UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SOUTHEAST STORMWATER ASSOCIATION, INC., *et al.*,

Plaintiffs,

v. Case No. 4:15-CV-579-MEW-CAS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants.
_____/

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Consistent with Federal Rule of Civil Procedure 56 and Local Rule 56.1, Plaintiffs, Southeast Stormwater Association, Inc., Florida Stormwater Association, Inc., Florida Rural Water Association, Inc., and Florida League of Cities, Inc. (collectively "Municipal Interests"), for the reasons discussed in their memorandum of law, move for summary judgment on all counts of their Complaint. ECF 1.

Respectfully submitted by:

/s/ Mohammad O. Jazil
MOHAMMAD O. JAZIL (FBN 72556)
mjazil@hgslaw.com
HOPPING GREEN & SAMS, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
(850) 222-7500 / (850) 224-8551 (fax)

Counsel for Plaintiffs, Southeast Stormwater Association, Inc., et al.

Dated: March 15, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served through the Court's CM/ECF system to all counsel of record on this 15th day of March 2019.

/s/ Mohammad O. Jazil

Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SOUTHEAST STORMWATER ASSOCIATION, INC., *et al.*,

Plaintiffs,

v. Case No. 4:15-CV-579-MEW-CAS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants.
_____/

MEMORANDUM OF LAW
IN SUPPORT OF SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF ACRONYMS

ALA	Anti-Lobbying Act
APA	Administrative Procedure Act
BMPs	Best Management Practices
Corps	U.S. Army Corps of Engineers and its civilian leadership
CWA	Clean Water Act
EPA	U.S. Environmental Protection Agency and its Administrator
FRWA	Florida Rural Water Association
FSA	Florida Stormwater Association
League	Florida League of Cities
MS4	Municipal Separate Storm Sewer System
NPDES	National Pollution Discharge Elimination System
OHWM	Ordinary High Water Mark
RFA	Regulatory Flexibility Act
SAB	Science Advisory Board
SBA	Small Business Administration's Office of Advocacy
SESWA	Southeast Stormwater Association
SWANCC	Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers
TMDL	Total Maximum Daily Load
WOTUS	Waters of the United States

I. INTRODUCTION

The Southeast Stormwater Association ("SESWA"), Florida Stormwater Association ("FSA"), Florida Rural Water Association ("FRWA"), and Florida League of Cities ("League") (collectively "Municipal Interests") move for summary judgment against the U.S. Army Corps of Engineers and its civilian leadership (collectively "Corps"), and the U.S. Environmental Protection Agency and its Administrator (collectively "EPA").

The Municipal Interests challenge the Corps and EPA's final rule titled "Clean Water Rule: Definition of 'Waters of the United States'" (the "2015 Final Rule"). 80 Fed. Reg. 37,054 (Jun. 29, 2015). The 2015 Final Rule defines the federal government's jurisdiction under the Clean Water Act ("CWA"), the basis from which the CWA's regulatory and permitting requirements flow. The definition set forth in the rule, however, is too expansive. It exceeds the bounds set by the CWA's text, U.S. Supreme Court precedent, and the Commerce Clause; contravenes the Due Process Clause; subverts applicable notice-and-comment requirements; masks the true fiscal impact through a flawed economic analysis; and is otherwise arbitrary and capricious.

More fundamentally, the 2015 Final Rule would impede the effective implementation of stormwater management functions—flood control and treatment—of particular concern to the Municipal Interests. Local governments are

typically responsible for controlling stormwater run-off and often do so through the development of a municipal separate storm sewer system consisting of conveyances—canals, ditches, catch basins, gutters, swales, and drains—used to move and treat stormwater runoff before it makes its way into a traditional "waters of the United States" ("WOTUS"). 40 C.F.R. § 122.26(b)(8). This often miles-long web of conveyances, called an "MS4," is considered a "point source" for purposes of the CWA. *See* 33 U.S.C. §§ 1342, 1362(14). Because it is a point source, a local government must obtain a National Pollution Discharge Elimination System ("NPDES") permit and comply with the permit's conditions and requirements before an MS4 discharges treated stormwater into a WOTUS. 33 U.S.C. § 1342; *see also L.A. Cty. Flood Control Dist. v. NRDC, Inc.*, 568 U.S. 78 (2013).[1] Failure to comply with the NPDES permitting requirements (or to obtain a section 404 permit for any related dredge and fill work in wetlands that fall within the definition of a WOTUS) exposes the local government to severe civil and criminal penalties. *See* 33 U.S.C. § 1319(b), (c).

Put another way, an MS4—with its canals, swales, ditches, drains, pipes, and system of best management practices—makes stormwater cleaner before discharging that water into a more environmentally, recreationally, or commercially

[1] Additionally, section 402(p) of the CWA specifically requires an NPDES permit for certain discharges from an MS4 into a WOTUS. 33 U.S.C. § 1342(p).

significant waterbody. It thus makes sense to carve-out MS4 systems from the definition of WOTUS so that regulatory and permitting requirements do not apply to the very MS4 systems intended to make water cleaner to comply with the many regulatory and permitting requirements that apply to all WOTUS. In fact, until the 2015 Final Rule, MS4s had sensibly been *excluded* from the definition of WOTUS because, under the CWA's plain text, a "point source" is distinct from a WOTUS and the CWA only mandates permits for "discharge[s] *from* a municipal . . . storm sewer" into navigable waters—not discharges *into* the MS4. *See id.* § 1342(p)(2)(C), (D). No more.

The 2015 Final Rule includes all portions of the system *not* in "dry land" into the definition of WOTUS, without ever defining the phrase "dry land," and suggesting that MS4s do not qualify as "wastewater treatment system[s]." *See* 80 Fed. Reg. at 37105, 37107, 37109, 37111, 37112, 37114, 37116, 37118, 37120, 37122, 37124, and 37126. In the Southeastern United States, and especially in Florida, the 2015 Final Rule would make much of an MS4 system both a point source—responsible for treating stormwater runoff—and a WOTUS into which the CWA generally prohibits untreated discharges. FWEA Utility Council Comments at 3.[2] The end result is an absurdity with very real consequences: diversion of resources toward treating discharges *into* a stormwater conveyance like a ditch or

[2] EPA-HQ-OW-2011-0880-12856.

swale rather than focusing resources on treating discharges *out of* a stormwater conveyance and into a more ecologically significant waterbody like the Lower St. Johns River in Florida. JEA Comments at 3.[3]

The 2015 Final Rule's treatment of MS4s underscores its shortcomings, both statutory and constitutional, both common sense and scientific. This Court should thus vacate the 2015 Final Rule as written.

II. STATUTORY & REGULATORY BACKGROUND

This case arises against the backdrop of a complex statutory scheme. The Municipal Interests thus provide background on the CWA, the three seminal U.S. Supreme Court cases that prompted the Corps and EPA to promulgate the 2015 Final Rule, the flawed process used to promulgate the 2015 Final Rule, the substance of the 2015 Final Rule itself, and the 2015 Final Rule's expected impact on the Municipal Interests and their members.

A. Background on the Clean Water Act

The CWA establishes multiple programs that, together, are designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One element of Congress's comprehensive strategy is the program to regulate the "discharge of any pollutant," defined as, *inter alia*, "any addition of any pollutant to navigable waters from any point source," except

[3] EPA-HQ-OW-2011-0880-10747.

"in compliance with" other provisions of the CWA. *Id.* §§ 1311(a), 1362(12)(A). The CWA, in turn, defines "navigable waters" to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

In 1974, the Corps promulgated a rule that defined WOTUS as waters that "are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974). The Corps revised the definition in 1977 to encompass not only traditional navigable waters but also "adjacent wetlands" and "[a]ll other waters" the "degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

B. Seminal U.S. Supreme Court Cases

Although the definition of WOTUS remained essentially unchanged for the next three decades, the Corps and EPA's application of these regulations expanded and unpredictably so. This prompted litigation that resulted in three U.S. Supreme Court decisions interpreting the phrase "waters of the United States" as used in the CWA: *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), and *Rapanos v. United States*, 547 U.S. 715 (2006).

Riverside Bayview concerned a wetland "adjacent to a body of navigable water" in an "area characterized by saturated soil conditions and wetland vegetation [that] extended beyond the boundary of respondent's property to . . . a navigable waterway." 474 U.S. at 131. There, the Court upheld the federal government's interpretation of WOTUS to include a wetland that "actually abuts on a navigable waterway." *Id.* at 135.

Emboldened by *Riverside Bayview*, the U.S. Supreme Court observed, the federal government "adopted increasingly broad interpretations of its own regulations under the [CWA]." *Rapanos*, 547 U.S. at 725.

SWANCC contracted a margin of this expanding federal universe: the Migratory Bird Rule. The Migratory Bird Rule extended federal jurisdiction to any *intra*state waters "[w]hich are or would be used as habitat" by migratory birds. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). At issue in *SWANCC* was whether the Migratory Bird Rule applied to "an abandoned sand and gravel pit in northern Illinois." 531 U.S. at 162. Explaining that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed [the Court's] reading of the CWA in *Riverside Bayview*," the U.S. Supreme Court held that "nonnavigable, isolated, intrastate waters," which did not "actually abut[] on a navigable waterway," are not WOTUS. *Id.* at 166–67.

Rapanos further clipped the boundaries of federal jurisdiction. In *Rapanos*, the U.S. Supreme Court "consider[ed] whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute [WOTUS] within the meaning of the [CWA]." 547 U.S. at 729. Prior to *Rapanos*, the Corps had "interpreted its own regulations to include 'ephemeral streams' and 'drainage ditches' as 'tributaries' that are part of [WOTUS]." *Id.* at 725. "This interpretation extended [WOTUS] to virtually any land feature over which rainwater or drainage passes and leaves a visible mark." *Id.* A five-member majority of the Court rejected this interpretation. A four-member plurality held that WOTUS do not "include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739. Justice Kennedy concurred in the judgment; however, for wetlands, *and only for wetlands*. *Id.* at 780. And Justice Kennedy would require a "significant nexus" between wetlands and jurisdictional waters—a showing that the wetlands "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 779–80.

In response to *Riverside Bayview*, *SWANCC*, and *Rapanos*, the Corps and EPA jointly promulgated the 2015 Final Rule. *See, e.g.*, 80 Fed. Reg. at 37,056–57. As the agencies explained, the 2015 Final Rule was intended to "increase CWA

program predictability and consistency by clarifying the scope of [WOTUS]." *Id.* at 37,054.

C. Process to Promulgate the 2015 Final Rule

The Corps and EPA published their proposed rule on April 21, 2014 ("2014 Proposed Rule"), and accepted comments on the proposal until November 14, 2014. *See* 79 Fed. Reg. 22,188; 79 Fed. Reg. 61,590. Months later EPA released its final "Connectivity Report." 80 Fed. Reg. 2,100 (Jan. 15, 2015); EPA, EPA/600/R-14/475F, *ORD Report: Connectivity of Streams and Wetlands to Downstream Waters* 1–4 (Jan. 2015).[4] That report "provides much of the technical basis for this rule." 80 Fed. Reg. at 37,057.

Neither the Municipal Interests nor their members had a meaningful opportunity to comment on the Connectivity Report. EPA's Science Advisory Board ("SAB") was considering the Connectivity Report throughout the 2014 Proposed Rule's comment period. Many thus asked the Corps and EPA to extend the comment period. FSA, for example, requested "an additional 90-day comment period . . . beginning after the [SAB] release[d] its final report summarizing its analysis of the connectivity report." FSA Comments at 1.[5] EPA and the Corps

[4] EPA-HQ-OW-2011-0880-20858.
[5] EPA-HQ-OW-2011-0880-7965.

refused. "Response Letters to Comments on the Clean Water Rule, Topic 13: Process Concerns and Administrative Requirements" at 20–21, 60.[6]

The SAB submitted the Connectivity Report to EPA with recommendations for revisions to the 2014 Proposed Rule. Based on those recommendations, significant changes were made to the 2014 Proposed Rule without providing the Municipal Interests or their members an opportunity to comment on "the technical basis for this rule." 80 Fed. Reg. at 37,057. As such, the rulemaking outpaced its own technical basis.

The Corps and EPA also failed to consider public comments with an open mind. They used federal funds to campaign for the 2014 Proposed Rule and respond to criticisms of the proposal. Specifically, the Corps and EPA used federal funds to prepare news releases, webcasts, blog posts, and social media to *shape* public comments rather than simply *consider* public comments—to influence members of Congress, state and local government officials, and the general public. *Compare* http://perma.cc/F9U3-NW36 (urging submission of comments such as "[c]lean water is important to me" and "I support EPA's efforts to protect it for my health, my family, and my community") *with* Anti-Lobbying Act ("ALA"), 18 U.S.C. § 1913 (prohibiting use of public funds to "directly or indirectly . . . influence in any

[6] EPA-HQ-OW-2011-0880-20872.

manner" members of Congress or "an official of any government" concerning "legislation, law, ratification, policy, or appropriation").

Contrary to the requirements of the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601–12, the Corps and EPA even failed to (1) solicit flexible regulatory alternatives, (2) consider these alternative proposals, and (3) provide a meaningful economic analysis. They instead concluded that the 2015 Final Rule would not have significant economic impacts on small entities, including smaller government entities that include some of the Municipal Interests' members. *See* 80 Fed. Reg. 37,054, 37,102. Comments filed by the Small Business Administration's Office of Advocacy ("SBA") contradict this conclusion. The SBA notes:

> Advocacy and small businesses are extremely concerned about the [2014 Proposed Rule]. The rule will have a *direct and potentially costly* impact on small businesses. The limited economic analysis which the agencies submitted with the rule provides ample evidence of a potentially significant economic impact. Advocacy advises the agencies to *withdraw the [2014 Proposed Rule]* and conduct a SBAR [or Small Business Advocacy Review] panel prior to promulgating any further rule on this issue.

SBA Comments at 9 (emphasis added).[7]

D. Substance of the 2015 Final Rule

[7] EPA-HQ-OW-2011-0880-7958.

The 2015 Final Rule was the product of this flawed process. The rule places waters into three broad categories: (1) waters that are always jurisdictional, (2) waters "that require a case-specific significant nexus evaluation" to determine whether they are jurisdictional, and (3) waters excluded from jurisdiction.

Always Jurisdictional—Six types of waters are always jurisdictional: (1) "traditional navigable waters," (2) interstate waters, (3) territorial seas, (4) impoundments of waters deemed jurisdictional, (5) tributaries, and (6) waters "adjacent" to the other five types.

- "Traditional navigable waters" are "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." 33 C.F.R. § 328.3(a)(1).
- "Interstate waters" are waters that cross state borders, "even if they are not navigable" and "do not connect to [navigable] waters." 80 Fed. Reg. at 37,074.
- "Territorial seas" are "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." *Id.* at 37,075 (quoting section 502(8) of the CWA).

- Tributary is any water that (1) "contributes flow, either directly or through another water" to a traditional navigable water, interstate water, or territorial sea, and (2) "is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark [("OHWM")]." 33 C.F.R. § 328.3(c)(3). Tributaries are jurisdictional even where man-made or natural breaks occur, "so long as a bed and banks and an [OHWM] can be identified upstream of the break." *Id.* OHWM is defined broadly 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.* § 328.3(c)(6). The Corps has acknowledged in a guidance document that it is common for "problematic situations" to arise, making the OHWM "difficult to interpret." *See* U.S. Army Corps of Engineers, *A Guide to Ordinary High Water Mark Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States* 15, 30 (Aug. 2014). This is particularly true in Florida "where the banks are low and flat, [and] the water does not impress on the soil any well-defined marks of demarcation between the bed and the banks." *Tilden*

v. Smith, 113 So. 708, 712 (Fla. 1927). But now, contrary to Corps guidance, the difficult job of determining the OHWM may be "infer[red]" through desktop computer models and without "a field visit." 80 Fed. Reg. at 37,077.

- "Adjacent" waters are waters "bordering, contiguous, or neighboring" a traditional navigable water, interstate water, territorial sea, impoundments of these waters, or a jurisdictional tributary. 33 C.F.R. § 328.3(c)(1). "Neighboring" includes waters, any part of which, are located (1) within 100 feet of the OHWM of any jurisdictional waters, (2) within the 100-year floodplain of any jurisdictional waters but not more than 1,500 feet from the OHWM of such waters, or (3) within 1,500 feet of the high tide line of a traditional navigable water, interstate water, territorial sea, or within 1,500 feet of the OHWM of the Great Lakes. *Id.* § 328.3(c)(2)(i)–(iii).

Case-Specific Significant Nexus Evaluation—Waters that are not categorially jurisdictional might still be jurisdictional based on a case-specific "significant nexus" evaluation. A water with a "significant nexus" is "a water, including wetlands, [that] either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of a traditional navigable water, interstate water, or territorial sea. *Id.* § 328.3(c)(5).

"Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters." *Id.*

The following are automatically considered to be "similarly situated" and thus jurisdictional: (1) prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands; (2) any water within the 100-year floodplain of an otherwise jurisdictional water, which is particularly relevant in the Southeastern United States; and (3) waters, any part of which are 4,000 feet of the high tide line or OHWM of any otherwise jurisdictional water, impoundment of an otherwise jurisdictional water, or jurisdictional tributary. *Id.* § 328.3(a)(7)(i)–(v).

Excluded Waters—Waters excluded from jurisdiction include, among other things, "waste treatment systems;" a small subset of ditches that do not contribute flow to a jurisdictional water; ditches with ephemeral or intermittent flow that do not drain wetlands, relocate tributaries, or excavate tributaries; "stormwater control features" created in "dry land;" and "[p]uddles." *Id.* § 328.3(b)(1)–(7). But the exclusions are vague. For example, there is no definition of "dry land," and the specific mention of "stormwater control features" suggests that such features do not fall within the "wastewater treatment systems" exclusion. *Id.*

Notably, before the 2015 Final Rule, MS4s were excluded from the definition of "waters of the United States" because the CWA requires permits only for

"discharges *from* municipal storm sewers." 33 U.S.C. § 1342(p)(3)(B). Contrary to the CWA, the 2015 Final Rule excludes stormwater conveyances only when constructed in "dry land" without ever defining "dry land" and including otherwise expansive definitions of WOTUS. *See generally* 33 C.F.R. § 328.3.

E. Impact on Municipal Interests

The Municipal Interests—like the SBA—expect the 2015 Final Rule to have a significant impact on local governments.

For example, Pinellas County, Florida, and its co-permittees expect to spend billions of dollars because of the 2015 Final Rule. Pinellas Comments at 4-7.[8] Pinellas County is the lead permittee for MS4 Permit FLS000005, and is a FSA member. EPA, Enforcement and Compliance History Online, MS4 Permit FLS000005.[9] The following, many of which are League, FSA and FRWA members, are Pinellas County's co-permittees: City of Belleair Beach, City of Belleair Bluffs, City of Clearwater, City of Dunedin, City of Gulfport, City of Indian Rocks Beach, City of Largo, City of Madeira Beach, City of Oldsmar, City of Pinellas Park, City of Safety Harbor, City of Seminole, City of South Pasadena, City of St. Pete Beach, City of Tarpon Springs, City of Treasure Island, FDOT District 7, Town of Belleair, Town of Kenneth City, Town of North Redington Beach, Town of Redington Beach,

[8] EPA-HQ-OW-2011-0880-14426.
[9] https://echo.epa.gov/detailed-facility-report?fid=110011334056. These permits are referenced at EPA-HW-OW-2011-0880-14613.

and Town of Redington Shores. *Id.* Pinellas County and its co-permittees expect to spend between $131 million to $1.03 billion to comply with standards for Total Nitrogen in waters that the 2015 Final Rule would make jurisdictional, and between $299 million to $1.69 billion to comply with standards for Total Phosphorus in these newly jurisdictional waters. FSA Comments, *Estimated Fiscal Impacts on Selected Municipal Separate Storm Sewer System Permittees* at 9.[10]

"[Pinellas] County [itself] owns and operates 149 wet detention pond facilities, each of which discharges into the [County's] MS4." Pinellas Comments at 4.[11] Application of federally enforceable water quality standards to these wet detention ponds "could cost the County . . . [an] additional $85 million." *Id.* "This estimate does not include complying with water quality standards in ditches or other similar stormwater conveyances." *Id.* To simply "compile permit applications or exemptions" for 1,318,867 linear feet of ditches in the County's MS4 system would cost $21,101,872 every five years at a historic cost that ranges between $16–$23 per linear foot. *Id.* at 5. The "cost to compile permit applications or exemptions" for 3,563,411 linear feet of pipes within the MS4—

[10] EPA-HQ-OW-2011-0880-14613.
[11] EPA-HQ-OW-2011-0880-14426.

that might also be a WOTUS under the 2015 Final Rule—would be $57,014,576. *Id.* at 6. The "cost to compile permit applications or exemptions" for the MS4's 849,946 linear feet of "major drainage channels" would be $13,599,136. *Id.*

Mecklenburg County, North Carolina, a SESWA member, similarly fears that the 2015 Final Rule would impede the use of Best Management Practices ("BMPs") intended to benefit the environment by reducing pollutants in stormwater runoff. Mecklenburg Comments at 2.[12] Mecklenburg County, which "is located in the piedmont region of North Carolina," *id.* at 1, worries that BMPs often "constructed [in] wet ponds and wetlands," but designed to benefit waters further downstream, could themselves become WOTUS. *Id.* at 2. This would make it more difficult to implement BMPs and divert resources needed to improve the environment. *See id.*

Gwinnett County, Georgia, another SESWA member, shares these fears, noting that "it is not clear to [them] the extent to which water within the County's stormwater system, which is intended to retain, detain and convey stormwater for treatment, may be treated as a [WOTUS]." Gwinnett Comments at 2.[13]

The Village of Wellington, Florida, a city of less than 60,000 people, and a FSA and League member, estimates that it would cost $9 million just to bring its

[12] EPA-HQ-OW-2011-0880-10946.
[13] EPA-HQ-OW-2011-0880-17352.

canal system, which is a part of its MS4, into compliance with existing water quality standards. FSA Comments, *Example Fiscal Impacts* at 7.[14]

Volusia County, Florida, a FSA and FRWA member, estimates that it must spend $30,368,000 to meet water quality standards in a single canal that simply conveys water into a more ecologically significant water, diverting resources necessary to attain and maintain water quality in the latter. *Id.* at 18.

The City of Miramar, Florida, a city of less than 130,000 people and a League member, estimates that it must impose "a 900% increase in an assessment fee for stormwater management." League Comments at 3.[15]

Comments by the Municipal Interests and their members provide many more examples of costs the 2015 Final Rule would impose. MS4s in Manatee County, Florida plan to spend as much as $2.3 billion; in Sarasota County, Florida as much as $476 million; and in Seminole County, Florida as much as $1.95 billion. FSA Comments, *Estimated Fiscal Impacts on Selected Municipal Separate Storm Sewer System Permittees* at 7, 11, 13.[16]

EPA's economic analysis of the 2015 Final Rule ignored these costs on local governments. The economic analysis wrongly assumed that there are no costs associated with waters becoming subject to water quality standards, monitoring

[14] EPA-HQ-OW-2011-0880-14613.
[15] EPA-HQ-OW-2011-0880-14466.
[16] EPA-HQ-OW-2011-0880-14613.

requirements, total maximum daily load ("TMDL") development, TMDL implementation, dredge and fill permitting requirements, and all the costs associated with work to assess whether waters are included (or excluded) from the 2015 Final Rule's new definition of WOTUS. *Compare* EPA Economic Analysis at 15–16 *with* Daivd Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74–76 (2002) (noting, for example, that an "individual permit application" for a dredge and fill permit costs on average "over $271,596 to prepare" and that it takes "an average of 788 days (or two years, two months)" to obtain an individual permit).

Paradoxically, the 2015 Final Rule's expansion of federal jurisdiction would divert and dilute scarce local government resources needed to further the CWA's goal of restoring and maintaining water quality, thereby harming the communities the Municipal Interests serve, and undermining ongoing efforts to restore or maintain water quality. FSA Comments at 5, 9 (noting that the 2015 Final Rule would "divert scare resources" from water quality improvement projects);[17] JEA Comments at 1–2 (noting that 2015 Final Rule would "misallocate limited public resources" being used by City of Jacksonville, a League, FSA, and FRWA member);[18] Florida

[17] EPA-HQ-OW-2011-0880-14613.
[18] EPA-HQ-OW-2011-0880-15194.

Department of Agriculture Comments at 5 (noting that 2015 Final Rule would "divert resources away from ongoing state and federal priority restoration efforts and towards unnecessary efforts to protect waters that do not directly affect human health and aquatic life" such as stormwater conveyances).[19]

III. RELEVANT STANDARDS OF REVIEW

Summary judgment is the appropriate vehicle to resolve challenges to final agency actions. *See Richards v. Immigration & Naturalization Serv.*, 554 F.2d 1173, 1177 n. 28 (D.C. Cir. 1977); *Fla. Wildlife Fed'n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1155 (N.D. Fla. 2012). But because federal agencies must resolve factual and policy issues in the first instance to arrive at a decision, the traditional summary judgment standard does not apply. *See Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769–70 (9th Cir. 1985).

The Administrative Procedure Act ("APA") governs. 5 U.S.C. §§ 551–706. It directs this Court to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A); "contrary to constitutional right, power, privilege, or immunity," *id.* § 706(2)(B); "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C); or "without observance of procedure required by law," *id.* § 706(2)(D).

[19] EPA-HQ-OW-2011-0880-10260.

"[T]he focal point for judicial review [is] the administrative record already in existence, not some new record made initially in the reviewing court," making it necessary for the final agency action to rise or fall on the record alone. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1246 (11th Cir. 1996).

Courts often—but not always—defer to agencies when reviewing their actions against the record compiled. Deference is best thought of as a continuum ranging from no deference to great deference depending on the issue.

Courts "do not defer to [agencies] with respect to the interpretation of judicial precedent." *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 692 (6th Cir. 2001); *see also Negusie v. Holder*, 555 U.S. 511, 521–23 (2009) (refusing to afford deference to agency's interpretation of judicial precedent); *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (*en banc*) (explaining that there is "no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the [Supreme] Court's opinions"), *vacated on unrelated grounds*, 524 U.S. 11 (1998).

Courts do "not submit to an agency's interpretation of a statute if it presents serious constitutional difficulties." *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (internal quotations omitted) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). This is especially true of constitutional issues arising from statutes that, like the

CWA, impose criminal penalties. *See Abramski v. United States*, 573 U.S. 169, 191 (2014) (noting that "criminal laws are for courts, not for the Government, to construe").

Courts do not defer to an agency's interpretation of a statute where the language of that statute is clear—the *Chevron* Step One analysis. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Where "Congress has delegated authority to an agency by leaving a statutory gap [or ambiguity] for the agency to fill," *Kempthorne*, 512 F.3d at 707, and the agency fills that gap through rulemaking, *Chevron* Step Two dictates that "courts give controlling weight to the regulations unless they are 'arbitrary, capricious, or manifestly contrary to the statute." *Buckner v. Fla. Habilitation Network, Inc.*, 489 F.3d 1151, 1154 (11th Cir. 2007) (quoting *Chevron*, 467 U.S. at 844).

Courts also afford deference to factual and policy determinations reflected in the record. Determinations that are "rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute" should be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Such deference still has its limits though. A rule is "arbitrary and capricious" where "the agency has relied on factors which Congress has not

intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43.

The 2015 Final Rule misses the mark when judged against these standards.

IV. ARGUMENT

The 2015 Final Rule—and especially its failure to exclude MS4 systems from the definition of "waters of the United States"—ignores the CWA's text; misinterprets U.S. Supreme Court precedent; exceeds the federal government's authority under the Commerce Clause; violates the Due Process Clause; and is otherwise arbitrary and capricious for its many deficiencies.

A. The 2015 Final Rule ignores the Clean Water Act's text in two key respects.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). And the text "must, if possible, be construed in such fashion that every word has some operative effect." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003). The 2015 Final Rule violates these bedrock principles of statutory interpretation in two key respects: (1) it reads the word "navigable" out of the CWA, and (2) it ascribes the same meaning to "point source" as "waters of the United States" while ignoring that the CWA only regulates discharges *from* an MS4 system and not discharges *into* an MS4 system.

First, the CWA grants the Corps and EPA jurisdiction over "navigable waters," 33 U.S.C. § 1251(a), (d), defining such waters as "waters of the United States," *id.* § 1362(7). This separate definition of the "navigable waters" does not "constitute[] a basis for reading the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 172. The phrase still demonstrates "what Congress had in mind as its authority for enacting" the CWA, *id.*, was its "commerce power over navigation." *Id.* at 177. "[T]he word 'navigable'" must "be given some importance," and even under the "significant nexus" test, the nexus must be to "navigable waters *in the traditional sense*." *Rapanos*, 547 U.S. at 778–79. "[N]avigable" cannot be written out to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778.

The 2015 Final Rule ignores these admonitions. Its definition of "tributary," for example, includes any feature contributing any flow, "either directly or through another water," and "characterized by the presence of physical indicators of a bed and banks and an [OHWM]." 33 C.F.R. § 328.3(c)(3). Because flow may be "intermittent or ephemeral," 80 Fed. Reg. at 37,076, jurisdiction extends to minor creek beds, municipal stormwater systems, and ephemeral drainages as long as they exhibit a bed, banks, and OHWM.

Pinellas Park Ditch #5, for example, is now a WOTUS under the 2015 Final Rule. Ditch #5 discharges into a wetland that then discharges into a creek. Ditch #5 provides no environmental or human benefits, other than flood control.

Pinellas Park Ditch #5, FSA Comments, Figure 2.[20]

Parker Canal is also a WOTUS under the 2015 Final Rule. The canal is a large constructed ditch that drains water east to west against natural land grade. It discharges into Colson Branch, which is a tributary of the Lower St. Johns River.

[20] EPA-HQ-OW-2011-0880-7965.

Parker Canal, FSA Comments, Figure 3.[21]

The Dade City Canal is a mad-made, mostly dry conveyance for flood control. It too becomes a WOTUS because it qualifies as a "tributary."

[21] EPA-HQ-OW-2011-0880-7965.

Dade City Canal, FSA Comments, Figure 1.[22]

These pictures are worth thousands of words. Common sense dictates that Pinellas Park Ditch #5, the Parker Canal, and the Dade City Canal are *not* "navigable waters." One can neither "navigate" a concrete ditch or earthen basin nor suggest that these minor features have an essential nexus to a more traditional WOTUS. Calling such stormwater conveyances WOTUS reads out "navigable waters" from the CWA. This the Corps and EPA cannot do. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 (1976) ("rulemaking power granted to an administrative agency . . . is not the power to make law").

[22] EPA-HQ-OW-2011-0880-7965.

Second, the 2015 Final Rule impermissibly ascribes the same meaning to "point source" as it does WOTUS. The rule asserts jurisdiction over "man-altered[] or man-made water[s]" including "rivers, streams, canals, and ditches not excluded under [328.3(b)]" and "channelized" waters and "piped streams," "even where used as part of a stormwater management system." 33 C.F.R. § 328.3(c)(3); 80 Fed. Reg. at 37,100. "Jurisdictional ditches" include those with "intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands," and those "regardless of flow, that are excavated in or relocate a tributary." 80 Fed. Reg. at 37,078. In other words, the Corps and EPA concede that stormwater conveyances, among other things, may be treated as "both a point source and a 'water of the United States.'" *Id.* at 37,098. This cannot be.

The CWA's structure and text "conceive of 'point source' and 'navigable waters' as separate and distinct categories." *Rapanos*, 547 U.S. at 735. It defines "discharge of pollutant" as the "addition of any pollutant *to* navigable waters *from* a point source," making the distinction clear. 33 U.S.C. § 1362(12)(A) (emphasis added). It defines "point source" as "any discernable, confined and discrete conveyance," including ditches, channels, tunnels and conduits, "from which a pollutant may be discharged," making the distinction clearer still. *Id.* § 1362(14).

Importantly, section 402 of the CWA requires permits only for "discharge[s] *from* municipal storm sewers" "*into* navigable waters." 33 U.S.C. § 1342(p)(3)(B)

(emphasis added). This makes the inclusion of any part of the MS4 system—a point source—into the definition of a WOTUS directly contrary to the CWA.

Both EPA and the U.S. Supreme Court have also previously recognized the distinction between an MS4 and a WOTUS. In the preamble to the original version of the MS4 regulations, EPA said that "waters of the United States are not storm sewers for purposes of this rule." *See* 53 Fed. Reg. 49,416, 49,442 (Dec. 7, 1988). The U.S. Supreme Court reaffirmed the distinction in *Los Angeles County Flood Control District*, holding that no "discharge" from an MS4 had occurred when water flowed from an engineered portion of the Los Angeles River into another portion of the same river that was part of the MS4. 568 U.S. at 80.

Thus, under the CWA's plain text, a "point source" cannot be a WOTUS, and MS4s must specifically be excluded from the definition of WOTUS.

B. The 2015 Final Rule misinterprets the U.S. Supreme Court decision in *Rapanos*.

Although the Corps and EPA claim to tether the 2015 Final Rule to Justice Kennedy's "significant nexus" test from *Rapanos*, the rule (1) fails to faithfully apply Justice Kennedy's opinion and, even if applied faithfully, (2) that opinion alone is not controlling.

First, the less than faithful application of Justice Kennedy's opinion is rooted in several crucial mistakes. The Corps and EPA fail to recognize that the opinion is limited to wetlands. Justice Kennedy said so himself. He framed the issue as

"whether the term 'navigable waters' in the CWA extends *to wetlands* that do not contain and are not adjacent to waters that are navigable in fact." *Rapanos*, 547 U.S. at 759 (emphasis added). He said that "[c]onsistent with . . . the need to give 'navigable' some meaning, the Corps' jurisdiction *over wetlands* depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (emphasis added). His justification for the test falls apart when the test is expanded beyond wetlands because it is "*wetlands* [that] perform important functions such as filtering and purifying water draining into adjacent waterbodies," *id.* at 766, and "*wetlands* [that] perform critical functions related to the integrity of other waters." *Id.* at 779 (emphasis added). And only in the case of wetlands is there "no serious constitutional or federalism difficulty" because "in most cases regulation of wetlands . . . are adjacent to tributaries that possess a significant nexus with navigable waters." *Id.* at 782.

It is also a mistake to assert jurisdiction based on adjacency not only to traditional navigable waters, but also impoundments or tributaries of traditionally navigable waters. Justice Kennedy rejected the idea that a wetland's mere adjacency to a *tributary* could be "the determinative measure" of whether it was "likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Id.* at 781. "[W]etlands adjacent to [such] tributaries . . . might appear little more related to navigable-in-fact waters than were the isolated

ponds [in *SWANCC*]." *Id.* at 781–82. On this point, Justice Kennedy voted to vacate the assertion of federal jurisdiction over wetlands supposedly "adjacent" to a ditch that indirectly fed into a navigable lake. *Id.* at 764; *accord id.* at 730. "[M]ere adjacency to a tributary of this sort is insufficient." *Id.* at 786. Justice Kennedy similarly rejected an extension of jurisdiction over wetlands based on a mere surface water connection to a non-navigable tributary; some greater "measure of the significance of the connection for downstream water quality" is required. *Id.* at 784–85.

The 2015 Final Rule nevertheless employs the disfavored adjacency approach. The rule categorically asserts jurisdiction over "waters" (many of which are dry more often than wet) based on their "adjacency" to "tributaries" "however remote and insubstantial," *id.* at 764, including ephemeral features, drains, ditches, and streams remote from navigable waters.

Finally, the definition of "tributaries" is antithetical to Justice Kennedy's fact-intensive, site-specific "sufficient nexus" test. The 2015 Final Rule defines "tributary" only by physical characteristics, rather than concern as to whether flow may be "intermittent or ephemeral." 80 Fed. Reg. at 37,076. As a result, jurisdiction extends to minor creek beds, municipal stormwater systems, and ephemeral drainages as long as they exhibit a bed, banks, and OHWM.

Thus, the 2015 Final Rule's reach is vast, covering countless miles of previously unregulated features,[23] sweeping in many isolated, often dry land features regardless whether "their effects on water quality are speculative or insubstantial." *Rapanos*, 547 U.S. at 780. While Justice Kennedy contemplated that the Corps might, by rule, "identify categories of tributaries" that, due to "volume of flow," "proximity to navigable waters," and other relevant considerations "are significant enough" to support federal jurisdiction, *id.* at 780–81, the 2015 Final Rule fails to examine these factors. Contrary to Justice Kennedy's opinion, the 2015 Final Rule focuses only on the presence of "physical indicators" of a bed, banks, and OHWM. *See* 80 Fed. Reg. at 37,076.

Second, even if faithfully applied, Justice Kennedy's opinion alone is not controlling. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, *the holding* of the Court may be viewed as that position taken by those Members who *concurred in the judgment* on *the* narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (emphasis added) (citations omitted). In *Rapanos*, five Justices concurred in a

[23] *See* UWAG Comments, EPA-HQ-OW-2011-0880-15016, at 51–53 (drainage ditches in southeastern coastal plains); Waters Working Group Comments, EPA-HQ-OW-2011-0880-19529, at 27 (water supply systems and municipal separate storm sewer systems); Murray Energy Corp. Comments, EPA-HQ-OW-2011-0880-13954, at 11 (mine site drainage ditches and culvert conveyances); Ass'n of Am. Railroad Comments, EPA-HQ-OW-2011-0880-15018, at 4 (rail ditches).

judgment limiting CWA jurisdiction. But, for wetlands,[24] the tests set forth in the plurality and concurring opinions do not form concentric circles; one test does not neatly subsume the other; neither is always over-inclusive or under-inclusive when judged against the other; neither is always *the* narrowest. So "*the* holding" in *Rapanos*—"*the* narrowest" grounds for the judgment—mandates that *wetlands* pass *both* tests before becoming jurisdictional.

At the very least, the holding in *Rapanos* mandates that one consider the facts of a particular jurisdictional determination before deciding which test is the narrowest, and then applying that narrowest of tests.[25] Justice Kennedy's opinion alone does not always control. The 2015 Final Rule ignores this.

---

[24] Regardless of the test, it is important to note the points on which the plurality and Justice Kennedy agree and from which the 2015 Final Rule departs. The plurality and Justice Kennedy agree that "the word 'navigable' in 'navigable waters [must] be given some importance." 547 U.S. at 778 ; *see id.* at 731. They agree that the Clean Water Act reaches some waters and wetlands that are not navigable-in-fact but that have a substantial connection to navigable waters, though they disagree about the precise test. 547 U.S. at 739, 742; *id.* at 784–85. They agree that "waters of the United States" do *not* include "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," much less the waters or "wetlands [that] lie alongside [such] a ditch or drain." 547 U.S. at 781; *see id.* at 778–81 (identifying "volume of flow" and "proximity" as relevant factors and ruling out jurisdiction over features with a "remote," "insubstantial," or "speculative" effect on navigable waters); *id.* at 733–34 (jurisdiction reaches "continuously present, fixed bodies of water"; "intermittent or ephemeral flow" of the sort found in "drainage ditches," "storm sewers and culverts," and "dry arroyos" is insufficient); *id.* at 742 (wetlands with "an intermittent, physically remote hydrologic connection" to jurisdictional waters lack a "significant nexus").

[25] In *United States v. Robinson*, 505 F.3d 1208 (11th Cir. 2007), the Eleventh Circuit adopted the "significant nexus" test to the extent it was the narrowest view of

C. The 2015 Final Rule exceeds the Commerce Clause power and violates the Due Process Clause.

The 2015 Final Rule also suffers from two constitutional infirmities: (1) it violates the Commerce Clause, and (2) the Due Process Clause.

First, the 2015 Final Rule exceeds Congress's powers under the Commerce Clause. In *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), the U.S. Supreme Court explained that federal authority under the Commerce Clause falls into three categories: the power to regulate (1) "channels of interstate commerce," (2) "instrumentalities of commerce" and (3) activities that have a "substantial effect" on commerce. The U.S. Supreme Court noted in *SWANCC* that, in enacting the CWA, Congress intended for jurisdiction to be tied to its commerce power over navigation—to its ability to regulate channels of interstate commerce like navigable rivers, lakes and canals. 531 U.S. at 168. Specifically, the U.S. Supreme Court reasoned that the word "navigable," as used in the CWA, "has at least the import of

---

Rapanos given the particular facts of the case. As the Eleventh Circuit explained, "in factual circumstances different from *Rapanos*, Justice Scalia's test may be less restrictive of CWA jurisdiction; however, in determining the governing holding in *Rapanos*, we cannot disconnect the facts in the case from the various opinions and determine which opinion is narrower in the abstract." *Id.* at 1222. Ultimately the Eleventh Circuit adopted Justice Kennedy's test because the case was "one in which Justice Scalia's test may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test, despite the fact that Justice Kennedy's test, as applied in *Rapanos*, would treat more waters as within the scope of the CWA." *Id.* at 1223. The Eleventh Circuit held that it would conduct a case-by-case inquiry to determine which test is the "narrowest view of the Justices who concurred in the judgment in *Rapanos*." *Id.* at 1224.

showing us what Congress had in mind as its authority for enacting the [Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172 (citations omitted). The U.S. Supreme Court warned that extending jurisdiction to isolated, non-navigable waters would raise "significant constitutional questions" because such waters are "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 174. A plurality reiterated this warning in *Rapanos*, rejecting an assertion of jurisdiction over wetlands not adjacent to traditional navigable waters and noting that such an expansive jurisdictional theory would "stretch the outer limits of Congress's commerce power." 547 U.S. at 738.

The 2015 Final Rule exceeds the bounds delineated by *SWANCC*, *Rapanos*, and the Commerce Clause. As discussed in greater detail elsewhere in this Motion, the 2015 Final Rule extends CWA jurisdiction to isolated wetlands and ponds, ephemeral drainage features, ditches and other waters that have no navigable features and lack meaningful connections to navigable waters. Where, as here, "an administrative interpretation of a statute invokes the outer limits of Congress's power, [the U.S. Supreme Court] expect[s] a clear indication that Congress intended that result." *SWANCC,* 531 U.S. at 172. The 2015 Final Rule can point to no such clear Congressional intent in the CWA. To the contrary, the CWA makes clear that Congress chose to "recognize, preserve, and protect the primary responsibilities and

rights of the States." 33 U.S.C. § 1251(b). Congress chose not to stretch—and then exceed— the outer limits of its powers under the Commerce Clause. *See id.* The 2015 Final Rule does precisely that which Congress chose not to do itself; it makes the Dade City Canal a WOTUS.

Second, the 2015 Final Rule violates the Due Process Clause because it fails to give the public fair notice of what is and is not regulated, making the rule unconstitutionally vague. "'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). "This requirement of clarity in regulation is [therefore] essential to the protections provided by the Due Process Clause of the Fifth Amendment" and "requires the invalidation of laws that are impermissibly vague." *Id*. (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)).

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

S. Ct. at 2317. The second concern is "to provide standards for enforcement," *Fire Fighters*, 502 F.3d at 551, "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television*, 132 S. Ct. at 2317.

A regulation is constitutionally invalid if it fails to establish objective guidelines for enforcement. *Id*. That is the case here.

Consider, for example, the concept of an OHWM, 33 C.F.R. § 328.3(c)(6), which is the crux of a "tributary," *id*. § 328.3(c)(3), and the starting point for marking off the applicable distances for "adjacent" and "neighboring" waters, *id*. § 328.3(c)(1), (2) and waters with a "significant nexus," *id*. § 328.3(a)(8). There are no 'required' physical characteristics that must be present to make an OHWM determination." U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 05-05 at 3 (Dec. 7, 2005). Regulators can reach any outcome they please.

Likewise, the 2015 Final Rule is equally vague as to the "case-by-case" "significant nexus" test. 80 Fed. Reg. at 37,059. At every stage, the test turns on subjective observations and opaque analyses—making it impossible for one to determine whether a federal permit is needed.

Many of the 2015 Final Rule's categorical exemptions from jurisdiction are also vague. For example, the agencies inserted an exemption for "puddles," 33 C.F.R. § 328.3(b)(4)(vii), however, they fail to explain what constitutes a puddle. The agencies use the significant nexus test to assert jurisdiction over "depressional

wetlands," 80 Fed. Reg. at 37,093, without regard for size or permanence. And there is no definition of "dry land" to guide the Municipal Interests for purposes of the limited exclusions for wastewater recycling structures, waste treatment systems, and stormwater control features. 33 C.F.R. § 328.3(b)(4), (6), (7).

D. The 2015 Final Rule is otherwise arbitrary and capricious and was promulgated without observance of appropriate procedure.

While there are likely several reasons the 2015 Final Rule is arbitrary and capricious,[26] the Municipal Interests focus on the two most obvious of them: (1) assertion of jurisdiction over remote and intermittent waters without evidence that these waters have a nexus to navigable-in-fact waters, and (2) the establishment of arbitrary distances entirely unsupported by scientific evidence. These and other issues could have been avoided had the Corps and EPA (3) abided by the required procedural safeguards, namely the regular notice and comment process, the prohibitions in the ALA, and the requirements of the RFA.

First, the 2015 Final Rule asserts jurisdiction over remote and intermittent waters, without evidence that they have a nexus (much less a significant nexus) with

[26] For example, as discussed above, the Corps and EPA concede that under the 2015 Final Rule ditches and stormwater conveyances may be treated as "*both* a point source and a 'water of the United States'" under the CWA. 80 Fed. Reg. at 37,098 (emphasis added). The 2015 Final Rule's arbitrariness is also underscored by its categorical assertion of jurisdiction over some (but not all) ditches—an ambiguous term that is nowhere defined in the rule. *See* 33 C.F.R. § 328.3(b).

any navigable-in-fact waters. 80 Fed. Reg. at 37,075. That is, the EPA and Corps assert that any "tributary" necessarily also "significantly affect[s] the chemical, physical, and biological integrity of traditional navigable waters." *Id.*

To support this assertion, the EPA and Corps relied on unique, non-representative water-rich systems. *See*, *e.g.*, 80 Fed. Reg. at 37,068–75. Yet the EPA and Corps concede that the jurisdictional status of some tributaries—especially "intermittent and ephemeral" features that may not experience flow for months and years at a time—has long been "called into question," 79 Fed. Reg. at 22,231, and that the evidence of connectivity for such features is "less abundant." 80 Fed. Reg. at 37,079. Thus, the EPA and Corps fail to articulate the "rational connection between the facts found and the choice made," as is required. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)

Second, as officials at the Corps acknowledged, longstanding guidance previously provided that "it is not appropriate to determine significant nexus based solely on any specific threshold of distance." Moyer Memo.[27] "Agencies are," of course, "free to change their existing policies," but if they do so, they "must at least display awareness that [they are] changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (internal quotations omitted). "In such cases it is not that further

[27] EPA-HQ-OW-2011-0880-20882, at 2.

justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id*. at 2126. And "[i]t follows that an [u]nexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Id*. (internal quotations omitted).

The 2015 Final Rule, however, applies unexplained distance criteria within floodplains to asset "adjacency" jurisdiction. 33 C.F.R. § 328.3(c)(2)(ii). The EPA and Corps admit that the 100-year floodplain was chosen for administrative convenience. *See* 80 Fed. Reg. at 37,089 (100-year floodplain serves "purposes of clarity" and "regulatory certainty"). In fact, the EPA and Corps acknowledge there is no consensus as to the appropriate flood interval. *See* EPA, *Questions and Answers—Waters of the U.S. Proposal* 5.[28] As support, they cite only the Science Report's generic statement that "floodplains are physically, chemically and biologically integrated with rivers via functions that improve downstream water quality." 80 Fed. Reg. at 37,085. The agencies cite generic statements, but the relevance of "floodplains" *in general* does not justify reliance on the 100-year floodplain *in particular*. *Id*.

[28] https://perma.cc/7RRP-V46X.

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

Mere intonation of "technical expertise" is not enough to grant agency deference. Courts may "defer to [an agency's] expertise [only] if it provides substantial evidence to support its choice and responds to substantial criticism of [the] figure." *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1141 n.45 (D.C. Cir. 1996). That evidence is lacking here. This alone is a basis for vacating the 2015 Final Rule, for an agency "may not pluck a number out of thin air." *WJG Tel. Co. v. FCC*, 675 F.2d 386, 388–89 (D.C. Cir. 1982).

Third, these and other errors could have been avoided through observance of appropriate procedure. The Corps and EPA failed to reopen the comment period after making substantial, unanticipated changes to the 2014 Proposed Rule. There was no way to anticipate from the 2014 Proposed Rule that the 2015 Final Rule would define key jurisdictional concepts and use the arbitrary distances and

reference points the EPA and Corps chose. For example, the definition of "neighboring" changed from "located in the riparian area or floodplain" or having a "hydrologic connection," in the 2014 Proposed Rule to "waters located within 100 feet of the [OHWM]" of a (1)–(5) feature, "waters located within the 100-year floodplain" of a (1)–(5) feature but "not more than 1,500 feet from the [OHWM] of such water," and "waters located within 1,500 feet of the high tide line" of a (1)–(3) water, in the 2015 Final Rule. 80 Fed. Reg. at 37,105.

The Corps and EPA also denied the public the opportunity to comment on the final Connectivity Report, despite acknowledging its key scientific significance. The 2014 Proposed Rule was accompanied only by a draft of the Connectivity Report, which was at the time undergoing review by the SAB. Subsequently numerous substantive changes to the Connectivity Report were made. The final report introduced a new, continuum-based approach that analyzed the connectivity of particular waters to downstream waters along various dimensions and added important new material. *Connectivity Report* 1–4.[29] While the changes go to the heart of the legal and scientific flaws underlying the 2015 Final Rule, the final report was not published until two months after the comment period closed. 80 Fed. Reg. at 2,100.

[29] EPA-HQ-OW-2011-0880-20858.

As discussed more fully in section II, C *supra*, the Corps and EPA abdicated their roles as impartial regulators. EPA disseminated through social media a message to 1.8 million users, which read: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community"[30] in violation of the ALA's anti-lobbying provision. *See* 18 U.S.C. § 1913. And another federal agency—the SBA—criticized the economic analysis that failed to compare the 2015 Final Rule's effects on small businesses and local governments against the current regulatory regime, thereby gaming the requirements of the RFA. 5 U.S.C. §§ 601–12; *see also Nat'l Truck Equip. Ass'n v. NHTSA*, 919 F.2d 1148, 1157 (6th Cir. 1990) ("[A] conclusory statement with no evidentiary support in the record does not prove compliance with the Regulatory Flexibility Act"); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42 (requiring support in the record).

V. CONCLUSION

This Court should vacate the 2015 Final Rule.

[30] http://perma.cc/F9U3-NW36.

***

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this motion complies with the size and font requirements in the local rules. While this motion, at 9,430 words, exceeds the word limit in the local rules, an unopposed request to exceed that limit has also been filed.

***

Respectfully submitted by:

/s/ Mohammad O. Jazil

MOHAMMAD O. JAZIL (FBN 72556)
mjazil@hgslaw.com
HOPPING GREEN & SAMS, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
(850) 222-7500 / (850) 224-8551 (fax)

Counsel for Plaintiffs, Southeast Stormwater Association, Inc., et al.

Dated: March 15, 2019