoing Memorandum in Support of Motion for Preliminary Injunction was served electronically through the U.S. District Court for the Southern District of Texas's CM/ECF system on all registered counsel.

/s/ Matthew B. Miller

EXHIBIT A



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REPLY TO
ATTENTION OF

APR 24 2015

CECC-E

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations,
U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief Counsel, U.S. Army Corps of Engineers (ATTN: David R. Cooper)

SUBJECT: Legal Analysis of Draft Final Rule on Definition of "Waters of the United States"

This memorandum responds to your request for a legal analysis of the draft final rule regarding the definition of the "waters of the United States" (WOUS) subject to Clean Water Act (CWA) jurisdiction, which the Environmental Protection Agency (EPA) submitted to the Office of Management and Budget (OMB) for inter-agency clearance on April 1, 2015.

Summary

The draft final rule regarding the definition of WOUS contains several serious flaws. If the rule is promulgated as final without correcting those flaws, it will be legally vulnerable, difficult to defend in court, difficult for the Corps to explain or justify, and challenging for the Corps to implement. The Corps has identified every serious area of concern in the draft final rule to both the Department of the Army (DA) and the EPA, and Corps legal and regulatory staff has provided numerous edits or "fixes" to rule language to correct those errors. However, to date, the fixes have not been adopted, so the flaws remain.

The fundamental problem, reflected in every one of the flaws described below is that the proposed rule that was published on April 21, 2014, is based on sound principles of science and law, but many provisions of the draft final rule have abandoned those principles and introduced indefensible provisions into the rule. The following is a summary of the most serious flaws in the draft final rule; the proposed fixes are shown in track changes in the attached "Revised Draft Final Rule," which was provided most recently to DA and EPA on April 16, 2015.

Legal Standard

EPA and Corps staff agree with our colleagues at the U.S. Department of Justice that the final rule will survive the expected legal challenges that it will face in the federal courts only if the courts conclude that the rule complies with the test for CWA jurisdiction provided by Justice Kennedy in the *Rapanos* decision. The following is the essence of Justice Kennedy's test: a water body (such as a wetland) is subject to CWA jurisdiction if it has a significant nexus with navigable waters. The term "significant nexus" means 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 the downstream navigable waters. For an effect to be significant, it must be more than speculative or insubstantial.

Loss of CWA Jurisdiction

The draft final rule excludes from jurisdiction of the CWA large areas of lakes, ponds, and similar water bodies that are important components of the tributary system of the navigable waters and that the Federal government has been regulating as jurisdictional from 1975 to the present moment. Those water bodies are important to the physical, chemical, and biological integrity of the entire tributary system of the navigable waters and to the navigable waters themselves. However, those lakes, ponds, and wetlands would lose all federal CWA protection under the draft final rule merely because they happen to lay outside and beyond a distance of 4000 feet from a stream's ordinary high water mark (OHWM) or high tide line (HTL). The 4000-foot cut-off line (or "bright-line rule") for jurisdiction has no basis in science or law, and thus is "arbitrary." The Corps believes that the 4000-foot limit on jurisdiction would cause significant adverse environmental effects as a result of the loss of jurisdiction over a substantial amount of jurisdictional "waters," based on the Corps' experience in implementing the CWA Section 404 program and performing the majority of jurisdictional determinations under the CWA.

The arbitrary nature of the 4000-foot cutoff of jurisdiction is demonstrated by the fact that EPA staff engaged in drafting the rule told Corps staff during a conference call in March 2015 that EPA was going to cut off CWA jurisdiction at a distance of 5000 feet from the OHWM/HTL of traditional navigable waters, interstate waters, territorial seas, soundwaters, or tributaries. Then, three days later, EPA staff changed its position and decided to cut off CWA jurisdiction at the narrower 4000-foot limit from an OHWM/HTL. EPA staff has never provided any scientific support or justification for either a 5000-foot or 4000-foot cut-off. Both distances are arbitrary and either limitation would be very difficult to defend in the federal courts when the final rule is challenged because neither limitation on CWA jurisdiction is supported by science or field-based evidence. It is significant that EPA's Science Advisory Board recommended against using any set distance to establish or limit CWA jurisdiction.

To abandon existing Federal CWA jurisdiction over ecologically important water bodies that significantly affect the biological, physical, and chemical integrity of the downstream waters would lead to significant adverse effects on the environment, because, shorn of CWA protection, those lakes, ponds, and wetlands can be polluted, filled, drained, and degraded at will, with no Federal regulation to prevent, regulate, or mitigate for those destructive activities. Pollutants dumped into no-longer-jurisdictional water bodies would flow downstream to the navigable waters, polluting drinking water supplies and killing or harming fish, shellfish, and wildlife, and harming human populations. Consequently, the abandonment of CWA jurisdiction over important parts of the tributary system of the navigable waters cannot be done without first preparing an environmental impact statement (EIS) to identify precisely what water bodies would lose CWA protection under the final rule and what significant adverse environmental effects would result from that loss of jurisdiction.

In a limited time frame during the development of the draft final rule (roughly the last two months), the Corps' professional staff has documented representative examples of the many lakes, ponds, and wetlands that are part of the tributary system of the navigable waters and that would lose CWA jurisdiction and protection under the draft final rule. This documentation has

been presented to both the Assistant Secretary of the Army (Civil Works) (ASA(CW)), and to EPA decision-makers and technical staff. Thus far, no one has refuted or denied the professional, technical, and well-documented examples of lost jurisdiction under the draft final rule. No one has presented any basis to refute or challenge the Corps' determination that the draft final rule would cause significant adverse effects on the human environment and thus would require an EIS before the final rule could be promulgated in its current form.

During discussions with EPA staff on April 9, 2015, EPA representatives suggested that, although the proposed abandonment of substantial parts of the CWA's long-standing jurisdiction would cause significant adverse effects on the human environment, those adverse effects might be offset by the hope that the final rule will lead to the assertion of CWA jurisdiction over five categories of "isolated" waters under section (a)(7) of the draft final rule. That argument is unpersuasive for at least two reasons:

First, a well-established principle of NEPA law states that a proposed Federal action that would cause significant adverse effects on any part or aspect of the human environment requires an EIS to address those significant adverse effects, even if the Federal agency believes that other aspects of its proposed action would have environmental benefits. For example, the Council on Environmental Quality's (CEQ's) legally binding NEPA regulations state the rule of law regarding how a Federal agency must determine whether its proposed action could cause significant adverse environmental effects as follows:

"Significantly" as used in NEPA required consideration of . . . intensity: (b) Intensity. This refers to the severity of the impact. (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." (40 CFR 1508.27)

Secondly, in section (a)(7) of the draft final rule, EPA has determined that every hydrologically/geographically isolated water in each of the five defined subcategories of isolated waters is "similarly situated" with all other isolated waters in those subcategories in the watershed that drains to the nearest traditional navigable water, interstate water, or territorial sea. Leaving aside the legal, scientific, and technical problems presented by section (a)(7), which are discussed below, section (a)(7) does not assert CWA jurisdiction over any of the isolated water bodies identified in that provision. CWA jurisdiction could be asserted over those isolated water bodies identified in section (a)(7) only if and when the Corps (or possibly EPA as a "special case") was to determine on a case-specific basis that those isolated water bodies have a significant nexus with navigable or interstate waters. Given the fact that, by definition, the vast majority of those isolated water bodies have no hydrologic connection with navigable or interstate waters, it is uncertain whether many, if any, of those isolated waters will pass the "significant nexus" test and be found to be subject to CWA jurisdiction. Even if the Corps or the EPA were to assert that those isolated waters are jurisdictional under the significant nexus test, it is doubtful that the federal courts would uphold such assertions of CWA jurisdiction.

The Corps has questioned what legal authority exists that would enable DA and EPA to abandon CWA jurisdiction over large areas of lakes, ponds, and wetlands that are important parts of the tributary system of the navigable waters, and over which the Corps and EPA have asserted CWA

jurisdiction since 1975. But even if such legal authority exists, at present there is no legally adequate administrative record to support such a move. The proposed rule did not propose any limitation for CWA jurisdiction comparable to the 4000 feet cut-off, which was presented for the first time in the draft final rule. Consequently, the public did not have the opportunity to evaluate that idea or to comment on it during the public comment period and thus the addition of this limitation likely violates the Administrative Procedures Act (APA).

In some ways the proposed abandonment of CWA jurisdiction over many lakes, ponds, and wetlands that are important parts of the tributary system of the navigable waters also has the effect of calling attention to legal and scientific questions regarding other parts of the final rule. For example, the draft final rule asserts CWA jurisdiction *by rule* over every "stream" in the United States, so long as that stream has an identifiable bed, bank, and OHWY. That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes and arroyos in the desert Southwest, even though those ephemeral dry washes, arroyos, etc. carry water infrequently and sometimes in small quantities if those features meet the definition of a tributary. The draft final rule's assertion that the dry washes all have a "significant nexus" with navigable waters contrasts sharply with the contradictory position in the rule that large areas of lakes, ponds, and wetlands in the well-watered parts of the USA, which water bodies actually send large amounts of water, sediments, nutrients, and (potentially) pollutants to the navigable waters, would lose CWA jurisdiction under the 4000-foot cutoff.

When these flaws were described to EPA staff during the April 9, 2003 meeting, the response was that the agencies have legal authority to place any limitation that they choose on the extent of CWA jurisdiction, even if that would have the effect of excluding from CWA jurisdiction lakes, ponds, and wetlands that have already been determined by the Corps to have a significant nexus with navigable waters, or that would satisfy that jurisdictional test in any future site-specific jurisdictional determination. Even if that assertion is valid, that sort of abandonment of CWA jurisdiction cannot take place without having first prepared an EIS to analyze and seek public comment on the potentially significant adverse effects on the natural and human environment that would result.

It is easy to fix the draft final rule to avoid the legal necessity of preparing an EIS. The Corps has suggested the necessary fix many times during the last several months. To date, consensus has not been reached to resolve the Corps' continuing concerns. The reason that EPA has given for not adopting the Corps' fixes is that EPA apparently believes that the 4000-foot cut-off of CWA jurisdiction would provide greater clarity (i.e., a "bright line") to the regulated public by limiting the Corps' ability to perform site-specific jurisdictional determinations. The Corps has explained why the EPA's 4000-foot limit would be more difficult to understand, identify, implement, or defend in the federal courts than the Corps' suggested approach, as explained in the technical memorandum accompanying this memorandum.

The Corps' fix is shown in the attached revised draft final rule. If this problem is not fixed, then the Corps must prepare an EIS before the final rule can be promulgated and leaves the rule vulnerable to an APA challenge.

Definition of "Adjacent"

On the day that the draft final rule was sent to OMB to begin the inter-agency review process, EPA introduced into the rule's definition of "adjacent" a new sentence that would exclude from the final rule's definition of "adjacent waters" large areas wetlands that are used, or have been used, for farming, forestry, or ranching activities. That sentence reads as follows: "Waters subject to established, normal farming, silviculture, and ranching activities (33 U.S.C. Section 1344(f)(1)) are not adjacent." On its face, the sentence is indefensible: it is a textbook example of rulemaking that cannot withstand judicial review. This is true because a wetland is, by definition, "adjacent" to a tributary stream if, as a matter of geographical fact, that wetland is "bordering, contiguous, or neighboring" to the stream, regardless of whether farming, forestry, or ranching activities are taking place on that wetland. That sentence must be removed or modified to retain credibility and legal defensibility for the final rule's definition of "adjacent."

According to the draft preamble to the draft final rule, the intended effect of the new sentence is to require a site-specific "significant nexus" determination before the particular adjacent waters could be determined to be subject to CWA jurisdiction, rather than to declare the waters jurisdictional by rule, as is the case with all other "adjacent" wetlands and other adjacent waters. For many years wetland areas adjacent to rivers and streams have been used for cutting hay or other farming, ranching, or silviculture purposes. All normal farming, ranching, and silviculture activities have been exempted by statute from CWA Section 404 permitting requirements since 1977. The proposed rule that was published in the Federal Register did not propose to exclude from the definition of "adjacent" any categories of adjacent waters based on the activities that occur in those waters, so the public did not have an opportunity to comment on the new definition, again leaving the rule vulnerable to an APA challenge. The last-minute decision to distinguish adjacent farmed waters from other adjacent wetlands is highly problematic, both as a matter of science and for purposes of implementing the final rule.

Nevertheless, if EPA and DA decide that the final rule should implement the idea underlying the sentence quoted above, then at the least the sentence should be revised as follows: "Waters subject to established, normal farming, silviculture, or ranching activities (33 U.S.C. Subsection 1344(f)(1)) are not jurisdictional by rule under sub-section (a)(6) of this paragraph as "adjacent waters," but may be determined to be jurisdictional on a case-by-case basis under subsection (a)(8)."

Definition of "Neighboring"

The draft final rule would provide a new definition of the term "neighboring," which would declare "jurisdictional by rule" all water bodies within 1500 feet of an OHWM or HTL, so long as the water body is located within a 100-year flood plain. The 1500-foot limitation is not supported by science or law and thus is legally vulnerable. The Corps has advocated the more scientifically and legally defensible distance of 300 feet for declaring by rule that all neighboring water bodies are jurisdictional, based on the Corps' experience in implementing the CWA Section 404 program and performing the majority of jurisdictional determinations under the CWA. Site-specific significant nexus determinations of jurisdiction are necessary to justify the assertion of CWA jurisdiction over water bodies that lie more than 300 feet from an OHWM or

HTL. The definition of "neighboring" also contains other fixable flaws. The edits are shown and explained in the attached revised draft final rule.

Categories of Isolated Waters

The draft final rule's treatment of five categories of "isolated" waters (i.e., prairie potholes, western vernal pools, Carolina bays and Delmarva bays, Texas coastal prairie wetlands, and pocosins) is problematic. Such isolated waters undoubtedly are ecologically valuable and important, so the policy goal of providing CWA protection for such waters is understandable. However, to be subject to CWA jurisdiction, those isolated water bodies must be demonstrated to have a significant nexus with navigable or interstate waters, which nexus will be difficult to show for isolated waters that are not hydrologically connected to the tributary system of either navigable or interstate waters.

The draft final rule would declare that all isolated waters in each of these five listed categories of isolated waters are "similarly situated," but the Corps has never seen any data or analysis to explain, support, or justify this determination. In essence, section (a)(7) of the draft final rule provides a definition of each of five categories of isolated waters and then asserts that every water that fits into each definition is similar to all other waters that fit into that same definition within any single point of entry watershed. This approach is circular reasoning, making use of a tautology, so that the determinations of "similarly situated" do not have much substance.

Moreover, the determination that all isolated waters in each of the listed five categories of isolated waters are "similarly situated" is in conflict with the draft final rule's definition of "similarly situated," which is embedded in the definition of "significant nexus." The current draft final rule defines the concept of "similarly situated" as follows: "Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters." This definition requires findings on two matters: the functions of the waters and how close to each other those similar waters are located. However, the current definition for each category of isolated waters in section (a)(7) of the draft final rule is based entirely on the functions of those waters, leaving out the required findings regarding proximity. In other words, the definitions in section (a)(7) for the five categories of isolated waters are not based on any findings that those isolated waters "are sufficiently close together to function together in affecting downstream waters," as required by the definition of "similarly situated." Significantly, EPA's technical staff has demonstrated that in some areas prairie potholes (for example) are located close together and, in other areas, they are spaced far apart. Yet, the assertion that all prairie potholes are "similarly situated" does not account for that discrepancy, which renders section (a)(7) legally vulnerable.

It is also worth noting that section (a)(7) asserts that every example of the five categories of isolated waters identified in that section have essentially the same functions regarding navigable and interstate waters, and the territorial seas, as every other isolated water in that category. But how can that be true, when some of those isolated waters have been hydrologically connected to the tributary system of the navigable waters by drainage ditches, while other isolated waters in that same category have not been so connected, and are truly "isolated?" Their functions would

not necessarily be the same and even if they share some of the same functions, the effects of the functions would be varied such that they would not be functioning "alike."

Functions of Wetlands/Water Bodies Indicating Significant Nexus

The draft final rule presents a limited and exclusive list of nine (9) functions that wetlands and other water bodies perform, which can be evaluated and documented to establish a significant nexus between that wetland or other water body and downstream navigable or interstate waters to establish CWA jurisdiction over that water body. The Corps on numerous occasions has advised EPA that the list of functions is incomplete, based on the Corps' experience and expertise in performing significant nexus evaluations in the nearly eight years since the release of the *Rapanos* guidance. During that period the Corps has made more than 21,000 significant nexus determinations by analyzing the biological, physical, and chemical functions provided by such water bodies. Nevertheless, thus far EPA has not expanded the list or revised the provision to designate EPA's list of functions as representative and non-exclusive. The proposed fix for this problem is presented in the attached revised draft final rule.

Transition to New Rule

The draft final rule does not include an adequate provision for "grandfathering," that is, for transitioning from the existing rule to the new rule. The transition could be difficult and fraught with problems, all of which require careful treatment in a well-conceived provision that has not yet been drafted. The needed provision should consider the various types of authorizations provided under the CWA, the different types of jurisdictional determinations provided to landowners, and various other types of actions related to jurisdictional determinations. Without a well-considered transition provision, implementation of the rule will generate significant legal problems.

Essential Principles in the Proposed Rule

To understand the fundamental legal problems with the draft final rule, all that one needs to do is read the language of the proposed rule and compare it to the very different language of the draft final rule. The comparison reveals that many essential principles that made the proposed rule legally defensible have been abandoned or obscured in the draft final rule. Given the fact that the proposed rule was carefully developed by the EPA and the Corps, and then reviewed and cleared by the EPA, the Corps, DA, the Department of Justice, OMB, and other Federal agencies, the draft final rule's deviation from fundamental legal and scientific principles that were essential components of the proposed rule reveals the basic problems of the draft final rule.

The fundamental legal and scientific principles of the proposed rule are fairly straightforward, elegantly simple, easily understood, based on sound scientific and legal principles, and thus very legally defensible. Those principles included the following:

The proposed rule would assert CWA jurisdiction by rule over all of the natural water bodies that constitute the tributary system of the navigable and interstate waters, subject to a limited number of specified exclusions from CWA jurisdiction. The proposed rule would do that by asserting

CWA jurisdiction by rule over all tributaries of the navigable and interstate waters. Those tributaries are defined in the proposed rule as all water bodies (i.e., rivers, streams, lakes, ponds, wetlands, etc.) that contribute a flow of water (directly or through another water body) to the navigable or interstate waters, plus all other waters that are adjacent to those tributary water bodies. In accordance with the Supreme Court's legally binding, precedential decisions, the proposed rule and its administrative record would establish the reasonable proposition that the natural water bodies that constitute the tributary system of the navigable and interstate waters have a significant nexus with those downstream waters because they provide the water to those downstream navigable and interstate waters, and because pollutants, sediments, etc., flow from the upper parts of the tributary system down to the navigable and interstate waters.

Under the proposed rule, for truly isolated water bodies that have no shallow subsurface or confined surface connection to the tributary system of the navigable or interstate waters, those isolated water bodies could be evaluated on a case-by-case basis in site-specific jurisdictional determinations made by the Corps or EPA to determine whether various "aggregations" of those isolated water bodies might be "similarly situated" and might have a "significant nexus" with navigable or interstate waters, or the territorial seas, and thus might be subject to CWA jurisdiction despite the fact that they have no shallow subsurface or confined surface hydrologic connection to the navigable or interstate waters. Whatever result those specific significant nexus analyses might yield for various aggregations of truly isolated water bodies, at least the legal challenges to those jurisdictional determinations would be independent of, and would not undermine the legal defensibility of, the final rule as a whole.

The basic principles of the proposed rule described above reflect the controlling Federal law and undeniable scientific facts about pollution control and hydrology, and thus are legally sound and defensible. Unfortunately, the draft final rule has departed markedly from the sound legal and scientific principles of the proposed rule, in several important ways, and those basic changes make the draft final rule legally vulnerable.

Change in Definition of "Tributary"

The draft final rule would change the definition of "tributary" to exclude from that important definition all lakes, ponds, and wetlands that are part of the tributary system of the navigable or interstate waters and that send a flow of water into those waters. This change would have the effect of excluding from CWA jurisdiction potentially vast areas of lakes, ponds, and wetlands that are integral parts of the tributary system of the navigable and interstate waters. Those excluded wetlands, lakes, and ponds have been subject to CWA jurisdiction since at least 1975 and are subject to CWA jurisdiction now. Excluding those lakes, ponds, and wetlands from CWA jurisdiction under the draft final rule is not supported by an administrative record or EIS to provide the NEPA compliance for the significant adverse environmental effects that would result from such an action. Also, no notice of such a change was provided in the proposed rule to allow for public comment leaving the rule vulnerable to an APA challenge.

Attempts to remedy the problems that the new definition of tributary causes has led to the addition of several new provisions in the draft final rule, which were not in the proposed rule, and which try to patch the final rule to recapture CWA jurisdiction over some of the lakes,

ponds, and wetlands that the new definition of tributary would abandon. These patches are difficult to understand, explain, implement, or defend in court.

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

Other examples of problematic patches in the draft final rule that are intended to correct problems created by the new definition of tributary can be found in the revised definition of "neighboring," which asserts that water bodies that lie within 1500 feet of a stream's OHWM or HTL are neighboring to that stream. Once again, the 1500-foot figure is not based on any principle of science or law, and thus is legally vulnerable. Additionally, the federal courts may find that common sense dictates that a water body located 1500 feet from a stream is too far away from that stream to be defined as neighboring and thus adjacent to that stream. The fact that the draft final rule abandons the fundamental legal and scientific principle of the proposed rule that asserted CWA jurisdiction by rule over water bodies that are part of the tributary system of navigable or interstate waters, and substitutes for that principle non-science-based tests based on distances from OHWMs/HTLs, makes the draft final rule legally vulnerable.

Site-Specific JDs for Water Bodies Draining into Jurisdictional Waters

A related example of a serious legal flaw in the draft final rule is the fact that it imposes novel limitations on the ability of the Corps and EPA to make jurisdictional determinations based on case-specific "significant nexus" determinations for any lake, pond, or wetland that contributes a flow of water to navigable or interstate waters, or to the territorial seas. The Corps and EPA can make such case-specific significant nexus determinations now, but not under the draft final rule. No final rule should be promulgated unless this flaw is fixed. The Corps' proposed edit is set forth in the attached revised draft final rule.

Isolated Waters Characterized as "Similarly Situated"

Another example of a provision of the draft final rule that makes the entire rule legally vulnerable is the provision that characterizes literally millions of acres of truly "isolated" waters (i.e., wetlands that have no shallow subsurface or confined surface connection with the tributary systems of the navigable waters or interstate waters) as "similarly situated." In at least three places in the preamble, it is stated that such a determination of "similarly situated" in a final rule would be tantamount to an inevitable future determination that all of those identified aggregations of similarly situated isolated waters do have a significant nexus with navigable or interstate waters, and thus will later be determined to be subject to CWA jurisdiction in future

jurisdictional determinations. That part of the draft final rule creates legal vulnerabilities for the entire rule.

It will be difficult, if not impossible, to persuade the federal courts that the implicit, effective determination that millions of acres of truly isolated waters (which have no shallow subsurface or confined surface connection to the tributary system of the navigable or interstate waters) do in fact have a "significant nexus" with navigable or interstate waters. Consequently, the draft final rule will appear to be inconsistent with the Supreme Court's decisions in *Rapanos* and *SWANCC*. As a result, this assertion of CWA jurisdiction over millions of acres of isolated waters may well be seen by the federal courts as "regulatory over-reach," which undermines the legal and scientific credibility of the rule.

The final rule should address isolated water bodies just as the proposed rule did --by leaving to future case-by-case determinations all findings regarding what isolated waters are similarly situated, which waters should be aggregated in what watersheds, and whether those case-specific aggregations of isolated waters actually have a significant nexus with navigable or interstate waters.

James Wood
LANCIE WOOD
Assistant Chief Counsel
Environmental Law and Regulatory Programs

cc: Revised Draft Final Rule

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PART 328 – DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 328 continues to read as follows:

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by removing the introductory text and revising subsections (a), (b) and (c) to read as follows:

328.3 Definitions

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which ~~that~~ are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(7) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each paragraph (A) through (E)

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of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. ~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis.~~ Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets located in the upper mid-west.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

Comment [DRCS]: The Corps agrees with EPA that a water under section (a)(7) or (a)(8) cannot be found to be jurisdictional merely by aggregating that waterbody with adjacent waters and asserting that the adjacent waters somehow confer or transmit CWA jurisdiction to or over the isolated waters; that would be an inappropriate form of "bootstrapping" jurisdiction. The proposed insert would forbid that bootstrapping, but would still allow all waterbodies with similar functions within an SPOE watershed to be aggregated and evaluated together during a significant nexus determination. This fix is necessary to avoid the effect of the current language, which would forbid the aggregation of waterbodies that have similar functions and exist side by side in a SPOE watershed, merely because similar waterbodies happen to lie on one side or the other of a line that demarcates adjacency.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

Comment [DRC2]: Previous language, "found in southeastern Oregon to northern Baja California," has been replaced with "in parts of California." Why are vernal pools in southeastern Oregon being omitted?

(8) All of the following waters, if they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section: (1) All waters located within 4000 feet of the high tide line or ordinary high water mark, or within the 100-year floodplain, whichever is greater, of a water identified in paragraphs (a)(1) through (5) of this section; and (2) waters that contribute a flow of water (either directly or through another water body) to a water identified in paragraphs (a)(1) through (5) of this section, where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The entire water is a water of the United States, a portion is located within 4000 feet of the high tide line or ordinary high water mark, or is within the 100-year floodplain, or if that water contributes a flow of water to a water identified in paragraphs (a)(1) through (5) of this section. Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent

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and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

Comment [DR3]: Same comment as above on no "bootstrapping" under section (e)(7).

~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.~~

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(1) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(A) Ephemeral ditches that are not a relocated tributary or excavated in a tributary or other jurisdictional waterbody, and that would not have the effect of draining a jurisdictional waterbody.

(B) Ephemeral and intermittent roadside ditches that drain a Federal, state, tribal, county, or municipal road, and that are not a relocated tributary or excavated in a tributary.

Comment [3AM4]: This language ensures that ditches that are constructed within or to drain jurisdictional waters, once constructed, are themselves waters of the U.S. That would have the effect of making the waterbody being drained a jurisdictional "adjacent" water, thereby providing some degree of CWA control over drainage of wetlands.

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(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling.

(c) Definitions—In this section, the following definitions apply:

(1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes and the like. For purposes of determining adjacency, a ~~waterbody that includes~~ waterbody that includes, and is considered a single waterbody with, all wetlands within or that are bordering, contiguous to, or abutting that waterbody. ~~its ordinary high water mark is considered a single water.~~ Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. All waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water are adjacent. ~~Waters subject to established, normal farming, aquaculture, or ranching activities (33 USC § 4344(f)(1)) are not adjacent.~~

(2) *Neighboring*. The term *neighboring* means:

(A) all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) all waters located within the 100 year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than ~~4500~~ 300 feet of the ordinary high water mark of such water. The entire water is neighboring if a portion is located within ~~4500~~ 300 feet of the ordinary high water mark and within the 100 year floodplain;

Comment [DRCS]: This language would correct a problem presented by the comparable sentence found in the draft final rule submitted to OMB. The problem is that often it is impossible to identify an OHWM for a river, stream, lake, pond, or similar waterbody that has adjacent wetlands, any OHWM is obscured by the wetlands. The current wording would require the Corps or EPA to identify an OHWM where none can be found because of the adjacent wetland.

Comment [JAM6]: Including this language conflates geographic jurisdiction with activity-based exemptions. There is no scientific basis to support the notion that waters subject to specific activities are any more or less "adjacent" than other adjacent waters.

Comment [DR7]: Per the Corps' prior comments, this language would capture all waterbodies that are separated vertically, which is inappropriate (e.g., wetlands and open waters on banks).

(C) all waters located within ~~1500~~³⁰⁰ feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within ~~1500~~³⁰⁰ feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located with 1500 feet of the high tide line.

(3) *Tributary and tributaries.* The terms *tributary* and *tributaries* ~~each~~ mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more congested breaks (such as bridges, culverts, pipes, or dams) or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a water excluded under paragraph (b) of this section, directly or through another water, to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Ditch*. The term *ditch* means a man-made channel whose physical characteristics are often straightened to efficiently convey water from a source to an outlet. Ditches are generally constructed for the purpose of drainage, irrigation, water supply, water management and/or distribution. A ditch may carry flows that are perennial, intermittent, or ephemeral.

(45) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(56) *Significant Nexus*. The term *significant nexus* means 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 water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to [waters performing similar functions to?] function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (J) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the

Comment [JAMP8]: This addition has been discussed previously and language provided previously. Many types of ditches are excluded and certain ditches are referred to in the definition of tributary; however, ditches are not defined. A common understanding is necessary for clarity.

Comment [JAMP9]: This sentence, in particular, and in combination with the definition overall, does not work effectively for both paragraphs (a)(7) and (a)(8). Additionally, the sentence contains a partially incomplete thought. Waters are similarly situated when they function alike and are sufficiently close to each other? Downstream waters? Each other so it can be ascertained they are functioning as a single landscape unit? The bracketed language is offered to complete the thought.

This must be clarified and it may suggest clarification is necessary in (a)(7) to make it clear in what sense those waters are "similarly situated" - close to each other? Functioning as a landscape unit?

region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation ~~are include, but are not limited to, the~~ following:

- (A) sediment and pollutant trapping, transformation, filtering, and transport;
- (B) nutrient recycling, trapping, transformation, filtering, and transport;
- (C) pollutant trapping, transformation, filtering, and transport;
- (~~D~~) retention and/or attenuation of flood waters;
- (~~D~~) runoff storage;
- (~~E~~) contribution of flow;
- (~~F~~) export, trapping, and transformation of organic matter, including food resources;
- (~~H~~) export of food resources;
- (~~I~~) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in, or dependent on, a water identified in paragraphs (a)(1) through (3) of this section;
- (~~I~~) habitat support for aquatic and wetland plant communities;
- (I) groundwater discharge and recharge;
- (J) carbon sequestration.

(67) *Ordinary High Water Mark.* The term *ordinary high water mark* means 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

Comment [JAM10]: These changes were discussed and provided previously. Edits capture functions provided by Corps districts that are currently being used to demonstrate significant nexus in support of affirmative jurisdictional determinations.

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soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(78) *High Tide Line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or beach, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

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EXHIBIT B

July 28, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20004

The Honorable Jo Ellen Darcy
Assistant Secretary of the Army (Civil
Works)
Department of the Army
108 Army Pentagon
Washington, D.C. 20310

Dear Administrator McCarthy and Assistant Secretary Darcy:

On May 27, 2015, you signed a final regulation entitled “Clean Water Rule: Definition of Waters of the United States” on behalf of the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“ACOE”). 80 Fed. Reg. 37054-37127 (June 29, 2015) (“WOTUS Rule”). The WOTUS Rule, which is set to go into effect on August 28, 2015, provides sweeping changes for the determination of WOTUS jurisdiction impacting water quality regulation activities conducted by the EPA, ACOE and the states. For the reasons we outline below, we write to ask that you extend the effective date of the Rule by at least nine months to allow for appropriate judicial review.

As you know, the WOTUS Rule was immediately challenged by the States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and the New Mexico Environment Department and New Mexico State Engineer in the United States District Court for North Dakota, *North Dakota v. U.S. Environmental Protection Agency*, Case No. 15-59 (filed June 29, 2015); by the States of Ohio, Michigan, and Tennessee in the United States District Court for the Southern District of Ohio, *Ohio, et al. v. U.S. Army Corps of Engineers, et al.*, Case No. 2:15-cv-02467 (filed June 29, 2015); by the States of Texas, Louisiana, and Mississippi in the United States District Court for the Southern District of Texas, *State of Texas, et al. v. United States Environmental Protection Agency, et al.*, Case No. 3:15-cv-00162 (filed June 29, 2015); by the States of Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, South Carolina, Utah, West Virginia, Wisconsin, and the North Carolina Department of Environment and Natural Resources in the United States District Court for the Southern District of Georgia, *Georgia v. McCarthy*, Case No. 2-15-79 (filed June 30, 2015); and by the State of Oklahoma in the United States District Court for the Northern District of Oklahoma, *Oklahoma v. U.S. Environmental Protection Agency*, Case No. 15-CV-381-CVE-FHM (filed July 8, 2015) (amended complaint filed July 10, 2015).

Although the states promptly filed their actions challenging the WOTUS Rule, it will necessarily take some time for the courts to resolve the merits of these various cases with their different claims. The agencies must first lodge and serve the administrative record. The parties then will have some time from the lodging of the administrative record to complete briefing on the merits of their challenges. Once briefing has been

completed, the courts considering the various states' challenges will likely schedule hearings and oral argument on the pending challenges. Even under a fairly aggressive schedule, the pending challenges will likely not be fully briefed and argued for at least 9 months.

Under the schedule set by the EPA and ACOE explained in the attached memorandum from EPA headquarters, the WOTUS Rule will become effective well before courts have the opportunity to resolve the merits of the significant pending challenges to this Rule. Absent a court granting preliminary injunctive relief, this schedule will cause immediate harm to the states because their delegated authority under the Clean Water Act, own regulatory programs governing state waters, and local industries will be affected by increased permitting and compliance requirements under the EPA's and ACOE's sweeping new asserted jurisdiction.

The Clean Water Act establishes a system of cooperative federalism that recognizes states have the "primary responsibilities and rights" to "prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" and to "consult with the administrator in the exercise of his authority under this chapter." 33 U.S.C § 1251(b). Under the Clean Water Act, North Dakota and other states have delegated authority to promulgate water quality standards, designate impaired waters, issue total maximum daily loads, and administer permitting programs reliant upon the WOTUS Rule's jurisdictional definitions.

As the agencies admit in the Economic Analysis of EPA-Army Clean Water Rule (May 20, 2015), the WOTUS Rule will increase EPA and ACOE jurisdiction over existing practice. This directly harms states in their capacity as partners and regulators in implementing programs for which the states have delegated authority. For example, as acknowledged by the EPA in its economic analysis, the regulation will result in an increased volume of permit applications, each of which will be of increased scope and complexity under the new rule. This administrative burden will require significant commitment of additional state resources. States will also need to reassess their designations of water quality standards for waters now brought under WOTUS jurisdiction, and will need to issue more water quality certifications for federally-issued permits under the Clean Water Act 404 program.

The increase in EPA's and ACOE's jurisdiction comes at the direct expense of states—which previously had exclusive jurisdiction over state waters. Such action exceeds the statutory authority of Congress in enacting the Clean Water Act under the Commerce Clause and infringes upon the states' rights under the Tenth Amendment of the Constitution. Since 2000, the Supreme Court has twice restricted the EPA and ACOE's claim of jurisdiction when, as here, it exceeded the outer bounds of the Constitution.

Administrator McCarthy and Assistant Secretary Darcy
July 28, 2015
Page 3

Rapanos v. United States, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, 531 U.S. 159 (2001).

In addition to injuring the states in their sovereign capacity, states will be harmed by the increased burdens placed on them as they develop and build infrastructure projects important to the well-being of their citizens. The current August 28, 2015 effective date will place a significant hardship on North Dakota and others that have immediately pending and proposed projects to develop state infrastructure by increasing the cost and complexity of obtaining the necessary permits.

Further, the new regulation will also have a significant impact on agricultural, homebuilding, oil and gas, and mining operators as they try to navigate between established state regulatory programs and the EPA's and ACOE's new burdensome and conflicting federal requirements. This uncertainty especially threatens those states that rely on revenues from industrial development to fund a wide variety of state programs for the benefit of their respective citizens.

Contrary to the history of partnership between states and the federal government and in disregard of the sovereign interests implicated and immediate harm to states caused by the rule, EPA and the ACOE assert that the final rule "*does not have federalism implications.*" 80 Fed. Reg. 37102 (emphasis added). The agencies declined to conduct a federalism analysis, despite numerous requests by states and others, failing to give consideration to these issues before issuing the final rule. The agencies were required to consult with the states during the development of the proposed and final rule pursuant to both the Clean Water Act and Executive Order, and we remain concerned that EPA and the ACOE fail to recognize the importance of cooperative federalism. The attached memorandum indicates that EPA and the ACOE continue to proceed without acknowledging the impact of the WOTUS Rule on state sovereignty.

Given the gravity of the Constitutional issues implicated by the states' claims and to avoid these hardships, the courts should be granted an opportunity to resolve the pending challenges to the agencies' new WOTUS Rule. We ask that you immediately act to extend the effective date of the WOTUS Rule by at least 9 months. A federal regulation of this scope and significance demands a thorough judicial review before imposing costly and disruptive burdens on the states and their citizens.

Please contact the North Dakota Attorney General's Office, Assistant Attorney General Maggie Olson at (701) 328-3640 if you have any questions or wish to discuss this letter.

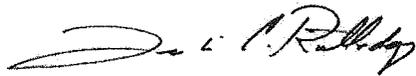
Sincerely yours,



Wayne Stenehjem
North Dakota Attorney General



Mark Brnovich
Arizona Attorney General



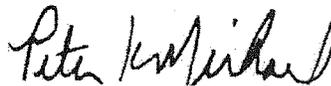
Leslie Rutledge
Arkansas Attorney General



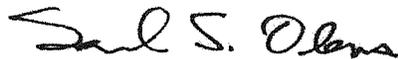
Sean Reyes
Utah Attorney General



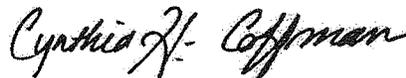
Marty J. Jackley
South Dakota Attorney General



Peter K. Michael
Wyoming Attorney General



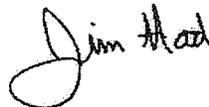
Samuel Olens
Georgia Attorney General



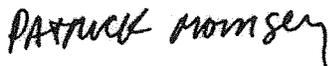
Cynthia H. Coffman
Colorado Attorney General



James D "Buddy" Caldwell
Louisiana Attorney General



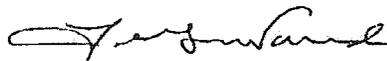
Jim Hood
Mississippi Attorney General



Patrick Morrisey
West Virginia Attorney General



Pam Bondi
Florida Attorney General



Lawrence Wasden
Idaho Attorney General



Gregory F. Zoeller
Indiana Attorney General



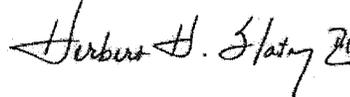
Tim Fox
Montana Attorney General



Chris Koster
Missouri Attorney General



Ken Paxton
Texas Attorney General



Herbert H. Slatery III
Tennessee Attorney General



Brad D. Schimel
Wisconsin Attorney General



Jack Conway
Kentucky Attorney General



Mike DeWine
Ohio Attorney General



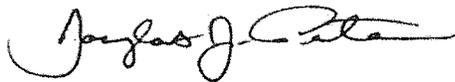
Bill Schuette
Michigan Attorney General



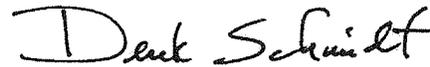
Alan Wilson
South Carolina Attorney General



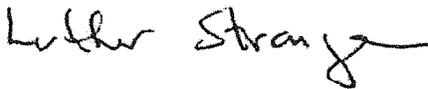
Craig Richards
Alaska Attorney General



Douglas J. Peterson
Nebraska Attorney General



Derek Schmidt
Kansas Attorney General



Luther Strange
Alabama Attorney General



Adam Laxalt
Nevada Attorney General



Scott Pruitt
Oklahoma Attorney General



Donald van der Vaart, Secretary
North Carolina Department of Environment
and Natural Resources



Ryan Flynn, Secretary
New Mexico Environment Department



Tom Blaine, P.E.
New Mexico State Engineer



MEMORANDUM FOR DEPUTY ASSISTANT ADMINISTRATOR FOR WATER
REGIONAL ADMINISTRATORS (REGIONS I – X)
CHIEF OF ENGINEERS
DIVISION AND DISTRICT ENGINEERS

SUBJECT: Implementation of the Clean Water Rule

Our final Clean Water Rule was published in the *Federal Register* on June 29, 2015, and will become effective on August 28, 2015. We thank each of you for your hard work and coordination to complete this rulemaking. As we move into the implementation phase, we must continue this joint effort and ensure that the process of identifying waters that are and are not protected under the Clean Water Act (CWA) is consistent, predictable, and effective. It is imperative that implementation of the Rule continues to reflect our goal to improve transparency, increase public participation, and promote public health and environmental protection for all of us who depend on reliable and abundant sources of clean water. This goal will be particularly important as we work with our state, tribal, and local partners to apply the Rule.

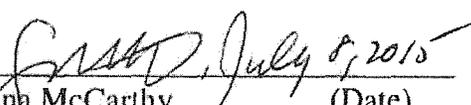
We are enthusiastic about the opportunities provided by the Rule to improve the process of identifying waters covered under the CWA, and making jurisdictional determinations and permit decisions effectively and efficiently. To meet these goals, it is essential that field staff charged with implementation of the Rule have the tools and resources they need. The next 60 days are particularly important as we work to be fully prepared to apply the Rule when it becomes effective.

There are several key areas on which we must focus immediately:

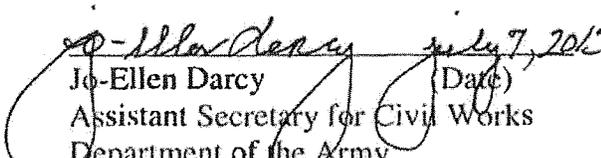
1. **Responding to Information Needs:** The Rule and its preamble provide clear and comprehensive direction regarding the process for conducting jurisdictional determinations. Because of the specificity of the Rule, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) headquarters shall jointly prepare a comprehensive Questions and Answers document, based on discussions with field staff, negating the need for any new manual or guidance document. As with any new procedures, field staff and the

the end of calendar year 2015, the workgroup shall develop a suite of options for our consideration.

As public servants, we have a profound obligation to implement the Rule in the most effective and efficient manner possible. Nothing less is acceptable. The move from old to new procedures must be as seamless and effective for the public as we can make it. We will be relying heavily on the experience and judgment of our senior leadership team as we transition to the new Rule. Your personal attention is needed if we are to succeed in this all-important phase. We look forward to working with each of you in addressing the key issues and in achieving the goals and strategic targets outlined above.



Gina McCarthy (Date)
Administrator
U.S. Environmental Protection Agency



Jo-Ellen Darcy (Date)
Assistant Secretary for Civil Works
Department of the Army

EXHIBIT C



Wayne Stenehjem
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

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BISMARCK, ND 58505-0040
(701) 328-2210 FAX (701) 328-2226
www.ag.nd.gov

NATURAL RESOURCES
500 NORTH 9TH STREET
BISMARCK, ND 58501-4509
(701) 328-3640 FAX (701) 328-4300

August 20, 2015

John C. Cruden
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
Law and Policy Section
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Cruden:

At your earliest convenience, please forward the enclosed correspondence to your clients.

Please contact me or AAG Jennifer Verleger at (701) 328-3640 if you have any questions relating to this matter.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Margaret I. Olson".

Margaret I. Olson
Assistant Attorney General

jjt
Enclosure

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August 20, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20004

The Honorable Jo Ellen Darcy
Assistant Secretary of the Army
(Civil Works)
Department of the Army
108 Army Pentagon
Washington, D.C. 20310

Dear Administrator McCarthy and Assistant Secretary Darcy:

On July 28, 2015, the undersigned Attorneys General and state executive agency officials co-signed a letter to you asking that the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) delay implementation of the final *Clean Water Rule: Definition of “Waters of the United States”* (“WOTUS Rule”) at least nine months to allow the federal judiciary time to review the legality of the rule prior to the imposition of significant and irreparable harm on the states and our regulated communities as a result of the rule. We are disappointed that you failed to respond to, or even acknowledge, our request. We now write to urge you to withdraw the WOTUS Rule immediately.

The U.S. House of Representatives Committee on Oversight and Reform recently released a set of documents authored by the Corps that are deeply concerning. Those documents, written after EPA submitted the final draft WOTUS Rule to the Office of Management and Budget for review, raise serious questions regarding the legality of the final rule and the process by which it was adopted. For example, senior Corps staff cautioned that the final rule “depart[s] significantly from the version provided for public comment” and “contradicts long-standing and well-established legal principles.” The documents highlight staff concerns that key jurisdictional definitions like “neighboring” in the final rule are “not supported by science or law” and are therefore “legally vulnerable.” According to Corps staff, it “will be difficult, if not impossible, to persuade the federal courts that the implicit, effective determination that millions of acres of truly isolated waters . . . have a ‘significant nexus’ with navigable or interstate waters” under *Rapanos* and *SWANCC*, the two most recent U.S. Supreme Court decisions rejecting prior federal efforts to unlawfully expand jurisdiction over state water resources. As representatives of states comprising more than 75% of the land area of this country, we agree with these characterizations.

The Corps’ documents identify some of the same types of legal and procedural deficiencies that our states have raised in lawsuits challenging the WOTUS Rule. We believe that the final rule violates the Administrative Procedure Act for many reasons, and was adopted without providing the states and the public with a meaningful opportunity to review and comment on the final version of the rule, which departed in

Honorable Gina McCarthy and Honorable Jo Ellen Darcy
August 20, 2015
Page 2

several material respects from the proposed rule. We also believe that the rule runs afoul of Supreme Court precedent, and exceeds applicable statutory and constitutional limitations on federal executive authority.

Throughout this process, we have been troubled by the failure of EPA and the Corps to meaningfully consult with the states in the development of the proposed and final rule, as mandated by the Clean Water Act and Executive Order 13,132. Now it is apparent that EPA may have also ignored the concerns of its sister agency and named co-author of the rule. Transparency and open government have not been well served when it takes a Congressional oversight committee to unearth internal memoranda demonstrating, for example, that the Corps wanted its agency name and logo removed from two critical documents prepared by EPA to support the final rule, the Technical Support Document and the Economic Analysis.

The development history of the WOTUS Rule undermines the cooperative federalism principles embodied in the Clean Water Act, and raises serious questions regarding infringement on state sovereign authority. We therefore urge you to withdraw the final rule and engage in a meaningful dialogue with the states about strategies for developing a revised rule through a transparent process that provides clarity and certainty for the regulated community while respecting applicable legal constraints on the exercise of federal authority in this important area.

Please contact the North Dakota Attorney General's Office, Assistant Attorney General Maggie Olson, at (701) 328-3640 if you have any questions or wish to discuss this letter.

Sincerely,



Wayne Stenehjem
North Dakota Attorney General



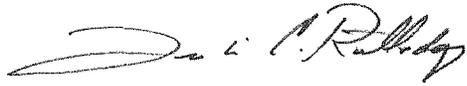
Peter K. Michael
Wyoming Attorney General



Mark Brnovich
Arizona Attorney General



Craig Richards
Alaska Attorney General



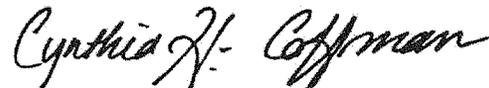
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Arkansas Attorney General



Marty J. Jackley
South Dakota Attorney General



Samuel Olens
Georgia Attorney General



Cynthia H. Coffman
Colorado Attorney General



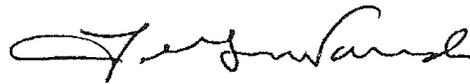
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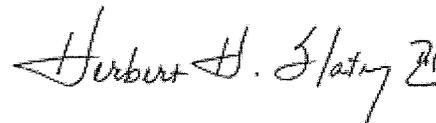
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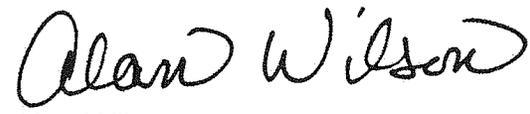
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North Carolina Department of
Environment and Natural Resources



Ryan Flynn, Secretary
New Mexico Environment Department



Tom Blaine, P.E.
New Mexico State Engineer

Honorable Gina McCarthy and Honorable Jo Ellen Darcy
August 20, 2015
Page 5

A handwritten signature in black ink, appearing to read "Gregory F. Zoeller". The signature is written in a cursive, flowing style with a large initial "G".

Gregory F. Zoeller
Indiana Attorney General

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

States of North Dakota, Alaska,
Arizona, Arkansas, Colorado, Idaho,
Missouri, Montana, Nebraska, Nevada,
South Dakota, and Wyoming; New
Mexico Environment Department; and
New Mexico State Engineer,

Plaintiffs,

vs.

U.S. Environmental Protection Agency,
Regina McCarthy in her official
capacity as Administrator of the U.S.
Environmental Protection Agency, U.S.
Army Corps of Engineers, Jo Ellen
Darcy in her official capacity as
Assistant Secretary of the Army (Civil
Works),

Defendants.

Civil No. 3:15-cv-59

**MEMORANDUM OPINION AND
ORDER GRANTING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

I. SUMMARY OF DECISION

Original jurisdiction is vested in this court and not the court of appeals because the “Clean Water Rule: Definition of Waters of the United States,” jointly promulgated by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, has at best only an attenuated connection to any permitting process. If the exceptionally expansive view advocated by the government is adopted, it would encompass virtually all EPA actions under the Clean Water Act, something precisely contrary to Section 1369(b)(1)(F)’s grant of jurisdiction.

The court finds that under either standard – “substantial likelihood of success on the

merits” or “fair chance of success” – the States are likely to succeed on their claim because (1) it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule at issue, and (2) it appears likely the EPA failed to comply with APA requirements when promulgating the Rule. Additionally, the court finds the other factors relevant to the inquiry weigh in favor of an injunction.

II. PROCEDURAL BACKGROUND

On April 21, 2014, the United States Army Corps of Engineers and the Environmental Protection Agency (“EPA”) (collectively “the Agencies”) issued a proposed rule to change the definition of “Waters of the United States” under the Clean Water Act. Following a period for comment, the Agencies promulgated a final rule (“the Rule”) on June 29, 2015, which defines waters of the United States. The Rule has an effective date of August 28, 2015.

On June 29, 2015, twelve States¹ and the New Mexico Environment Department and the New Mexico State Engineer (collectively “the States”) filed a complaint against the Agencies, the EPA Administrator in her official capacity, and the Assistant Secretary of the Army (Civil Works) in her official capacity.² On August 10, 2015, the States filed a motion for a preliminary injunction.³ A hearing was held on the motion on August 21, 2015. The court, having considered the entire record as now developed including evidence presented at the hearing and the arguments of counsel, issues this memorandum opinion and order.

¹ States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming.

² Doc. #1.

³ Doc. #32.

III. ANALYSIS

1. *Jurisdiction*

Title 33, of the United States Code, § 1369(b)(1)⁴ defines the circumstances under which the United States Courts of Appeals have exclusive jurisdiction over an action of the EPA Administrator. Implicated here are the provisions of subsections (b)(1)(E) and (b)(1)(F) of § 1369. Section 1369(b)(1)(E) posits jurisdiction in the courts of appeals where the Administrator has approved or promulgated “any effluent limitation or other limitation under section 301, 302, 306, or 405, [33 USCS § 1311, 1312, 1316, or 1345]”. “Effluent limitations” are defined by the act as “any restriction established by a state or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters.”⁵

The Rule itself imposes no “effluent limitation.” It merely redefines what constitutes “waters of the United States.”⁶ This is made plain by the specific language of the Rule itself, as it unequivocally states that it “imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.”⁷

The Agencies’ claim that the Rule is an “other” limitation is equally unavailing. “[A]n agency action is [an ‘other’] limitation’ within the meaning of section 509(b)(1)(E) if entities

⁴ Alternately known as, and commonly referred to as, § 509(b)(1) of The Federal Water Pollution Control Act.

⁵ 33 U.S.C. § 1362(11).

⁶ 80 Fed. Reg. 37054.

⁷ 80 Fed. Reg. 37102.

subject to the CWA's permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes.”⁸ The Eighth Circuit Court of Appeals has noted that this phrase “leaves much to the imagination.”⁹ The Fourth Circuit Court of Appeals has defined an “other limitation” as “a restriction on the untrammelled discretion of the industry . . . [as it existed prior to the passage of the [CWA]].”¹⁰

The Rule here imposes no “other limitation” upon the Plaintiff States. At the hearing, the EPA argued that the Rule places no new burden or requirements on the States, a position supported by the language of the Rule itself at 80 F.R. 37102. The contention is that the States have exactly the same discretion to dispose of pollutants into the waters of the United States after the Rule as before. Rather, the Rule merely changes what constitutes waters of the United States.

Section 1369(b)(1)(F) grants the courts of appeals jurisdiction in cases involving the “issuing or denying [of] any permit under section 1342 of this title.” In Iowa League of Cities, the Eighth Circuit noted, that the Supreme Court, in Crown Simpson Pulp Co. v. Costle,¹¹ “interpreted broadly the direct appellate review provision” of § 1369(b)(1)(F).¹² In Crown Simpson, the Supreme Court interpreted Subsection F “to extend jurisdiction to those actions that have ‘the precise effect’ of an action to issue or deny a permit.”¹³ The

⁸ Iowa League of Cities v. E.P.A., 711 F.3d 844, 866 (8th Cir. 2013).

⁹ Id.

¹⁰ Va. Elec. & Power Co. (VEPCO) v. Costle, 566 F.2d 446, 450 (4th Cir. 1977).

¹¹ 445 U.S. 193, 196.

¹² 711 F.3d at 862.

¹³ Friends of the Everglades v. U.S. E.P.A., 699 F.3d 1280, 1287 (11th Cir. 2012) (citing Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 196 (1980)).

precise holding in Crown Simpson is that original jurisdiction rests in the courts of appeal “when the action of the Administrator is functionally similar to the denial or issuance of a permit.”¹⁴

The case at bar is much like that in Friends of the Everglades. The Rule “neither issues nor denies a permit”¹⁵ Indeed, the Rule has at best an attenuated connection to any permitting process. It simply defines what waters are within the purview of the “waters of the United States.”¹⁶ This does not in itself implicate § 1369(b)(1)(F) because it is simply not the functional equivalent or similar to an action of the administrator in denying or issuing a permit.¹⁷

If the exceptionally expansive view advocated by the government is adopted, it would encompass virtually all EPA actions under the Clean Water Act. It is difficult to imagine any action the EPA might take in the promulgation of a rule that is not either definitional or regulatory. This view of §1369(b)(1)(F)’s grant of jurisdiction would run precisely contrary to Congress’ intent in drafting the court of appeals jurisdictional provision as recognized in the Supreme Court in National Cotton Council of America v. U.S. E.P.A.¹⁸

The relationship between issuing or denying a permit and the Rule at issue is tangential to issuance or denial of a permit—a classic red herring. Under these

¹⁴ Id. (citing Crown Simpson Pulp Co., 445 U.S. at 196).

¹⁵ Friends of the Everglades, 699 F.3d at 1287.

¹⁶ 80 Fed. Reg. 37104-05.

¹⁷ See Friends of the Everglades, 699 F.3d at 1287 (citing Crown Simpson Pulp Co., 445 U.S. at 196).

¹⁸ See National Cotton Council of America v. U.S. E.P.A., 553 F.3d 927, 933 (6th Cir. 2009) (quoting Lake Cumberland Trust, Inc. v. EPA, 954 F.2d 1218 (6th Cir. 1992) (“Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act.”)).

circumstances, original jurisdiction lies in this court and not the court of appeals.

2. Preliminary Injunction Motion.

The court applies the well-known four-factor inquiry in determining whether or not a preliminary injunction should issue.¹⁹ Commonly referred to as the Dataphase factors, the court weighs (1) the threat of irreparable harm to the movant; (2) the balance of harms; (3) the movant's likelihood of success on the merits; and (4) the public interest.²⁰

A. Likelihood of Success on the Merits

The court initially considers likelihood of success on the merits because if the movant fails to establish a likelihood of success, the quest for a preliminary injunction fails and the discussion is ended.

When issuing injunctive relief, the court must determine whether the moving party's claim has a likelihood of success on the merits.²¹ Two separate likelihood standards can be applied by a reviewing court. A "substantial likelihood of success on the merits" standard applies when the issue arises out of a statute or regulation made in the presumptively reasoned democratic process.²² In cases that do not meet the "presumptively reasoned requirement" a "fair chance of success" standard articulated in Heartland Acad. Cmty. Church v. Waddle²³ is applied.

As presaged by the phrasing of the cases describing the applicability of the higher

¹⁹ McKinney ex rel. N.L.R.B. v. Southern Bakeries, 786 F.3d 1119, 1122 (8th Cir. 2015).

²⁰ Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109, 112-13 (8th Cir. 1981).

²¹ Id. at 113.

²² Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724, 732 (8th Cir. 2008).

²³ 335 F.3d 684, 690 (8th Cir. 2003).

“substantial likelihood of success” test, there is a presumption that the implementation process of the Rule here is reasoned. The presumption can be overcome where the evidence establishes a fundamentally flawed process, demonstrating that the regulation is not the product of a reasoned democratic process.

1. *Use of Deliberative Memoranda*

Generally, courts should not consider “interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency” when reviewing agency rules.²⁴ The deliberative process exemption permits non-disclosure if “the document is both predecisional and deliberative.”²⁵ The purpose of the deliberative process exemption is to avoid the harm that agency discussions are “chilled” by the disclosure and use of the agencies deliberative process memoranda and correspondence.²⁶ A document is predecisional if it “contains personal opinions and is designed to assist agency decision-makers in making their decision.”²⁷ A document is deliberative if its disclosure or use would “expose the decision-making process in such a way that candid discussion within the agency would be discouraged, undermining the agency’s ability to perform its functions.”²⁸ Even so, a court may “inquir[e] into the mental processes of administrative decision-makers” if “it is ‘the only way there can be effective judicial

²⁴ 5 U.S.C. § 552(b)(5).

²⁵ Missouri Coalition for Environment Foundation v. U.S. Army Corps of Engineers, 542 F.3d 1204, 1211 (8th Cir. 2008).

²⁶ Id. at 1210.

²⁷ Id. at 1211.

²⁸ Id.

review.”²⁹

The States repeatedly point the court’s attention to two clearly pre-decisional and deliberative interagency memoranda.³⁰ Ordinarily the court would not rely on these documents in its Dataphase analysis, however, the footing of the case leaves no other effective way to exercise judicial review in a timely manner. At this point, the Rule’s effective date looms, the administrative record has not been produced, and the States assert irreparable harm. The court has reviewed both the memoranda at issue, the Technical Support Document, and the Economic Analysis document, and finds that the memoranda’s opinion is supported by the underlying documents at the court’s disposal.³¹

While the court would prefer an opportunity to review the entire administrative record, rather than rely on a handful of documents and deliberative memoranda, it is impossible to obtain the record prior to the effective date of the Rule. Under these unique circumstances, including a review of the Army Corps of Engineer’s memoranda, consideration of the documents in the record is “the only way there can be effective judicial review.”³²

As noted in the internal memoranda and confirmed by a close review of the Economic Analysis document and Technical Support Document, the Agencies’ internal

²⁹ Voyageurs Nat. Park Ass’n v. Norton, 381 F.3d 759, 766 (8th Cir. 2004).

³⁰ Doc. #33, Exhs. A & P.

³¹In its reply brief, the States assert that since the memoranda are in the public record the Agencies have waived the deliberative process privilege. The court is unaware how these documents came to be in the public domain and no administrative record has been prepared for this proceeding. The court finds that waiver would be a decidedly unfair doctrine to apply to the Agencies and declines the invitation to find waiver under these circumstances.

³² See id. (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

documents reflect the absence of any information about how the EPA obtained its presented results. Consequently, the subsequent results are completely unverifiable.”³³ The court is placed in an even worse position than the internal reviewers to understand the process applied by the EPA because of a lack of access to the complete administrative record. Even so, a review of what has been made available reveals a process that is inexplicable, arbitrary, and devoid of a reasoned process. Under these circumstances, the applicable standard for likelihood of success on the merits is the “fair chance” standard. Regardless, it is worthy of note, that even if the court applied the higher “substantial likelihood of success” standard, its conclusions would be unchanged.

2. *Analysis of Likelihood of Success Factor*

a. EPA Violated Its Grant of Authority by Congress When It Promulgated the Rule.

The States are likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the Rule. In United States v. Bailey³⁴, the Eighth Circuit Court of Appeals held that the EPA or Corps may assert Clean Water Act jurisdiction if the waters in question meet either the plurality’s requirements or Justice Kennedy’s concurring opinion in Rapanos v. United States.³⁵ Because the Agencies assert jurisdiction under Justice Kennedy’s concurrence, the court’s analysis will focus on whether the Rule meets this criteria.

Justice Kennedy’s analysis begins with 33 U.S.C. § 1251(a), requiring the court to be

³³ Doc. #33, Exh. P, ¶3.

³⁴ 571 F.3d 791, 799 (8th Cir. 2009).

³⁵ 547 U.S. 715 (2006).

cognizant that the purpose of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³⁶ In order to establish the requisite significant nexus, the Agencies must determine whether the waters in question do in fact affect the chemical, physical, and biological integrity of those waters.³⁷ Jurisdictional waters have the requisite nexus, if they “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”³⁸ Waters fall outside the zone of “navigable waters” when the effect “on water quality [is] speculative or insubstantial.”³⁹ In determining its jurisdiction over waters, an agency “may choose to identify categories of tributaries 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 perform important functions for an aquatic system incorporating navigable waters.”⁴⁰

The Rule here likely fails to meet this standard. In Rapanos, the Corps defined a tributary as a water that “feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics.”⁴¹ Justice Kennedy noted that if it were applied consistently, “it may well provide a reasonable

³⁶ Rapanos v. United States, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring).

³⁷ Id. at 780.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id. at 781.

measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute ‘navigable waters’ under the Act.”⁴² Justice Kennedy concurred in judgment finding that the breadth of the Corps standard in Rapanos “seem[ed] to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact waters.”⁴³

The Rule at issue here suffers from the same fatal defect. The Rule allows EPA regulation of waters that do not bear any effect on the “chemical, physical, and biological integrity” of any navigable-in-fact water. While the Technical Support Document states that pollutants dumped into a tributary will flow downstream to a navigable water,⁴⁴ the breadth of the definition of a tributary set forth in the Rule allows for regulation of any area that has a trace amount of water so long as “the physical indicators of a bed and banks and an ordinary high water mark” exist.⁴⁵ This is precisely the concern Justice Kennedy had in Rapanos, and indeed the general definition of tributary is strikingly similar.⁴⁶ While the Agencies assert that the definitions exclusion of drains and ditches remedies the defect, the definition of a tributary here includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term.⁴⁷ The States have established a fair chance of success on the merits of their claim that the Rule violates

⁴² Id.

⁴³ Id.

⁴⁴ Doc. #66, Exhs. 2-10.

⁴⁵ 80 Fed. Reg. 37105.

⁴⁶ See Rapanos v. United States, 547 U.S. at 781.

⁴⁷ See id.

the congressional grant of authority to the EPA.

b. The Agencies Likely Failed to Comply with APA Requirements When Promulgating the Rule.

i. *The Rule is Likely Arbitrary and Capricious*

The court must set aside a final agency rule if it finds the rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁴⁸ The scope of this “standard is narrow and a court is not to substitute its judgment for that of the agency.”⁴⁹ Nevertheless, the agency has a duty to “examine the relevant data and articulate a satisfactory explanation for its action.”⁵⁰ An agency must base its explanation on a “rational connection between the facts found and the choice made.”⁵¹

The States have a fair chance of success on the merits under this prong as well. The Agencies assert that any water that fits in the definition of a “tributary” will as of necessity “significantly affect the chemical, physical, and biological integrity of traditional navigable waters.”⁵² The Technical Support Document states that science demonstrates tributaries do in point of fact affect the integrity of traditional navigable waters.⁵³ Setting aside the issue as to whether the Technical Support Document conflates ephemeral streams with tributaries, the claims made by the Agencies appear to only apply to a subset within the

⁴⁸ 5 U.S.C. § 706(2)(A).

⁴⁹ Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983).

⁵⁰ Id.

⁵¹ Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

⁵² 80 Fed. Reg. 37075.

⁵³ Corps and EPA, Tech. Support Document for the Clean Water Rule: Definition of Waters of the United States, 244-246 (May 27, 2015).

broad definition of the Rule. The Rule asserts jurisdiction over waters that are remote and intermittent waters. No evidence actually points to how these intermittent and remote wetlands have any nexus to a navigable-in-fact water. The standard of arbitrary and capricious is met because the Agencies have failed to establish a “rational connection between the facts found” and the Rule as it will be promulgated.⁵⁴

The Rule also arbitrarily establishes the distances from a navigable water that are subject to regulation. The Army Corps of Engineers noted:

The 4,000-foot limit arbitrarily cuts off which waters can be determined ‘similarly situated’ under [a significant nexus determination], as (a) (8) waters cannot be aggregated with other waters beyond 4,000 feet even if they are truly ‘similarly situated,’ further limiting the use of the ‘key’ factor under the final rule. The 4,000-foot limitation under (a) (8) conflicts with the TSD regarding the importance of connectivity.⁵⁵

Once again, the court has reviewed all of the information available to it and is unable to determine the scientific basis for the 4,000 feet standard. Based on the evidence in the record, the distance from the high water mark bears no connection to the relevant scientific data purported to support this because any water that is 4,001 feet away from the high water mark cannot be considered “similarly situated” for purposes of 33 C.F.R. § 328.3(a) (8). While a “bright line” test is not in itself arbitrary, the Rule must be supported by some evidence why a 4,000 foot standard is scientifically supportable. On the record before the court, it appears that the standard is the right standard because the Agencies say it is. Under these circumstances the Rule setting the 4,000 feet standard is likely arbitrary

⁵⁴ See Burlington Truck Lines, 371 U.S. at 168.

⁵⁵ Army Corps of Engineers, Memorandum for Deputy Commanding General for Civil and Emergency Operations: Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of “Waters of the United States, ¶ 17 (May 15, 2015).

and capricious.

ii. *The Rule is Not Likely a “Logical Outgrowth” of the Proposed Rule*

Title 5, of the United States Code, § 553(b) requires that an agency publish proposed rulemakings in the Federal Register including “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” The statute further requires the agency to provide “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”⁵⁶ The publication of notice of the proposed rule “need not contain every precise proposal which (the agency) may ultimately adopt as a rule.”⁵⁷ Nevertheless, the final rule must be a “logical outgrowth” of the proposed rule.⁵⁸ In determining whether a final rule is a “logical outgrowth,” the court should determine whether the interested parties “should have anticipated that such a requirement might be imposed.”⁵⁹

The definition of “neighboring” under the final rule is not likely a logical outgrowth of its definition in the proposed rule. The final rule greatly expanded the definition of “neighboring” such that an interested person would not recognize the promulgated Rule as a logical outgrowth of the proposed rule. The proposed rule defined waters of the United States as “includ[ing] waters located within the riparian area or floodplain of a water

⁵⁶ 5 U.S.C. § 553(c).

⁵⁷ Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1319 (8th Cir. 1981).

⁵⁸ Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

⁵⁹ Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A., 705 F.2d 506, 549 (D.C. Cir. 1983); see also Chocolate Mfrs. Ass’n of U.S. v. Block, 755 F.2d 1098, 1104 (4th Cir. 1985) (“[I]f the final rule materially alters the issues involved in the rulemaking or, as stated in Rowell v. Andrus, 631 F.2d 699, 702 n.2 (10th Cir. 1980), if the final rule ‘substantially departs from the terms or substance of the proposed rule,’ the notice is inadequate.”).

identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrological connection or confined surface hydrological connection to such a jurisdictional water.”⁶⁰ 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. 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.

iii. *The Alleged NEPA Violation.*

The States have asserted that the Agencies have violated NEPA by failing to provide an Environmental Impact Statement. This court is unpersuaded by the Agencies’ argument that they have not failed to comply with NEPA, mainly because it is hamstrung by the lack of the administrative record. It is unnecessary to reach this issue because the States have already established that they will likely succeed on the merits of their other claims.

B. Irreparable Harm

To succeed on a motion for a preliminary injunction, the moving party must show that irreparable harm will result absent the injunction.⁶¹ “In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.”⁶²

The States here have demonstrated that they will face irreparable harm in the

⁶⁰ 79 Fed. Reg. 22264.

⁶¹ Id. at 112.

⁶² Iowa Utilities Bd. v. F.C.C., 109 F.3d 418 (8th Cir. 1996).

absence of a preliminary injunction. It is within the purview of the traditional powers of the States to maintain their “traditional and primary power over land and water use.”⁶³ Once the Rule takes effect, the States will lose their sovereignty over intrastate waters that will then be subject to the scope of the Clean Water Act.⁶⁴ While the exact amount of land that would be subject to the increase is hotly disputed, the Agencies admit to an increase in control over those traditional state-regulated waters of between 2.84 to 4.65 percent.⁶⁵ Immediately upon the Rule taking effect, the Rule will irreparably diminish the States’ power over their waters.

In addition to the loss of sovereignty, the States assert an irreparable harm in the form of unrecoverable monetary harm. It is undeniable that if the States incur monetary losses as a result of an unlawful exercise of regulatory authority, no avenue exists to recoup those losses as the United States has not waived sovereign immunity from suits seeking these sorts of damages.

The analysis thus turns to whether or not the States can show that the Rule subjects them to unrecoverable monetary harm. The States assert numerous losses that would be attributable to the Rule. For example, the Rule will make North Dakota subject to, among other things, undertaking jurisdictional studies for every proposed natural gas, oil, or water

⁶³See Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (citing Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments”).

⁶⁴See e.g., 80 Fed. Reg. 37105, Part 328(a)(6) (expanding qualifying adjacent waters as previously defined in 33 C.F.R. § 328.3(a)(6) as merely adjacent wetlands to the new Rule at 33 C.F.R. § 328.3(a)(6) to “[a]ll waters adjacent”).

⁶⁵80 Fed. Reg. 37101.

pipeline project.⁶⁶ This will incur both direct losses, including vast expenditures to map and survey large portions of the state, and indirect losses such as lost tax revenue while projects are stalled pending mapping. Wyoming also asserts that it will be required to bear the costs of the additional Clean Water Act § 401 certifications, including expansion of permitting, oversight, technical and legal analysis for reclamation and development projects.⁶⁷ These losses are unrecoverable economic losses because there is neither an alternative source to replace the lost revenues nor a way to avoid the increased expenses. The States will suffer irreparable harm in the absence of a preliminary injunction.

C. Balance of the Harms and Effect on the Public Interest

In exercising its power to grant a preliminary injunction, the court must balance the harms to the parties to the litigation while “pay[ing] particular regard for the public consequences.”⁶⁸ For the court to grant an injunction, the moving party must establish that the entry of the relief would serve public interest.⁶⁹

On balance, the harms favor the States. The risk of irreparable harm to the States is both imminent and likely. More importantly delaying the Rule will cause the Agencies no appreciable harm. Delaying implementation to allow a full and final resolution on the merits is in the best interests of the public.

The court acknowledges that implementation of the Rule will provide a benefit to an important public interest, both in providing some protection to the waters of the United

⁶⁶ Doc. #33, Exh. D, ¶¶ 19-21.

⁶⁷ Doc. 33, Exh. H, ¶¶ 10-14

⁶⁸ Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008).

⁶⁹ Dataphase, 640 F.2d at 113.

States and because it would provide increased certainty as to what constitutes jurisdictional waters as some people will be categorically removed from the definition of waters of the United States (for example owners of an intermittent wetland 4,001 feet away from an established tributary). The benefit of that increased certainty would extend to a finite and relatively small percentage of the public. A far broader segment of the public would benefit from the preliminary injunction because it would ensure that federal agencies do not extend their power beyond the express delegation from Congress.⁷⁰ A balancing of the harms and analysis of the public interest reveals that the risk of harm to the States is great and the burden on the Agencies is slight. On the whole, the greater public interest favors issuance of the preliminary injunction.

IV. DECISION

The States have established that the Dataphase factors weigh in favor of injunctive relief. Their motion for a preliminary injunction, enjoining Fed. Reg. 37,054-127, jointly promulgated by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, is **GRANTED**.

IT IS SO ORDERED.

Dated this 27th day of August, 2015.

/s/ Ralph R. Erickson
Ralph R. Erickson, Chief District Judge
District of North Dakota

⁷⁰First Premier Bank v. U.S. Consumer Fin. Prot. Bureau, 819 F. Supp. 2d 906, 922 (D.S.D. 2011).

EXHIBIT E



MEMORANDUM FOR DEPUTY ASSISTANT ADMINISTRATOR FOR WATER
REGIONAL ADMINISTRATORS (REGIONS I – X)
CHIEF OF ENGINEERS
DIVISION AND DISTRICT ENGINEERS

SUBJECT: Implementation of the Clean Water Rule

Our final Clean Water Rule was published in the *Federal Register* on June 29, 2015, and will become effective on August 28, 2015. We thank each of you for your hard work and coordination to complete this rulemaking. As we move into the implementation phase, we must continue this joint effort and ensure that the process of identifying waters that are and are not protected under the Clean Water Act (CWA) is consistent, predictable, and effective. It is imperative that implementation of the Rule continues to reflect our goal to improve transparency, increase public participation, and promote public health and environmental protection for all of us who depend on reliable and abundant sources of clean water. This goal will be particularly important as we work with our state, tribal, and local partners to apply the Rule.

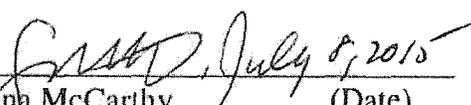
We are enthusiastic about the opportunities provided by the Rule to improve the process of identifying waters covered under the CWA, and making jurisdictional determinations and permit decisions effectively and efficiently. To meet these goals, it is essential that field staff charged with implementation of the Rule have the tools and resources they need. The next 60 days are particularly important as we work to be fully prepared to apply the Rule when it becomes effective.

There are several key areas on which we must focus immediately:

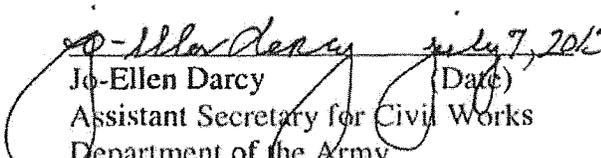
1. **Responding to Information Needs:** The Rule and its preamble provide clear and comprehensive direction regarding the process for conducting jurisdictional determinations. Because of the specificity of the Rule, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) headquarters shall jointly prepare a comprehensive Questions and Answers document, based on discussions with field staff, negating the need for any new manual or guidance document. As with any new procedures, field staff and the

the end of calendar year 2015, the workgroup shall develop a suite of options for our consideration.

As public servants, we have a profound obligation to implement the Rule in the most effective and efficient manner possible. Nothing less is acceptable. The move from old to new procedures must be as seamless and effective for the public as we can make it. We will be relying heavily on the experience and judgment of our senior leadership team as we transition to the new Rule. Your personal attention is needed if we are to succeed in this all-important phase. We look forward to working with each of you in addressing the key issues and in achieving the goals and strategic targets outlined above.



Gina McCarthy (Date)
Administrator
U.S. Environmental Protection Agency



Jo-Ellen Darcy (Date)
Assistant Secretary for Civil Works
Department of the Army