UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SOUTHEAST STORMWATER ASS'N, INC., *et al.*,

Plaintiffs,

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

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

Defendants.
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UNITED STATES' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2015, the United States Environmental Protection Agency ("EPA") and the Department of the Army, United States Army Corps of Engineers ("Army" or "Corps") (together, "the Agencies") promulgated a rule that revised the definition of "waters of the United States" under the Clean Water Act ("CWA").[1] The Rule, which has been enjoined by courts around the country, has never had nationwide effect. At this time, the rule is preliminarily enjoined in 28 states.

The Agencies have clear legal authority to reconsider the rules of prior administrations. Pursuant to the President's Executive Order,[2] the Agencies are actively engaged in two such related rulemakings. In the first, the Agencies have proposed to repeal the 2015 Rule. In the second, they have proposed a new definition of "waters of the United States." Through these two rulemaking processes, the Agencies are actively reconsidering many of the substantive questions raised by the challengers here. Having received public comments, including those from parties to this case, the Agencies will decide whether the 2015 Rule should be repealed, modified, or retained, and they will take final action on a proposed replacement of the 2015 Rule. Until the Agencies take final action on those proposals, the Agencies are keeping an open mind. That means that though their prior briefs and statements (made when the rulemaking posture was different) are a matter of public record, the Agencies now take no position on the substantive issues currently being reconsidered.

As for the procedural challenges to the 2015 Rule that are not intertwined with substantive issues under reconsideration, however, the Court should deny the motions for

[1] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule" or "Rule").

[2] *See* Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

summary judgment and grant summary judgment to the Agencies. *First*, the challengers fail to meet their burden to show any notice-and-comment defects in the 2015 Rule. *Second*, the Agencies provided adequate notice of the scientific basis for the Rule. *Finally*, the anti-lobbying and "propaganda" claims lack merit.

BACKGROUND

I. The Clean Water Act and implementing regulations

The CWA generally prohibits "the discharge of any pollutant by any person," 33 U.S.C. § 1311(a), unless the discharger "obtain[s] a permit and compl[ies] with its terms." *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (citation omitted).[3] A "discharge of a pollutant" occurs when a person adds "any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). "[N]avigable waters," in turn, are "the waters of the United States." *Id.* § 1362(7).

The Agencies, charged with implementing the CWA, "must necessarily choose some point at which water ends and land begins," but "[w]here on this continuum to find the limit of 'waters' is far from obvious." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985). The Corps first promulgated regulations defining "waters of the United States" in 1977. *See* 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). In the late 1980s, the Agencies adopted regulatory definitions of that statutory phrase substantially similar to the 1977 definition.[4] *See*

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[3] The CWA establishes two permitting programs for authorization to discharge pollutants to "waters of the United States." *See* 33 U.S.C. §§ 1342 & 1344; *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009). EPA administers the CWA section 402 National Pollutant Discharge Elimination System ("NPDES") program, under which persons may discharge pollutants downstream under certain conditions. The Corps administers the CWA section 404 program, issuing permits for the discharge of dredged or fill material. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 626 (2018).

[4] The Agencies then defined "waters of the United States" as:

Cont.

51 Fed. Reg. 41,206, 41,216-17 (Nov. 13, 1986); 53 Fed. Reg. 20,764, 20,765 (June 6, 1988). Thus, as of 2015, the Agencies had interpreted and implemented essentially the same definition of "waters of the United States" for nearly 40 years.

Over those four decades, the Agencies refined their longstanding regulatory definition of "waters of the United States" through guidance documents and agency practice, as informed by Supreme Court decisions. *See, e.g.*, *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006); *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007). Though "imperfect," this decades-old program provides a measure of predictability. *See In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015) (describing the "familiar" pre-2015 Rule regime).

II. The 2015 Rule and ensuing litigation

Since the Agencies promulgated the "WOTUS" Rule in 2015, there have been many administrative and judicial developments. Significantly, the 2015 Rule is not—nor has it ever been—implemented nationwide. It is currently judicially enjoined in 28 states. The Agencies, moreover, have proposed a rule that, if finalized, would repeal the 2015 Rule. The Agencies have also proposed a new definition of "waters of the United States" that would replace the 2015 Rule.

> All waters which are currently used, were used in the past, or may be susceptible to us[e] in interstate or foreign commerce . . . All interstate waters including interstate wetlands. . . . All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), . . . Tributaries of waters identified in . . . this section; The territorial sea; and Wetlands adjacent to waters (other than waters that are themselves wetlands) identified . . . in this section . . . .

40 C.F.R. § 232.2 (2014); *see also* 33 C.F.R. § 328.3 (2014) (containing nearly identical text).

A. The 2015 "Waters of the United States" Rule

In June 2015, the Agencies promulgated the 2015 Rule, revising the regulatory definition of "waters of the United States." *See* 80 Fed. Reg. 37,054 (June 29, 2015). A stated purpose of the 2015 Rule was to "increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act." *Id.* The 2015 Rule placed waters into three categories: (A) waters that are categorically "jurisdictional by rule" in all instances (*i.e.*, without the need for any additional analysis); (B) waters that are subject to case-specific analysis to determine whether they are jurisdictional, and (C) waters that are categorically excluded from jurisdiction.

"Jurisdictional by Rule" Waters. Waters that are "jurisdictional by rule" under the 2015 Rule include (1) waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide; (2) interstate waters, including interstate wetlands; (3) the territorial seas; (4) impoundments of waters otherwise identified as jurisdictional; (5) tributaries of the first three categories of "jurisdictional by rule" waters; and (6) waters adjacent to a water identified in the first five categories of "jurisdictional by rule" waters, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters. *See id.* at 37,104.

The 2015 Rule added definitions of key terms including, as relevant here, "tributaries" and "neighboring" adjacent waters that are "jurisdictional by rule." *See id.* at 37,105. A "tributary" under the 2015 Rule is a water that contributes flow, either directly or through another water, to a water identified in the first three categories of "jurisdictional by rule" waters and that is characterized by the presence of the "physical indicators" of a bed and banks and an ordinary high water mark. And "neighboring" adjacent waters are those located:

- within 100 feet of the ordinary high water mark of a category (1) through (5) "jurisdictional by rule" water;
- within the 100-year floodplain of a category (1) through (5) "jurisdictional by rule" water and not more than 1,500 feet from the ordinary high water mark of such water;
- within 1,500 feet of the high tide line of a category (1) through (3) "jurisdictional by rule" water; and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes.

Id. at 37,105.

Case-Specific Waters. In addition to the six categories of "jurisdictional by rule" waters, the 2015 Rule identifies certain waters that are subject to a case-specific analysis to determine if they have a "significant nexus" to a category (1) through (3) "jurisdictional by rule" water. *Id*. at 37,104-05. First, there are five specific types of waters that are subject to case-specific analysis: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. *Id*. at 37,105. In addition, a case-specific analysis would be performed for all waters located within the 100-year floodplain of any category (1) through (3) "jurisdictional by rule" water and all waters located within 4,000 feet of the high tide line or ordinary high water mark of any category (1) through (5) "jurisdictional by rule" water. *Id.*

The 2015 Rule defines "significant nexus" to mean 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 category (1) through (3) "jurisdictional by rule" water. 80 Fed. Reg. at 37,106. "For an effect to be significant, it must be more than speculative or insubstantial." *Id*. The term "in the region" means "the watershed that drains to

the nearest" primary water.[5] Under the 2015 Rule, to determine whether a water, alone or in combination with similarly situated waters across a watershed, has a significant nexus, one must consider nine functions such as sediment trapping, runoff storage, provision of life cycle dependent aquatic habitat, and other functions. *Id.*

Exclusions. The Agencies also retained exclusions from the definition of "waters of the United States" for prior converted cropland and waste treatment systems. *Id.* at 37,105. In addition, the Agencies codified several exclusions that reflected longstanding agency practice, and added others such as "puddles" and "swimming pools" in response to public comments on the proposed 2015 Rule. *Id*. at 37,096-98, 37,105.

B. Litigation over the 2015 Rule

Once published, the 2015 Rule was immediately challenged by 31 states and many other parties in district and appellate courts across the country, including this Court.[6] 83 Fed. Reg. 5200, 5201 (Feb. 6, 2018). On August 27, 2015—the day before the 2015 Rule was to take effect—the District Court in North Dakota enjoined the Rule in 13 states, holding that the movants there "are likely to succeed on the merits of their claim." *See North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055 (D.N.D. 2015).

Meanwhile, petitions for review of the 2015 Rule were consolidated in the Sixth Circuit Court of Appeals. On October 9, 2015, that court issued a nationwide stay of the 2015 Rule pending further proceedings. *See In re EPA*, 803 F.3d 804. It "conclude[d] that petitioners have demonstrated a substantial possibility of success on the merits of their claims." *Id.* at 807.

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[5] A "primary" water is a category (1) through (3) "jurisdictional by rule" water.

[6] The States of Michigan has withdrawn as a plaintiff in the action filed in the Southern District of Ohio, and the State of Colorado and the New Mexico Environment Department have moved to withdraw as plaintiffs in the action filed in the District of North Dakota.

Noting "the sheer breadth of the ripple effects caused by the Rule's definitional [changes]," the Sixth Circuit stayed the 2015 Rule to "restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime, pending judicial review." *Id.* at 808. Consistent with the Sixth Circuit's stay order, the Agencies thereafter returned to their longstanding practice of applying, nationwide, the definition of "waters of the United States" set forth in their 1980s regulations, as informed by guidance, agency practice, and relevant case law. 83 Fed. Reg. at 5201.

In the Sixth Circuit litigation, many of the parties argued that the court did not have jurisdiction over the challenges under 33 U.S.C. § 1369(b)(1). The Sixth Circuit held that it had jurisdiction, and the Supreme Court granted certiorari. *See In re U.S. Dep't of Def.*, 817 F.3d 261 (6th Cir. 2016), *cert. granted*, *Nat'l Ass'n of Mfrs. v. DOD*, 137 S. Ct. 811 (2017), *rev'd*, 138 S. Ct. 617 (2018).

III. The President's Executive Order and administrative reconsideration

On February 28, 2017, the President of the United States signed an Executive Order directing the Agencies to reconsider the 2015 Rule. Exec. Order No. 13,778, 82 Fed. Reg. 12,497. The order declared it to be "in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." *Id.* § 1.

Consistent with the President's directive, in July 2017 the Agencies proposed to repeal the 2015 Rule. If finalized, this proposal would recodify the prior regulatory definition of "waters of the United States," promulgated by the Agencies in the late 1980s. "Definition of 'Waters of the United States'−Recodification of Pre-Existing Rules." 82 Fed. Reg. 34,899 (July 27, 2017). In response to the proposal, the Agencies received more than 685,000 comments. *See* https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-0001 (rulemaking docket).

Upon consideration of the comments received, in July 2018 the Agencies published a Supplemental Notice of Proposed Rulemaking to clarify that they are proposing to permanently repeal the 2015 Rule in its entirety and to supplement and seek additional public comment on that proposal. 83 Fed. Reg. 32,227 (July 12, 2018). The Supplemental Notice also reiterates that the Agencies are proposing to recodify the pre-2015 regulations, and to implement the longstanding regulatory framework that is currently being administered by the Agencies in those states where the 2015 Rule is enjoined, while they continue to consider a new definition of "waters of the United States." *Id*.

The Agencies are proposing to repeal the 2015 Rule for several reasons, including: (1) there is substantial uncertainty associated with the 2015 Rule for regulators, the regulated community, and the public resulting from legal challenges and preliminary rulings by several courts; and (2) the Agencies are concerned that certain findings and assumptions supporting adoption of the 2015 Rule were not correct, and that these conclusions, if erroneous, may separately justify repeal of the 2015 Rule. *Id*. at 32,228; 32,237-39. The Agencies are also considering the preliminary, adverse legal findings of various courts, and whether to accept and adopt one or more of those preliminary conclusions of law, including whether to conclude that the 2015 Rule exceeds EPA's authority under the Clean Water Act. *Id*. at 32,228; 32,238; 32,240.

Thus, the Agencies have proposed to conclude that regulatory certainty would be best achieved by permanently repealing the 2015 Rule and recodifying the scope of CWA jurisdiction currently in effect in some states. *Id*. at 32,228; 32,237-38. The Agencies also proposed to conclude that rather than achieving its stated objectives of increasing predictability and consistency under the CWA, *see* 80 Fed. Reg. at 37,055, the 2015 Rule is creating significant confusion and uncertainty for states, tribes, local governments, agency staff, regulated entities,

and the public, particularly in view of court decisions that have cast doubt on the legal viability of the rule. 83 Fed. Reg. at 32,228; 32,237-38.

IV. The Agencies' proposal to revise the definition of "waters of the United States"

On February 14, 2019, the Agencies published a proposed new "waters of the United States" definition. This proposal is the second step of the Agencies' comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with the President's February 2017 Executive Order. 84 Fed. Reg. 4154 (Feb. 14, 2019). The proposed rule is intended to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" federally regulated under the CWA. *Id.* The proposed definition revision is also intended to clearly implement the overall objective of the CWA to restore and maintain the quality of the nation's waters while respecting State and tribal authority over their own land and water resources. *Id.*

The Agencies invited written pre-proposal recommendations and received more than 6,000 recommendations that the Agencies considered in developing this proposal. The proposal balances the input the Agencies received from a wide range of stakeholders, and describes six categories of waters that would be considered jurisdictional: (1) traditional navigable waters; (2) perennial or intermittent tributaries; (3) certain ditches that are traditional navigable waters or that satisfy the definition of a tributary; (4) certain lakes and ponds; (5) impoundments of "waters of the United States"; and (6) adjacent wetlands that physically touch other jurisdictional waters or have a surface water connection to a jurisdictional water with the requisite flow. 84 Fed. Reg. at 4169-90; 4203-04. The proposal also identifies what would not be a "water of the United States," such as ephemeral features that contain water only during or in response to rainfall, groundwater, prior converted cropland, stormwater control features excavated in upland, wastewater recycling structures, and waste treatment systems. *Id.* at 4190-95; 4204.

In addition to seeking comments on the specifics of the proposed "waters of the United States" definition itself, the Agencies are requesting comment on the discussion and definition of terms within it, such as whether tributaries should be limited to rivers and streams that flow year-round and whether lakes and ponds should be defined more precisely. Further, in response to requests from some states, the Agencies will be exploring how to develop a data or mapping system to provide a clearer understanding of the presence or absence of jurisdictional waters that landowners and members of the regulated community could rely on in the future. The Agencies are also taking comment on the underlying legal interpretations that provide the foundation for the proposed rule.

The Agencies held a public webcast to explain the key elements of the proposal on February 14, 2019, and also held two public hearing sessions on the proposal in Kansas City in February 2019. The Agencies have opened a 60-day public comment period, which will close on April 15, 2019.

V. Litigation developments

In January 2018, the Supreme Court overturned the Sixth Circuit's jurisdictional ruling,[7] holding that, under CWA section 509(b)(1), 33 U.S.C. § 1369(b)(1), "any challenges to the Rule . . . must be filed in federal district courts." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. at 624. The Sixth Circuit then vacated its stay of the 2015 Rule and dismissed all challenges brought in the Courts of Appeals for lack of jurisdiction. *In re U.S. Dep't of Def.*, 713 Fed. App'x 489 (6th Cir. 2018).

In February 2018, after a notice-and-comment rulemaking, the Agencies amended the 2015 Rule to add an applicability date of February 6, 2020 (the "Applicability Rule"). 83 Fed.

[7] *See In re U.S. Dep't of Def.*, 817 F.3d 261 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 811 (2017).

Reg. 5200. In the Applicability Rule, the Agencies found that the applicability date would serve the public interest by maintaining the pre-2015 regulatory framework for a time so that only one regulatory definition of "waters of the United States" would be applicable nationwide. *See* 83 Fed. Reg. at 5202. The alternative, the Agencies concluded, would be a patchwork of regulations, one that depended on the geographic reach of various judicial injunctions of the 2015 Rule, and which would be undesirable for most stakeholders. *Id.*

The Applicability Rule was challenged in federal district courts in South Carolina, New York, Washington, and California. *See S.C. Coastal Conservation League v. EPA*, No. 18-cv-330 (D.S.C.); *New York v. EPA*, No. 1:18-cv-01030-JPO (S.D.N.Y.); *Natural Res. Def. Council, Inc. v. EPA*, No. 1:18-cv-1048-JPO (S.D.N.Y.); *Puget Soundkeeper Alliance v. Wheeler*, No. 2:15-cv-01342-JCC (W.D. Wash.); *Waterkeeper Alliance v. Wheeler*, 3:18-cv-3521 (N.D. Cal.). In August 2018, the South Carolina District Court enjoined the Applicability Rule nationwide, *S.C. Coastal Conservation League*, No. 18-cv-330 (D.S.C.), Doc. 66 (order). That court later granted a motion for clarification and ordered the Applicability Rule vacated and enjoined nationwide. *Id.*, Doc. 89 (December 2018 order on clarification). In November 2018, the Western District of Washington also vacated the Applicability Rule nationwide. *Puget Soundkeeper Alliance v. Wheeler*, No. 2:15-cv-01342-JCC (W.D. Wash.), Doc. 61 (order).

Meanwhile, the challenges to the 2015 Rule began to be litigated in the district courts. In June 2018, the Southern District of Georgia preliminarily enjoined the 2015 Rule in the eleven Plaintiff states, including the State of Florida. *Georgia v. Wheeler*, No. 2:15-cv-79-LGW, Doc. 174 (order). Intervenor-plaintiffs in that action also moved that court to amend or modify its order granting a preliminary injunction, and seek a nationwide injunction of the 2015 Rule. *Id.*, Doc. 208. In addition to that preliminary injunction and the one issued by the North Dakota court, the Southern District of Texas preliminarily enjoined the 2015 Rule in three states in

September 2018, and the State of Oklahoma and the Chamber of Commerce have sought a preliminary injunction in cases filed in the Northern District of Oklahoma. *Texas v. EPA*, No. 3:15-cv-00162, Doc. 140 (order); *Oklahoma v. EPA*, No. 4:15-cv-00381-CVE-FHM (N.D. Okla.); *Chamber of Commerce v. EPA*, No. 4:15-cv-0386-CVE-PJC (N.D. Okla.). The North Dakota District Court also clarified the scope of the preliminary injunction issued by that court to include the State of Iowa, which intervened as a plaintiff after the preliminary injunction was granted. *North Dakota v. EPA*, No. 3:15-cv-59-DLH-ARS, Doc. 250 (D.N.D. Sept. 18, 2018). And in a case filed in the Southern District of Ohio, the court denied the motion for preliminary injunction filed by the States of Ohio and Tennessee, finding that the plaintiffs failed to establish irreparable harm in the absence of a stay. *Ohio v. EPA*, No. 2:15-cv-02467-EAS-KAJ, Doc. 86.

STANDARD OF REVIEW

Because the Clean Water Act does not provide a separate standard for review of EPA decision-making, judicial review of final agency action by the Agencies is governed by the standard set out in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Under the APA, a court may set aside agency actions "found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). Under arbitrary-and-capricious review, a court may set aside an agency's decision only if:

> 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.

Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1254 (11th Cir. 2007) (internal quotation marks and citation omitted). "[W]hen a party seeks review of agency action under the APA [before a district court], the district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); *see also Marshall Cty. Health Care*

Auth. v. Shalala, 988 F.2d 1221, 1225 (D.C. Cir. 1993). Challenges to agency action under the APA are properly adjudicated on cross-motions for summary judgment. *See, e.g.*, *Fla. Fruit & Veg. Ass'n. v. Brock*, 771 F.2d 1455, 1459 (11th Cir. 1985) (finding that "the summary judgment procedure is particularly appropriate in cases in which the court is asked to review . . . a decision of a federal agency"). Judicial review, however, is limited to the administrative record compiled and relied on by the agency. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971).

ARGUMENT

Because they are currently reconsidering the 2015 Rule, and have proposed a new definition of "waters of the United States," the Agencies do not state a position on the substantive issues subject to those administrative processes. As to the procedural challenges discussed below, the Court should deny Plaintiffs' motion for summary judgment and grant judgment in favor of the Agencies.

I. Plaintiffs fail to meet their burden to show significant procedural deficiencies.

This Court should reject the procedural challenges on the merits because Plaintiffs fail to meet their burden of showing that the 2015 Rule suffers from notice-and-comment defects or is otherwise procedurally deficient.

A. The 2015 Rule is a logical outgrowth of the proposal.

Under the APA, a "[g]eneral notice" of proposed rulemaking must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and provide the public an opportunity to comment. 5 U.S.C. § 553(b)(3), (c). The purpose of these procedures is "to get public input so as to get the wisest rules," to "ensure fair treatment for persons to be affected by regulations," and "to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage." *Dismas Charities, Inc. v.*

U.S. Dep't of Justice, 401 F.3d 666, 678 (6th Cir. 2005) (internal quotation marks and citation omitted).

The notice requirement does not mean that an agency is confined to adopting the position it proposed, as "[s]uch a restriction would undermine the 'purpose of notice and comment—to allow an agency to reconsider, and sometimes change, its proposal based on the comments of affected persons.'" *Miami-Dade Cnty. v. EPA*, 529 F.3d 1049, 1059 (11th Cir. 2008) (quoting *Ass'n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000)). Rather, an agency satisfies the notice requirement, and need not seek further comment, if the final rule is a "logical outgrowth" of the proposed rule. *Miami-Dade Cnty.*, 529 F.3d at 1058 (citation omitted). A final rule is a logical outgrowth "if affected parties should have anticipated that the relevant modification was possible." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014). Thus, changes to a proposal—even substantial ones—may be made, provided the final rule is a "logical outgrowth" of the proposed rule. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007); *see also Alto Dairy v. Veneman*, 336 F.3d 560, 569-70 (7th Cir. 2003) ("The purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced . . . but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding.").

A proposed rule satisfies the logical outgrowth test if it "expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). The requirements of APA section 553 are thus satisfied "if affected parties should have anticipated that the relevant modification was possible," *Allina Health Servs.*, 746 F.3d at 1107, or if additional notice and comment "would not provide commenters with their first occasion to offer

new and different criticisms." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (internal quotation marks and citation omitted).

Here, Plaintiffs contend that they had no way to anticipate that the final rule would "define key jurisdictional concepts and use the arbitrary distances and reference points the EPA and Corps chose." Pls' Br. at 41-42. But the Agencies adequately described the subjects and issues involved in the rulemaking and invited comment from the public. Though certain aspects of the final Rule differed from the proposal, the modifications to the Proposed Rule were foreseeable and, at least in part, the result of comments.

1. The distance limitations in the definition of "neighboring" logically grew out of the proposal.

The 2015 Rule retained the 1986 regulation's definition of "adjacent" as "bordering, contiguous [to], or neighboring." 33 C.F.R. § 328.3(c)(1); *see id.* § 328.3(a)(6).[8] "Neighboring" adjacent waters are those (1) within 100 feet of the ordinary high water mark of a primary water, impoundment, or tributary; (2) within the 100-year floodplain (but not more than 1,500 feet from the ordinary high water mark) of a primary water, impoundment, or tributary; or (3) within 1,500 feet of the high tide line of a primary water or within 1,500 feet of the ordinary high water mark of the Great Lakes. *Id.* § 328.3(c)(2). Plaintiffs assert that the Agencies failed to provide adequate notice of these distance limitations. *See* Pls.' Br. at 41-42. They are wrong.

In the proposal, the Agencies sought comment on a number of ways to address and clarify jurisdiction over "adjacent waters," including establishing a floodplain interval (e.g., a 50-year or 100-year floodplain) and providing clarity on reasonable proximity as an important aspect of adjacency. *See, e.g.*, 79 Fed. Reg. at 22,209 ("This new definition is designed to

[8] The terms "bordering" and "contiguous" are unchanged from the 1986 regulation. *See* 80 Fed. Reg. at 37,080. The challengers do not dispute these definitions.

provide greater clarity by identifying specific areas and characteristics for jurisdictional adjacent waters, but the agencies request comment for additional clarification."). Though the distances in the final Rule identified a smaller subset of waters as "neighboring" than proposed, the final distance limitations logically grew from and were within the range of the proposed distances. *See, e.g., Waukesha v. EPA*, 320 F.3d 228 (D.C. Cir. 2003) (rejecting logical outgrowth challenge where final metric was not expressly proposed but was within the range of possible outcomes presented to the public).

For "adjacent" waters, the Agencies stated their intent to bring "greater clarity to the meaning of 'neighboring'" by "*defin[ing] the lateral reach*" of that term. 79 Fed. Reg. at 22,207 (emphasis added); *see id.* at 22,208-09. The Agencies noted that the term "neighboring," which was historically part of the definition of "adjacent," "has generally been interpreted broadly in practice," and that the clarification of "neighboring" was intended to capture those waters that in practice the Agencies "have identified as having a significant effect" on the chemical, physical, or biological integrity of primary waters. *Id.* at 22,207.

The proposed definition of "neighboring" encompassed waters located within the distance limitations established by the riparian area or floodplain of a primary water, impoundment, or tributary, and waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a primary water, impoundment, or tributary. *Id.*; *see also id.* at 22,263. The proposal further explained that, to the extent "neighboring" might be defined based on a shallow subsurface hydrologic connection or confined surface hydrologic connection, the Agencies would "assess the distance" between the water body and the jurisdictional water, as the Agencies have "always included an element of reasonable proximity" in the application of the definition of "adjacent." *Id.* at 22,207-08 (citing *Riverside Bayview*, 474 U.S. at 133-34); *see also* 42 Fed. Reg. at 37,128. Recognizing that sometimes "the *distance*

between water bodies may be sufficiently far that even the presence of a hydrologic connection may not support an adjacency determination," the Agencies requested comment on a number of other options, including "*establishing specific geographic limits* for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency" and a specific floodplain interval. 79 Fed. Reg. at 22,208 (emphases added). The Agencies thus informed the public that the definition of "neighboring" was intended to set a clear spatial limit as to the geographic scope of adjacent waters, based on riparian area, floodplain, and/or some distance limits, and invited comment on how best to accomplish that objective.

Importantly, the slew of comments on distance limitations show that the public had adequate notice of the issue. *See Am. Trucking Ass'ns, Inc. v. FMCSA*, 724 F.3d 243, 253 (D.C. Cir. 2013) (finding logical outgrowth where comments "expressly recognized" the possibility that the agency would promulgate a provision requiring an off-duty break for short- and long-haul truckers alike). Many commenters flatly rejected the idea of any distance limitations (whether based on a riparian area or floodplain or a set distance). For example, some commenters asserted that the *Rapanos* plurality opinion, not Justice Kennedy's opinion, should be followed, and that a hydrologic connection rather than distance should be considered. *See, e.g.*, Exhibit 1 (Comments on proposed 2015 Rule), Part 1 at 1-23 (Comments of N.M. Cattle Growers Ass'n at 12; Tex. Comm'n on Envtl. Quality at 6). Others commented that there should be no distance limitation in the definition of "neighboring," asserting that chemical and biological connectivity can extend well beyond a riparian area or floodplain. Exhibit 1 (Comments on proposed 2015 Rule), Part 1 at 24-174 (Comments of Clean Water Action at 6; S. Envtl. Law Ctr. at 16-17; Earthjustice at 7; NRDC at 62); *see also* Exhibit 1 (Comments on proposed 2015 Rule), Part 1 at 175-298 (Comment of Minn. Dep't of Nat'l Res. at 2 (suggesting hydrologic criteria to determine adjacency rather than "geographic proximity"); Comment of Ducks Unlimited at 76 ("the general

goal of categorically incorporating riparian and floodplain waters as jurisdictional 'adjacent waters' within the definition of 'neighboring' is appropriate")). In fact, many commenters responded to the Agencies' request for suggested distance limits by proposing specific floodplain intervals set by the Federal Emergency Management Agency, riparian areas, and numerical distances. *See, e.g.*, Exhibit 1 (Comments on proposed 2015 Rule), Part 2 at 1-77 (Comments of Ky. Oil & Gas Ass'n at 8 (recommending 100-year floodplain for larger order streams, and the riparian zone within 50 feet of the ordinary high water mark for smaller order streams); Ctr. for Rural Affairs at 5 (recommending floodplains and riparian areas as "clear, water body-specific, physical boundaries"); Nat'l Lime Ass'n at 15 (supporting 5-year floodplain); NAIOP at 5 (recommending 100 feet from a subsection (a)(1)-(5) water or the floodplain of such a water); Fla. Crystals Corp. at 10 (suggesting a 200 foot limit); AASHTO at 8 (supporting floodplain, riparian zone, or specific geographic limits such as distance limitations based on the bank-to-bank width of the jurisdictional water); Hancock Cty. Drainage Bd. at 1 (suggesting a distance in feet from the jurisdictional water); N.M. Mining Ass'n at 2-3 (suggesting one-half mile)); *see also* Exhibit 1 (Comments on proposed 2015 Rule), Part 2 at 78-108 (NAM Comments at 22 (citing a case in which a water 125 feet from a tributary was found to have no significant nexus)). These comments show that the floodplain and numerical distance limitations in the final definition of "neighboring" were sufficiently presented to the public in the "general notice" of proposed rulemaking required by the APA. *See* 5 U.S.C. § 553; *cf. E. Tenn. Natural Gas Co. v. FERC*, 677 F.2d 531, 536 (6th Cir. 1982) (rejecting notice claim where parts of a final rule were shaped by the comments on the proposal). The Agencies then responded to the comments on the proposed definition of "neighboring" by setting a specific floodplain interval and numerical distance limits. 80 Fed. Reg. at 37,082-84.

Contrary to what Plaintiffs suggest, the APA does not require the Agencies to propose the precise numerical distance limits that were adopted. *See Chrysler Corp. v. Dep't of Transp.*, 515 F.2d 1053, 1061 (6th Cir. 1975) (proposed rule provided adequate notice of headlamp specifications, even though the agency did not mention any time limitation attached to the specifications in proposal); *Ala. Power Co. v. OSHA*, 89 F.3d 740, 744 (11th Cir. 1996) (final standard on specific weight of fabrics for clothing worn by employees exposed to flames or electrical arcs was a logical outgrowth of proposal that did not propose any weights but did state objective to prevent burn injuries); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548 (D.C. Cir. 1983) (although proposal "did not list specific 'loopholes' that EPA might try to close," the final rule's past production requirements for "small" refiners was a logical outgrowth of the proposal); *City of Waukesha*, 320 F.3d at 232 (affirming the final rule of 30 µg/L, though the proposals were 20, 40, or 80 µg/L); *cf. Kennecott v. EPA*, 780 F.2d 445, 452 (4th Cir. 1985) ("the agency is not required to specify every precise proposal that it may eventually adopt"). Instead, the Agencies provided a range of possibilities by proposing to define "neighboring" in terms of riparian areas, floodplains, and distances beyond floodplains. 79 Fed. Reg. at 22,207-08. Commenters recognized that a distance limitation based on a floodplain could result in the inclusion of waters "miles away" from a jurisdictional water, depending on the flood interval selected. *See, e.g.*, Exhibit 1 (Comments on proposed 2015 Rule), Part 2 at 109-229 (Comments of N.D. at 9; Water Advocacy Coal. at 50). Several commenters understood that the term "floodplain" could mean a 500-year floodplain. Exhibit 1 (Comments on proposed 2015 Rule), Part 2 at 124-267 (Comments of Water Advocacy Coal. at 50; AFBF at 12; V. Watson). As such, the distances adopted in the Rule constituted a "natural subset" of what these informed commenters believed to be within the potential scope of the proposal's treatment of "neighboring." *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336

F.3d 1075, 1081 (D.C. Cir. 2003) (upholding a "natural subset" of the proposal against a logical outgrowth challenge).

2. The distance limitations for case-specific waters logically grew out of the proposal.

Plaintiffs also fail to show defective notice of the distance limitations for the case-specific category of waters. In the 2015 Rule, waters within the 100-year floodplain of a primary water, or within 4,000 feet of the high tide line or ordinary high water mark of a primary water, impoundment, or tributary, are subject to case-specific significant nexus determinations. 33 C.F.R. § 328.3(a)(8). Notably, these waters were already subject to a case-specific determination of significant nexus following *Rapanos*. And the waters subject to case-by-case determinations in the final rule are a subset of those waters proposed for case-specific determinations in the proposal.

The Agencies made clear they proposed to provide clarity and predictability by limiting the case-specific category of waters to those waters "sufficiently close" to a jurisdictional water. 79 Fed. Reg. at 22,200, 22,211, 22,213, 22,217, 22,247, 22,263. They proposed that case-specific significant nexus determinations be based on a record that included all available information, the first item of which would be the "location" of the water body, and sought comments on this approach. *Id.* at 22,214. Thus, though the proposal did not specify the distances in the final rule, at least the "germ" of a distance limitation was contained in the proposal and gave the public notice. *NRDC v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988).

As with the proposal to define "neighboring" by reference to a specific lateral limit, the Agencies received many comments on case-specific determinations of significant nexus. For example, some commenters recognized the proposal's distance component and asked the Agencies to specify what distance would be considered "sufficiently close." *See, e.g.*, Exhibit 1

(Comments on proposed 2015 Rule), Part 1 at 20-48; 124-229; 260-67 (Comments of Nat'l Lime Ass'n at 11; NAIOP at 2; Water Advocacy Coal. at 58; Wis. Wetlands Ass'n at 3). Others rejected the use of distance limitations altogether or suggested that distance should not be the sole factor in considering whether a water should be subject to a case-specific analysis. Exhibit 1 (Comments on proposed 2015 Rule), Part 1 at 106-174 (Comment of NRDC at 54-55); Part 2 at 268-83 (Comments of Mo. Coal. for the Env't at 6); & Part 3 at 1-107 (NWF at 59-60); *see also* Exhibit 2 (Science Advisory Board Proposed Rule Review at 3) (suggesting that distance not be the sole indicator for evaluation of case-specific waters). These comments confirm that the Agencies gave adequate notice of the distance components for determining case-specific waters.

B. The public had adequate opportunity to comment on the Science Report.

When they published the Proposed Rule, the Agencies made available a Draft Science Report. Exhibit 3 (2015 Rule Draft Science Report at 1-1); 79 Fed. Reg. at 22,189. The Agencies also extended the comment period to allow for comment on the Science Advisory Board's peer review of the draft Report. 79 Fed. Reg. 61,590, 61,591 (Oct. 14, 2014). Yet Plaintiffs assert that they had no meaningful opportunity to comment, ostensibly because the final Science Report was not published until after the close of the comment period. Pls.' Br. at 42. This argument does not withstand scrutiny.

Under the APA's notice and comment requirements, technical studies and data upon which an agency relies must be made available for public evaluation. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008). But meaningful participation does not require an opportunity to comment on "every bit of information influencing an agency's decision." *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 326 (5th Cir. 2001) (citation and internal quotation marks omitted); *see also Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072,

1076 (9th Cir. 2006) (same). And an agency may add supporting documentation for a final rule in response to comments, as well as supplementary data that expands on or confirms the information contained in the proposed rule, so long as no prejudice is shown. *Id.* at 1076.

Here, EPA's Science Advisory Board recommended revisions to "improve the clarity of the Report, better reflect the scientific evidence, expand the discussion of approaches to quantifying connectivity, and make the document more useful to decision-makers." Exhibit 4 (Science Advisory Board Report Review at cover letter). It did not recommend a "new" approach. Nor did the Science Report adopt one. The final Science Report simply clarified and expanded upon concepts and topics in the Draft Science Report. Its later publication thus did not prejudice Intervenor Plaintiffs. Indeed, there were many comments on the Science Advisory Board's review of the Draft Science Report and on the concept of connectivity on a gradient. *See, e.g.*, Exhibit 1 (Comments on proposed 2015 Rule), Part 1 at 106-174 (NRDC at 33-34, 36); Part 2 at 124-229 (Comment of Water Advocacy Coal. at 24-28). These comments show that the public knew about the Agencies' supporting documentation and had the chance to give input.

Plaintiffs fall far short of their burden to establish with "reasonable specificity" how they may have responded if given the opportunity. Pls.' Br. at 42; *Texas v. Lyng*, 868 F.2d 795, 799 (5th Cir. 1989). The Agencies, in short, gave sufficient notice of the scientific underpinnings of the 2015 Rule, and Plaintiffs do not show otherwise.

C. The anti-lobbying and "propaganda" claims lack merit.

Intervenor Plaintiffs' assertions of unlawful advocacy, Pls.' Br. at 9, 43, do not set forth a justiciable claim and are irrelevant to their APA allegation that the Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or was promulgated "without observance of procedure required by law," *id*. § 706(2)(D).

The type of statutes that provide a basis for a procedural claim under 5 U.S.C. § 706(2)(D) set forth specific procedures that an agency must affirmatively undertake, such as the APA's requirements for notice and comment. 5 U.S.C. § 603. Here, the United States Government Accountability Office ("GAO") concluded that the Agencies completed all applicable procedural requirements in promulgating the Rule. July 15, 2016 GAO letter at 2, available at http://gao.gov/products/GAO-15-750R ("Our review of the procedural steps taken indicates that the agencies complied with the applicable requirements.").

It is well-established that there is no private right of action for a claim that an agency has misused appropriated funds under either an appropriations act or under 18 U.S.C. § 1913, which generally prohibits the use of appropriated funds to pay for a communication (*e.g.*, letter or advertisement) that is intended or designed to influence a member of Congress to favor, adopt, or oppose legislation. *Nat'l Treasury Emp. Union v. Campbell*, 654 F.2d 784, 790-93 (D.C. Cir. 1981); *Grassley v. Legal Servs. Corp.*, 535 F. Supp. 818, 825-26 (S.D. Iowa 1982). It is the Government Accountability Office whose role it is to "investigate all matters related to the receipt, disbursement, and use of public money" and to "make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures." 31 U.S.C. § 712(1), (4). Congress may take appropriate legislative action after an investigation or report by the GAO, but there is no remedy for a private party to enforce the Anti-Lobbying Act. *See Nat'l Treasury Emp. Union*, 654 F.2d at 794.[9]

[9] Similarly, Intervenor Plaintiffs do not satisfy the minimal constitutional requirements for standing set in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), as to this claim. Those requirements are: (1) an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) the likelihood that a favorable decision will remedy the injury. *Id.* Intervenor Plaintiffs have not stated how the asserted anti-lobbying and publicity spending

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Further, Plaintiffs' claim that the Agencies violated the Anti-Lobbying Act is irrelevant to whether the Rule was promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). *Cf. Miss. Comm'n on Envtl. Quality*, 790 F.3d 138, 184-85 (D.C. Cir. 2015) (finding that claim of violation of the Information Quality Act did not give rise to a right of action or bear on the petitions for review of EPA decision that specific areas were not in attainment of air quality standards).

Plaintiffs' anti-lobbying and propaganda claims, even, if they were cognizable, are wholly unavailing. The Agencies acted with an open mind and complied with all applicable procedural requirements in promulgating the Rule.

II. The Agencies take no position on the remaining claims at this time.

The Agencies take no position on the challengers' remaining objections to the 2015 Rule. That is because those objections substantially overlap with issues subject to reconsideration in the Agencies' ongoing rulemaking proposing to repeal the 2015 Rule. *National Tour Brokers Ass'n v. United States*, 591 F.2d 896 (D.C. Cir. 1978) (the purpose of notice-and-comment rulemaking is "to allow the agency to benefit from the expertise and input of the parties who file comments concerning the proposed rule and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules"). The issues on which the Agencies take no position include, *inter alia*, the 2015 Rule's substantive interpretation of "similarly situated," 83 Fed. Reg. at 32,240; constitutional questions, *id*. at 32,241; the 2015 Rule's consistency with the policy goals of the CWA, *id*. at 32,246; and whether the 2015 Rule would exceed the CWA's statutory limits, *id*. at 32,249.

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restrictions, or any resulting anti-deficiency violation, affect them. Nor do they state how a judicial finding of such violations would translate into a meaningful remedy as to the Rule.

CONCLUSION

This Court should deny Plaintiffs' motion for summary judgment with respect to the procedural claims addressed above.

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Respectfully submitted,

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