No. 19-5055

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, *et al.*,

Plaintiffs-Appellants,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants-Appellees,

and

WATERKEEPER ALLIANCE, *et al.*,

Intervenors-Appellees.

On appeal from the United States District Court for the Northern District of Oklahoma (Egan, J.), 15-CV-0381-CVE-FHM, 15-CV-0386 (consolidated)

PRINCIPAL AND RESPONSE BRIEF OF WATERKEEPER ALLIANCE, ET AL.

ORAL ARGUMENT NOT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Waterkeeper Alliance et al. certifies that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

Respectfully submitted this 25th day of November, 2019.

/s/ Janette K. Brimmer

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court under the meaning of Tenth Cir. Rule 28.2.

Pursuant to Tenth Circuit Rule 27.3(B)(2), Appellee Waterkeeper Alliance et al. lists the following related and earlier appeals:

State of Oklahoma, ex rel. E. Scott Pruitt v. EPA, et al., No. 15-9551 (10th Cir.);

Chamber of Commerce of the United States of America, et al. v. EPA, et al., No. 15-9552 (10th Cir.);

Chamber of Commerce of the United States of America, et al. v. EPA, et al., No. 16-5038 (10th Cir.);

State of Oklahoma ex rel. Mike Hunter v. EPA, et al., No. 16-5039 (10th Cir.);

In re EPA, (Case Nos. 15-3799 *et. al* (6th Cir.);

Nat'l Ass'n of Manufacturers v. Dep't of Defense, 138 S. Ct. 617 (2018).

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GLOSSARY

The "Act" — Clean Water Act, 33 U.S.C. § 1251 et seq.

"Rule" — Clean Water Rule promulgated at 80 Fed. Reg. 37,054 (June 29, 2015)'

The "Agencies" — collectively, refers to the U.S. Army Corp of Engineers and the U.S. Environmental Protection Agency.

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STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the State of Oklahoma and Chamber of Commerce of the United States et al. failed to demonstrate they were entitled to a preliminary injunction against application of the 2015 rule defining the term "waters of the United States" under the Clean Water Act within the State of Oklahoma?

STATEMENT OF THE CASE

I. THE RULE DEFINING THE "WATERS OF THE U.S."

The 2015 rule at issue in this litigation is the first revision to Clean Water Act regulations interpreting "waters of the United States" in more than thirty years. 33 U.S.C. §§ 1251-388; "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054, 37,073-74 (June 29, 2015) ("Rule"). The Rule contains various provisions that adopt standardized definitions for key terms such as "tributary" and "adjacent" waters. 80 Fed. Reg. at 37,075-86. Waters within these categories have always been subject to jurisdiction under the Act, its implementing regulations, and relevant case law, based on requirements in the Act and case-specific jurisdictional analyses. *See* 80 Fed. Reg. at 37,056. The Rule's definitions are based on extensive science showing that waters within these categories all bear a significant nexus to downstream or adjacent jurisdictional waters because of their inherent hydrological features. *Id.* at 37,065. The Rule does not expand the reach

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of the Act, and in many ways has narrowed it from the period of time prior to the Supreme Court's ruling in *Rapanos v. United States*, 547 U.S. 715 (2006)[1] and even from the post-*Rapanos* guidance initially utilized by the Agencies.[2]

II. PROCEDURAL HISTORY

Appellants filed their complaints in this action on July 8, 2015 (State of Oklahoma) (Doc. # 2, Case 15-cv-00381) and July 10, 2015 (Chamber of Commerce et al.) (the "Business Groups") (Doc. #2 Case 15-cv-00386), immediately following promulgation of the Rule. Appellants filed their respective motions for preliminary injunction on July 25, 2015 (State, Doc. # 17, 15-cv-00381) and July 24, 2015 (Business Groups, Doc. # 27, 15-cv-00386) to enjoin the defendants from enforcing the Rule in Oklahoma until a final judgment is entered in the case. On October 9, 2015, the Sixth Circuit Court of Appeals stayed application of the Rule, *In re Env't'l Pro. Agency*, 803 F.3d 804 (6th Cir. 2015), which stay continued through February of 2018, following the U.S. Supreme Court's decision finding jurisdiction proper in the district, not circuit, courts. Two federal district courts then overturned the Administration's effort to delay

[1] Waterkeeper Alliance has challenged that narrowing in a case pending in the U.S. District Court, Northern District of California, asserting, among other things, the Rule fails to protect all "waters of the United States" as required by the Act.

[2] The Post-*Rapanos* Guidance can be found at https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents-under-cwa-section-404.

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applicability of the Rule, with the Rule taking full effect in Oklahoma in 2018. *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp.3d 959 (D. S.C. 2018) and *Puget Soundkeeper Alliance v. EPA*, Case No. 2:15-cv-01342 (W.D.Wash. Nov. 26, 2018). On January 28, 2019, the District Court for the Northern District of Oklahoma lifted the stay of this consolidated case and reinstated the motions for preliminary injunction. (Doc. # 95). On May 29, 2019, the district court denied Appellants' motions for preliminary injunction and allowed Waterkeeper Alliance, and Grand Riverkeeper and Tar Creekkeeper, projects of LEAD Agency, Inc. ("Waterkeepers"), to intervene. (Doc. # 110). This appeal ensued. (Doc. # 111). On September 12, 2019, during the pendency of this appeal, the Agencies announced a final regulation repealing the Rule. "Definition of 'Waters of the United States' – Recodification of Pre-Existing Rules" (Pre-Publication Version), https://www.epa.gov/sites/production/files/2019-09/documents/wotus_rin-2040-af74_final_frn_prepub2.pdf. ("Repeal").

SUMMARY OF THE ARGUMENT

The State of Oklahoma and Chamber of Commerce of the United States of America et al. (collectively "Appellants," and the "State" and "Business Groups," respectively) appeal the U.S. District Court for the Northern District of Oklahoma's denial of motions to preliminarily enjoin the Rule defining the scope of waters protected by the Clean Water Act. The Clean Water Act ("Act") is the

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primary federal law governing water pollution in the United States. Its purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by, among other things, preventing pollution discharges, providing assistance to publicly owned treatment works for wastewater treatment, and maintaining the integrity of wetlands. 33 U.S.C. § 1251(a). The Act provides that its jurisdiction extends to "navigable waters," which are in turn defined as "the waters of the United States, including the territorial seas." *See* 33 U.S.C. §§ 1251, 1321, 1342, 1344; *see also id*. § 1362(7). In the case below, Appellants challenged the Rule, issued jointly by the U.S. Environmental Protection Agency's ("EPA") and the U.S. Army Corps of Engineers' (the "Corps") (collectively the "Agencies'"), which defines the scope of the "waters of the United States." 80 Fed. Reg. 37,054. The State and Business Groups seek to significantly narrow the scope of the Act through this litigation by pursuing an extreme and very narrow definition of "waters of the United States" – an interpretation that is contrary to both the Act and case law.

This Court should affirm the district court's denial of a preliminary injunction of the Rule. The district court correctly concluded that the State and Business Groups' speculative allegations regarding increases to the State's regulatory duties, and unsupported concerns over financial consequences for private property, either demonstrated no harm at all or failed to demonstrate

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specific or imminent harm, making them insufficient to support the requests for preliminary injunctive relief.[3] Further, while the District Court did not reach these issues, the balance of harms tips sharply away from the State and Business Groups' claims, as a preliminary injunction may expose waterbodies in Oklahoma—wetlands and streams that are public resources supplying drinking water, irrigation, flood control, recreation and wildlife values—to damage or destruction from dredging, filling, or pollution discharges. Finally, Appellants' have not demonstrated that their claims are likely to succeed on the merits.

Moreover, with the repeal of the Rule, this interlocutory appeal of the denial of preliminary injunctive relief on application of the Rule in Oklahoma is moot. There is no need to enjoin a rule that has been repealed; the repeal means Appellants cannot demonstrate imminent threatened injury resulting in irreparable harm from application of the Rule.

For these reasons, Waterkeepers respectfully request that this Court affirm the district court's denial of preliminary injunctive relief.

[3] Appellants rely heavily on rulings from district courts outside Oklahoma to support their request for preliminary injunction and this appeal. Those cases are irrelevant to the issue on appeal to this Court because it was Appellants' burden to independently meet the elements of a preliminary injunction in this Circuit and demonstrate harm to their interests in Oklahoma. They failed to meet their burden, and findings from district courts in other jurisdictions do not cure that failure.

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ARGUMENT

I. THE REPEAL OF THE RULE MOOTS THIS INTERLOCUTORY APPEAL OF A DENIAL OF PRELIMINARY INJUNCTIVE RELIEF.

On September 12, 2019, the Agencies announced repeal of the Rule and on October 22, 2019, they finalized the regulation repealing the Rule, with an effective date of December 23, 2019. 84 Fed Reg. 56,626 (Oct. 22, 2019). As a result, there will be no imminent and/or irreparable harm to the Appellants from application of the Rule in Oklahoma, and the issue in this interlocutory appeal of whether they are entitled to a preliminary injunction is moot.

A claim is moot where there is no longer a live case or controversy; where events have transpired such that a court can no longer grant the requested effective relief. *DTC Energy Group, Inc. v. Hirschfeld*, 912 F.3d 1263, 1269 (10th Cir. 2018); *Kansas Judicial Review v. Stout*, 562 F.3d 1240, 1245-46 (10th Cir. 2009). An interlocutory appeal may very well be moot even if the case as a whole remains live. *Fleming v. Gutierrez*, 785 F.3d 442, 446 (10th Cir. 2015) (citing *Gjertsen v. Bd. of Election Comm'rs*, 751 F.2d 199, 201 (7th Cir.1984)). Here, Appellants appealed the district court's denial of a request to preliminarily enjoin application of the Rule in Oklahoma. This interlocutory appeal no longer presents a live case or controversy because that Rule has now been repealed. As a result, Appellants cannot demonstrate they will suffer the imminent and serious harm from enforcement of the Rule in Oklahoma that is required to justify a preliminary

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injunction. Therefore, this Court can no longer grant effective preliminary injunctive relief concerning application of the Rule. This specific interlocutory appeal is moot.[4]

II. INJUNCTIVE RELIEF REQUIRES A MOVANT TO DEMONSTRATE FOUR FACTORS.

This Court reviews a district court's grant or denial of an injunction for abuse of discretion. *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 796 (10th Cir. 2019); and *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016). In making its assessment, this Court will examine the district court's factual findings for clear error and its legal conclusions *de novo*. *Id.* and *Kiernan v. Utah Transit Auth.*, 339 F.3d 1217, 1220 (10th Cir. 2003).

A plaintiff seeking a preliminary injunction must show (1) the movant is substantially likely to succeed on the merits, (2) the movant will suffer irreparable

[4] While the Agencies or Appellants may claim that the Repeal itself could, at some point, be overturned, that is not the kind of situation where there are "capable of repetition" or "escaping review" exclusions to the mootness doctrine. *See e.g.. Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215, 1220 (10th Cir. 2004) (declining to apply the "capable of repetition, yet evading review" exception to mootness where an issue "will once again be subject to review, and sufficient time for the appellate process to run will be available."). Right now, this Court has no case or controversy before it on the issue of preliminary injunctive relief; a decision on the appeal of denial of preliminary injunction would be advisory and hypothetical. Should the Repeal be overturned *and* the Rule come back into effect in Oklahoma, Appellants can immediately request relief from the district court. The alleged harm from the Rule coming back into effect is not likely to occur before the district court can rule on the merits of the challenge to the Rule in the case below. *See, e.g., RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009).

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injury if the court denies the injunction, (3) that the threatened injury, absent the injunction, outweighs the opposing party's injury from the injunction, and (4) that the injunction is not adverse to the public interest. *Id.* *See also, Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In order to show a threat of irreparable harm, the movant must demonstrate "a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages." *Fish*, 840 F.3d at 751 (quoting *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009)). Harm that is speculative or hypothetical will not suffice; the harm must be both certain and great, not merely serious and substantial. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262 (10th Cir. 2004). The movant must show that harm is likely to occur before the district court can rule on the merits. *RoDa Drilling*, 552 F.3d at 1210.

In this case, the district court correctly denied the request for preliminary injunctive relief because Appellants did not demonstrate they would suffer irreparable harm. In fact, the court found Appellants had failed to show any substantial, actual harm. Order, (Doc. # 110, App'x at 323). Additionally, while the district court did not reach these issues because Appellants failed to meet their burden on irreparable harm, any risk of harm to Appellants is plainly outweighed by the potential harm to Oklahoma waters and the public interest, and Appellants failed to demonstrate a likelihood of success on the merits of their claims.

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III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLANTS FAILED TO SHOW IRREPARABLE HARM FROM THE RULE.

In addition to the fact that Appellants cannot show serious and imminent harm due to repeal of the Rule, the district court correctly concluded that neither the State nor the Business Groups identified imminent and serious irreparable harm from application of the Rule, in spite of the fact that the case has been pending for four years. The Appellants have presented no evidence of substantial, actual harm. As the district court noted, "the Tenth Circuit has stated that 'probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction,' and the "moving party must demonstrate that such injury is likely before the other requirements will be considered." Order, App'x. at 330 (citing *DTC Energy Group, Inc. v. Hirschfeld*, 912 F.3d 1263, 1270 (10th Cir. 2018)).

A. The State.

Despite the passage of four years since the finalization of the Rule, the State was unable to produce evidence of any concrete harm stemming from the implementation of the Rule. The State submitted four declarations from three agency employees in 2015 and 2019, all of which contain only vague and speculative statements that administrative work-loads may increase, offering no evidence that jurisdictional waters in Oklahoma will actually increase in geographic scope or number as a result of the Rule.

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For example, the 2015 declaration of Ms. Chard,[5] the Water Quality Division Director for the Oklahoma Department of Environmental Quality, speculates that the department could see an increase in the number of permit applications due to the implementation of the Rule. App. at 2-3 (First Chard Decl. ¶¶ 5, 7, 10).[6] However, Ms. Chard did not identify a single permit or action by the State that was required because of the Rule.

Four years later, in a second declaration, Ms. Chard again could not point to any specific permits required due to application of the Rule, and instead vaguely states that there were "several" Clean Water Act section 401 certifications that "may" not have been necessary without the Rule, perhaps due to ambiguities with the Rule. App. at 240 (Second Chard Decl. ¶ 3).[7] Additionally, as the district court

[5] Ms. Chard was formerly known as Ms. Chard McClary.

[6] Neither Ms. Chard nor any of the other declarants for the State address the fact that Oklahoma Statutes already include a fairly-comprehensive definition of waters of the state," which Oklahoma state agencies use for their various regulatory obligations under the Clean Water Act. Okla. Stat. Ann. tit. 27A, § 2-1-102; *see also*, Okla. Stat. Ann. tit. 82, § 1084.2. Further, the State has adopted water quality standards for all surface waters of the state. Oklahoma Admin. Code, 785:45-1-1;785:45-5-3. Therefore, the State's claims as to additional regulatory burdens do not square with the State's own practices under existing state law. Additionally, the only way to actually interpret the State's arguments and claims here is that the State wishes to have the ability to decrease protections afforded under the Clean Water Act and protect far fewer waters than in the past.

[7] The Section 401 certification Ms. Chard references is *not* an obligation of a state, but rather a right afforded under the Act that a state may choose to exercise. 33 U.S.C. § 1341(a)(1) (a state may waive certification, a practice that Waterkeepers do not condone or encourage, but that is available to a state).

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found, the State could "identify no evidence of an aggressive expansion of federal regulation of Oklahoma waters." Order, App'x. at 333. This, despite the fact that Ms. Chard's agency would have that very information readily available, if it existed, given that it is the Clean Water Act permitting authority for the State of Oklahoma.

Although Ms. Chard identifies three projects that were *granted* section 401 certifications after the Rule went into effect in Oklahoma, she carefully avoids asserting that any of these projects only needed 401 certifications because of the Rule. App'x. at 240 (Second Chard Decl. ¶¶ 4-6). In fact, the supporting materials for these projects indicates that all three would have required section 401 certification under the pre-Rule regulatory regime because they are all tributaries under the pre-2015 Rule definitions. Post-*Rapanos* Guidance, Dec. 2008 at 6-7. All of the projects involved filling tributaries to named and mapped creeks, meaning all of the tributaries connected to larger downstream waters. App'x. at 241-49 (Second Chard Decl. Ex. 2A) (proposal to fill 950 linear feet of tributaries to Chisholm Creek which joins another tributary to flow to the Cimarron River); App'x. at 250-57 (Second Chard Decl. Ex. 2B) (proposal to fill or reroute 2,123 linear feet of tributaries to Bird Creek, a tributary to the Verdigris and ultimately the Arkansas River); App. at 258-63 (Second Chard Decl. Ex. 2C) (proposal to fill 939 linear feet of a tributary to Mingo Creek, a tributary to Bird Creek and the

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Verdigris River). Those tributaries would have been jurisdictional waters with or without the application of the Rule.

This point is further illustrated by the timing of one of Ms. Chard's example projects – the proposal to build a Costco store and parking lot over tributaries to Chisholm Creek. App'x. at 240 and 241-49 (Second Chard Decl. ¶ 4; Ex. 2A). Although the section 401 certification for that project was technically issued three days after the Rule went into effect in Oklahoma on August 18, 2018, the need for 401 certification could not have been triggered by the effectiveness of the Rule, because the determination that the tributaries at that site were jurisdictional waters of the United States was made earlier, before the Rule went into effect in Oklahoma. This is demonstrated by the fact that the public notice for the Costco Clean Water Act permit and section 401certification was published in February and March of 2018. *Id*. (Second Chard Decl. Ex. 2A).

The State's other two declarants, Mr. Patterson and Ms. Gunter, were even less specific and more vague in their assertions of speculative risks from the Rule. In 2015, Mr. Patterson, the director of the Department of Transportation, stated that there was a risk that his department may need to use additional resources to determine which roads and other infrastructure would be in jurisdictional waters under the Rule. App'x. at 130-31 (Patterson Decl. ¶ 4, 5). Mr. Patterson pointed to no data or evidence that the risk of increases in jurisdiction or assessment times

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would come to fruition, nor has Mr. Patterson updated his declaration with any information showing that his fears have been realized or made concrete or imminent in any way.

Ms. Gunter, the general counsel and a director in the Oklahoma Department of Agriculture, Food, and Forestry, likewise described speculative future risks of increased permitting without pointing to any supporting evidence. In her declaration, Ms. Gunter explains that although the statutory text of the Clean Water Act defines concentrated animal feeding operations ("CAFOs") as point sources of pollution that must obtain permits, App'x. at 236-37 (Gunter Decl. ¶¶ 3, 5), only 39 of 252 Oklahoma CAFOS are permitted. *Id*. at 237 (Gunter Decl. ¶¶ 4, 5). Ms. Gunter makes no assertion that the 213 CAFOs without permits do or do not need permits under the plain language of the Act, and she makes no assertion as to whether, or to what extent, the Rule has affected or will affect the requirements for CAFO permitting. Ms. Gunter merely observes that her office processes permits under the Act, costing time and resources, but does not demonstrate how the Rule would add additional costs or resources.[8] *Id*. (Gunter Decl. ¶ 7). As was the case with Ms. Chard, CAFO permits and permitting requirements are work done and

[8] State laws already require Oklahoma Department of Agriculture, Food, and Forestry to issue Clean Water Act permits for all discharges by CAFOs to "waters of the state." *See,* 2 Okla.Stat. 2A-6(A).

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decisions made within Ms. Gunter's own agency, yet she does not provide any evidence of the impact of the Rule on CAFO permitting either past or future. If the evidence of an effect from the Rule existed, she would know and would have provided it. Her statement that the Rule places more CAFOs at risk of enforcement penalties or at risk of needing to obtain permits is entirely unfounded and unsupported with actual evidence. *Id*. (Gunter Decl. ¶ 6). Ms. Gunter was unable to identify a single permit that would not have been necessary absent the Rule.

In sum, the State's declarations utterly fail to identify any actual, substantial harm from the Rule. The declarations largely consist of complaints about their obligations to perform normal regulatory duties that are either discretionary or that existed well before the Rule. The State produced no evidence that the Rule burdens their regulatory programs and no evidence that the Rule affects or alters regulated waters in the State at all.

B. The Business Groups.

The declarations of the Business Groups are also speculative and insufficient to demonstrate actual harm. Mr. Jacobs, the president of Jacobs Manufacturing Corporation, stated that he owns a 50-acre plot of land he hoped to one day sell or give to one of his children to build a home. App'x. at 164 and 166 (Jacobs Decl. ¶¶ 8, 24). Mr. Jacobs asserts that he halted his plans to clear the land, impound

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natural streams, and begin a cattle-grazing operation, because the Rule went into effect and he would need to obtain a permit to impound natural waters. *Id*. (Jacobs Decl. ¶¶ 7, 22). Mr. Jacobs offers no explanation for why he believes the Rule would impose any new permitting requirements, or why a permit would or would not be necessary to impound natural waters without the Rule.[9] He makes no assertion that he has ever been subjected to a permitting process or been denied a permit.

There is also a stream on Mr. Jacob's property that flows during seven or eight months of the year, and varies in flow based on rainfall. *Id*. at 165 (Jacobs Decl. ¶¶ 11-13). Mr. Jacobs states that he "fear[s]" application of the Rule would mean this intermittent stream would be deemed a jurisdictional tributary because it feeds into Spavinaw Creek, then two named lakes, and ultimately to the Arkansas and Mississippi rivers. *Id*. (Jacobs Decl. ¶¶ 15, 19). Again, Mr. Jacobs offers no explanation for why a stream connected to these important downstream waters would not be protected under the Act without the application of the Rule, particularly given the interpretation of the Act by the Supreme Court as set forth below. There is no indication Mr. Jacobs has ever had a formal or informal Clean Water Act jurisdictional determination conducted on his land, and he offers no

[9] In fact, impounding waters would require a permit even before the Rule. *See, generally*, 33 C.F.R. § 322 (2011).

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other evidence that the waters on the land are not protected by the Act absent the Rule. Mr. Jacobs simply states without support that, before the Rule went into effect, the waters on his land were not subject to the Clean Water Act. He provides no evidence of the nature, extent, or significant nexus or lack thereof of the waters in question to support his bold contention. *Id*. (Jacobs Decl. ¶ 18).

In fact, it is possible that the Rule could operate to remove Clean Water Act protections from the stream on his property. Before the Rule, all tributaries were covered by the Act, *e.g.* 33 C.F.R § 328.3 (2010), but the Rule excludes certain non-perennial waters unless they meet each of three defining characteristics established in the Rule to limit jurisdiction over tributaries. 33 C.F.R. § 328.3(a) (2015). In this way, the Rule potentially provides Mr. Jacobs with what he would presumably consider a benefit, not harm. There is certainly no evidence of whether waters on Mr. Jacobs' property are covered by the Rule, or not, nor is there any evidence of imminent harm to Mr. Jacobs' property or interest warranting enjoining the Rule.

Mr. Stevens' declaration also fails to demonstrate actual harm from the Rule. Mr. Stevens is a part owner of Tri-State Electric Supply Company, and he lives on a plot of land containing a creek that is usually dry from August through November, but approximately four feet deep in the remainder of the year. App'x. at 171 (Stevens Decl. ¶¶ 2, 5, 6). Mr. Stevens states that the creek is a tributary to

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Bird Creek, which flows into the Verdigris River and then into the Arkansas River. *Id*. (Stevens Decl. ¶ 6). Like Mr. Jacobs, Mr. Stevens asserts without evidence, explanation, or support, that he believes operation of the Rule will make this creek subject to Clean Water Act protections that were not previously in place. *Id*. (Stevens Decl. ¶¶ 7, 8). He does not assert any future plans for his property that could be affected by the Rule, but instead vaguely states he might one day like to build a home for his children or grandchildren, and that "others might use it for farming or for recreation." *Id*. (Stevens Decl. ¶ 9). He does not identify the size of his property, where any of these potential future home building, farming, or recreation opportunities might occur on the property, or how any Clean Water Act protections for the creek could affect activities like building a home or farming or recreation. Mr. Stevens does not identify any specific action or prohibition on his use of his property caused by the Rule, and he has not been denied a permit or been subject to a permitting process as a result of the Rule.

For all of these reasons, the Business Groups' declarations fail to describe any harm to the declarants or to the groups' members as a result of the Rule, and the district court correctly concluded the declarations were vague, speculative, and insufficient to demonstrate irreparable harm.

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C. The Amici.

The *amici*, nineteen national and Oklahoma trade associations, also fail to demonstrate irreparable harm.[10] *Amici* do not submit a single declaration to support their argument that the 2015 Rule is causing irreparable harm to their members in Oklahoma. Instead, *amici* selectively quote and summarize parts of declarations of several members that they previously submitted to support a preliminary injunction in a different case in Texas, without submitting the underlying declarations themselves. *Amici* Br. at 29. These short and undetailed summaries cannot substitute for declarations demonstrating irreparable harm to *amici*'s members in Oklahoma. The Court is unable to assess the alleged harm to these members (some of which are not even named) or analyze the accuracy or legal sufficiency of the declarations through these second-hand attorney summaries. Moreover, even if these excerpts and legal characterizations of declarations from a Texas case could be considered by this Court, the descriptions

[10] *Amici* make no substantive arguments on the likelihood of success on the merits or the balance of harm and public interest factors for an injunction, arguing instead that this Court should reverse the district court's denial of an injunction simply because multiple other courts have issued injunctions and it does not "make any practical sense" to continue to follow the Rule because the Agencies are proposing to repeal and replace it. *Amici* Br. at 14-28. But the actions of other courts and the Agencies do not demonstrate fulfillment of these required factors for an injunction, and the Court should reject *amici*'s suggested shortcut of the injunction analysis.

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do not identify any concrete harm to anyone in Oklahoma. *Amici* failed to demonstrate irreparable harm in Oklahoma.

Based upon the failure of Appellants to demonstrate irreparable harm, this Court should affirm the district court's denial of injunctive relief. This Court should also affirm because Appellants have also not demonstrated the remaining factors required for an award of injunctive relief.[11]

IV. THE BALANCE OF HARM AND PUBLIC INTEREST DICTATED DENIAL OF INJUNCTIVE RELIEF.

While Appellants failed to demonstrate actual, immediate harm, the harm associated with excluding waterbodies from the protections of the Act are real, significant, and potentially permanent. The Act prohibits the discharge of any pollutant to waters of the United States by any person, except as specifically authorized by the Act. 33 U.S.C. §1311(a). Point source discharges of pollutants may be authorized through a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1342. NPDES permits serve to ensure that any discharge is monitored and controlled through applicable limits and technology designed to meet applicable water quality standards. *See generally* 33 U.S.C. §

[11] Because the district court did not address all preliminary injunction factors, in the event this Court reverses the district court's finding that Appellants failed to demonstrate irreparable harm, Waterkeepers ask this Court to remand this case to the district court to allow the parties and the district court the opportunity to fully address and decide on the remaining factors.

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1342 and applicable rules at 40 C.F.R. § 122. Dredge and fill activities in waters of the U.S. can be authorized through "Section 404" permits administered by the Corps with oversight by EPA. 33 U.S.C. § 1344(a). Again, Section 404 permits ensure that dredge and fill activities are monitored, controlled, and mitigated in order to implement "no net loss" of wetland function and values on the landscape. *See, e.g.*, *generally* EPA permitting guidelines at 40 C.F.R. § 230.

The Tenth Circuit has recognized that environmental injury is usually of an enduring or permanent nature and that it is generally irreparable. *Catron Cnty. Bd. Of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1440 (10th Cir. 1996). Therefore, protecting against environmental harm that will likely occur if the Rule is enjoined on the grounds asserted by Appellants, must be weighed against the less-than-concrete and not imminent harms (if any) identified by Appellants. Protecting a public resource such as water, which necessarily includes protecting those downstream, is in the public interest.

If the Act does not apply to a body of water or wetland, then the Act's prohibitions on discharge, including the prohibitions on dredge or fill destruction of waters, do not apply, nor do the Act's regulatory structures of permitting. Enjoining the Rule will likely result in waters being vulnerable to the discharge of pollutants or to dredging or draining or filling (and their ultimate destruction or significant degradation). In fact, the State's and Business Groups' motions and

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declarations suggest as much. The State complains of the "burdens" of administering the minimum requirements of the Act in Oklahoma, and it is apparent that they desire to have fewer waters protected from pollution or destruction under the Act.[12] The Business Groups assert that its membership will supposedly need permits to do things that pollute, drain, or fill waters, and allege that the members prefer to not get permits before engaging in polluting or destructive actions prohibited under the Act. Taking their allegations as true, this will harm not only the immediate waters in question, but will harm waters downstream and the public that depends on clean water.

This is harm to public resources. The waters of Oklahoma are resources for irrigation and drinking water; for natural flood retention; for recreation and subsistence fishing; for wildlife; and for livestock; for all the uses to which humans put water. It is this public resource value that makes the protections in the Act so fundamental and important. When weighed against the unsubstantiated and

[12] This is further apparent because the Act clearly provides a state always has the freedom and flexibility to be more protective than the minimum standards and permit requirements under the Act, *see* 33 U.S.C. §§ 1311(b)(1)(C), 1313(f), and 1370 and *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 1906 (1994), meaning that the arguments concerning Oklahoma's "sovereignty" are really arguments to allow Oklahoma the ability to have dirtier water or fewer wetland protections than required by the Act's minimums.

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speculative "harm" identified in the declarations, the scale plainly tips toward a protective approach and denial of the preliminary injunction.

V. APPELLANTS DID NOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR SPECIFIC CLAIMS UNDER THE ADMINISTRATIVE PROCEDURE ACT.

A. Should This Court Disagree With The District Court On The Issue Of Irreparable Harm This Court Should Remand To the District Court To Address Likelihood Of Success On The Merits.

The district court did not reach the merits of this case and the likelihood of success thereon, finding that the failure to demonstrate irreparable harm dictated denial of Appellants' requests to enjoin the Rule. Specifically, the district court expressly acknowledged that the State and Business Groups relied heavily on arguing success on the merits, but the District Court pointed out that this Circuit has held that the most important factor consider in analyzing a request for preliminary injunctive relief is that of irreparable harm; if there is no irreparable harm, the inquiry ends. *See*, Order, App'x. at 330-31. The District Court found that irreparable harm had not been demonstrated, ended the inquiry there, and denied a preliminary injunction. Order, App'x. at 334. Finally, the District Court further acknowledged that the Agencies had not, given the status of rulemaking, taken a public position on the merits of Appellants' claims and that any such briefing should be done by Waterkeepers at a future date. Order, App'x. at 336.[13]

[13] The district court also pointedly corrects Appellants' claim that the Agencies

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If this Court reverses the district court and finds that Appellants have demonstrated irreparable harm, Waterkeepers request that the Court remand for the district court to determine, in the first instance, the success on the merits factor with full briefing by all parties including Waterkeepers.

B. The Rule Is Within The Confines Of, And Even Narrower In Scope Than, the Act and Congressional Intent To Broadly Protect The Nation's Waters

If Appellants had demonstrated irreparable harm, the review of Appellants' complaints against the Rule would be guided, first, by the principles set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Court must examine the Rule against the Act, and "[i]f 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.'" *Chevron*, 467 U.S. at 842-43. A court will invalidate an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); "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). A rule is arbitrary and capricious if the agency relied on factors Congress did not intend it to consider, entirely failed to

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don't dispute Appellants on likelihood of success on the merits. Order, App'x. at 329 (fn. 4).

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consider an important aspect of the problem, offered an explanation for its decision that is counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency action entitled to a presumption of regularity. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

The Rule falls within (and is narrower than) Congress's intent to protect waters well beyond those that are "navigable in fact."[14] After decades of state failures in protecting and cleaning up the nation's waters, Congress passed the Federal Water Pollution Control Act, commonly known as the Clean Water Act, with the stated objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. *See also Envtl. Pro. Agency v. California*, 426 U.S. 200, 202-09 (1976); *American Paper Inst., Inc. v. Envtl. Pro. Agency*, 890 F.2d 869, 870-71 (7th Cir. 1989); *Montgomery Envtl. Coal.*, 646 F.2d at 574; and H.R. 11,896, 92nd Cong. (1971) and S. 2770, 92nd Cong. (1971). Congress' discussion centered in part on ensuring the term

[14] As in other pending litigation, Waterkeepers maintain that the Rule, in some instances, falls short of what is required by the Act, the application of Supreme Court case law, best available science, and other laws. Waterkeepers' arguments here are specific to Appellants' arguments for a preliminary injunction claiming the Rule improperly expands the scope of jurisdiction under the Act. Waterkeepers maintain that the Rule is not as fully protective of waters as required by law.

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"navigable waters" would not be defined or construed narrowly, as doing so would defeat the intent of the Act. H.R. Rep. No. 92-911 at 76–77 (1972) and S. Rep. No. 92-414 at 77 (1971). *See also* 118 Cong. Rec. 33,756–57 (Oct. 4, 1972).

Congress recognized that achieving its goal of restoring and protecting our Nation's waters required maintaining the natural function and structure of the entire aquatic ecosystem, and Congress recognized this "demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132–33 (1985) (citing S.Rep. No. 92–414, p. 77 (1972), U.S.Code Cong. & Admin.News 1972, pp. 3668). Therefore, the Act applied not just to navigable-in-fact waters, but far more broadly to the "waters of the United States," with Congress recognizing that waters are hydrologically connected, necessitating broad application in order to ensure that the Nation's waters were clean and safe. S. Rep. No. 92-414 at 77 (1972) and H.R. Rep. No. 92-911 at 76-77 (1972). Even the narrowest provisions in Justice Scalia's opinion in *Rapanos* recognize that in passing the Act, Congress intended to cover a much broader set of waters than was traditionally considered "navigable." *Rapanos v. United States*, 547 U.S. 715, 731 (2006).

Long before *Rapanos* and *SWANCC*, the Supreme Court, in *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (citations omitted), recognized

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that the Act was designed to establish an "all-encompassing program of water pollution regulation," and "applies to all point sources and virtually all bodies of water." This Court has also observed that "[i]t seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979).

C. Appellants Misapply The Supreme Court Decision In *Rapanos v. United States*.

Contrary to Appellants' characterization, three recent Supreme Court cases have confirmed the breadth of "waters of the United States" in recent years in the context of Section 404 of the Act. First, the Supreme Court held the Act provides federal authority to regulate discharges into wetlands adjacent to other "waters of the United States," including navigable-in-fact waters and other lakes, rivers, streams and other bodies of water. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131, 135-36 (1985). The Court explained that "Congress chose to define the waters covered by the Act broadly," to achieve the Act's objective of restoring and protecting the Nation's waters. *Id.* at 133. The Court further found that, "[i]n view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent

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wetlands may be defined as waters under the Act." *See id*. at 133-34. As long as the covered wetlands have such effects in *the majority of* cases, all such wetlands may be covered. *Id*. at 135 n.9.

The Court reaffirmed its holdings in *Bayview* regarding the breadth of "waters of the United States" under the Act in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("S*WANCC*"). The Court narrowly rejected the Corps' assertion of jurisdiction over an abandoned, water-filled sand and gravel pit under the Migratory Bird Rule, finding that use of the pit by migratory birds could not alone provide a basis for the Corp's assertion of jurisdiction. The Court did not, as asserted by Appellants, find that applying Clean Water Act protections to isolated, non-navigable, intrastate waters would read the term "navigable out of the statute." Aplnts. Brf. at 2.

In *Rapanos*, the Court remanded the Corps' initial determination that wetlands adjacent to non-navigable waters were "waters of the United States." *Rapanos*, 547 U.S. at 729, 757, 759. A four-Justice plurality devised one test to apply on remand for identifying "waters of the United States," while again recognizing that the Act applies more broadly than to just "traditionally navigable" waters, *id*. at 757 (Scalia, J., plurality opinion); Justice Kennedy employed a "significant nexus" test, *id*. at 759 (Kennedy, J., concurring in the judgment); and four dissenting Justices would have deferred to the Corps' broader regulations as

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the proper test, *id*. at 810 (Stevens, J., dissenting), which fully encompasses waters identified in both Justice Kennedy's and Justice Scalia's opinions.[15]

The Rule draws on the test articulated by Justice Kennedy in *Rapanos*, which itself drew on *Riverside Bayview* and *SWANCC*. Justice Kennedy concluded that the Act protects waters with a "significant nexus" to waters traditionally considered "navigable" under the Act. *Id*. at 759, 787. Such nexus exists where the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. Justice Kennedy explained that the Corps was free, by regulation, to "identify categories of tributaries that, due to their volume of flow. . .their proximity to

[15] *Marks v. United States*, 430 U.S. 188, 193 (1977) provides some guidance for how to apply the fractured result in *Rapanos*. In *Marks*, a majority agreed on the outcome of the case, but not the grounds for the outcome. The *Marks* doctrine dictates that the holding of the Court must be the narrowest position taken on the result of the case by concurring members of the Court. *Id.* This works in situations where a subset of justices' reasoning fits within a broader decision of concurring members; the narrower subset should control. In *Rapanos*, however, there is no subset of reasoning fitting neatly within another, but rather a set of contrary opinions, concurring only in the result that the matter must be remanded for further examination. Either Justice Kennedy's or Scalia's approach would narrow the test the Corps had been using for jurisdiction, meaning that to have the least extreme result on then-existing jurisdiction, post-*Rapanos* courts find jurisdiction where either test is met, where Justice Kennedy's test is met, or where the tests and regulatory definition are met. Under no application of *Marks* can Justice Scalia's test alone be considered the narrowest or least-extreme ground on which the Court ruled in *Rapanos*.

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navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id*. at 780-81. Justice Kennedy acknowledged that "isolated" wetlands may be protected by the Act, singly or in combination with similarly-situated wetlands, as they may significantly affect other covered waters "more readily understood as navigable," and that the Corps may properly determine that proximity, volume of flow (annually or on average), or other relevant considerations form the foundation for protecting a wetland under the Act. *Id*. at 780.

Justice Kennedy also criticized the plurality's attempt to categorically exclude some ephemeral waterways, dry much of the time, as well as wetlands without a surface connection to tributaries. He described the plurality's attempt to impose a continuous flow requirement as making little sense, because "torrents thundering at irregular intervals through otherwise dry channels," would then not be covered by the protections in the Act. *Id*. at 769; *see* fig.2 below. Similarly, Justice Kennedy noted that wetlands separated by land from another waterway can be vital to that waterway: if such a wetland is destroyed, "floodwater, impurities, or runoff that would have been stored or contained in the wetlands" could instead "flow out to major waterways." *Id*. at 775.

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Circuit Courts that have addressed this issue following *Rapanos* have applied Justice Kennedy's significant nexus analysis *or* have adopted even broader application of the Act's protections where a water meets either Justice Kennedy's or Justice Scalia's test, *or* with the Sixth Circuit, where it meets either test or regulation.[16] No court has adopted the plurality opinion alone. *See United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009) (addressing all three opinions in *Rapanos*) and *United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006) (both providing that if either plurality or Justice Kennedy's test is met, there is a "water of the United States"); *United States v. Gerke*, 464 F.3d 723, 724 (7th Cir. 2006); *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) (followed by *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011); *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008); *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011). *See also Precon Dev. Corp., Inc. v. United States Army Corps of Engineers*, 633 F.3d 278, 289-90 (4th Cir. 2011) (parties agree and court adopts Justice Kennedy significant nexus test) and *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649 n.10 (4th Cir. 2018) (Justice Kennedy's concurrence is "controlling").

[16] The Tenth Circuit has not yet addressed this issue following *Rapanos*.

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Plaintiff's citation to, and reliance on, their mischaracterizations of the *Rapanos* plurality opinion and Justice Kennedy's opinion as their primary basis for challenging the Rule should be rejected as inconsistent with those cases, precedent throughout the circuit courts of appeal, and proper application of the *Marks* doctrine.

D. Appellants' Claims Are Contrary To Law And Science.

The Rule's protection of traditionally navigable waters and waters with a significant nexus to those waters is based on Justice Kennedy's significant nexus test in *Rapanos*, although the Rule applies that standard too narrowly in that some waters that are in significant nexus are excluded from protection.[17] The Rule divides protected waters into two groups: (1) waters categorically protected, and (2) waters protected upon a case-by-case showing of a significant nexus. Six types of waters receive automatic protection under the Rule. The first three are traditional navigable waters, interstate waters, and the territorial seas (hereafter "foundational waters"). 33 C.F.R. § 328.3(a)(1)-(3).[18] The Rule also categorically

[17] In the Northern District of California, Waterkeeper Alliance is also challenging the Agencies' reliance solely on the significant nexus test as too narrow a basis for determining jurisdiction, because it improperly excludes waters from protection.

[18] The Rule makes these same changes to several sections of the Code of Federal Regulations but for ease of reference, this brief will refer to the changes as codified in 33 C.F.R. § 328.

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protects tributaries and waters adjacent to foundational waters. *Id*. § 328.3(a)(4)-(6).

Waters in two categories qualify for protection if a case-by-case analysis shows they have a "significant nexus" to foundational waters. One category is waters that, echoing Justice Kennedy, are shown to individually or in combination with "similarly situated" waters in a watershed that drains to a foundational water, significantly affect the chemical, physical or biological integrity of the downstream waters. *Id*. § 328.3(c)(5).[19] The other category is waters located within the 100-year floodplain of a foundational water or within 4,000 feet of a foundational water, impoundment, or tributary. *Id*. § 328.3(a)(8). The Rule excludes from case-by-case determinations waters beyond those boundaries. *Id*.

The Agencies began the rulemaking by producing a report, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" ("Report").[20] The Agencies vetted the Report with the Science Advisory Board ("SAB") and various expert panelists. The Report is a review and synthesis of peer-reviewed scientific literature describing the numerous

[19] The Act directs that all three—chemical, physical, and biological integrity—must be protected. 33 U.S.C. § 1251. The Act does not use these terms in any manner that supports or should be considered limits on jurisdiction. *Id.*

[20] The Report is attached in Waterkeepers' Supplemental Appendix.

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important connections between tributaries, adjacent waters, wetlands, and downstream waters. *See, e.g.*, Chapter 7 of Report; 80 Fed. Reg. at 37,057, 37,065.

1. Tributaries

There is no basis for Appellants' claims that the Rule expanded the definition of tributaries or that it is too expansive with regard to tributaries.[21] To the contrary, the Rule eliminates longstanding protections for tributaries recognized in *Bayview and numerous other cases*, protected under the pre-2015 regulatory definition, and identified in the Report as having a significant nexus.

Additionally, tributaries to foundational waters are categorically waters of the U.S. under the Rule, entitled to protections under the Act. Tributaries are defined as a water that contributes flow, either directly or through another water to a foundational water, characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark. 33 C.F.R. § 328.3(c)(3). Contrary to Appellants' argument, the Rule further explains that these physical indicators demonstrate that there is a volume, frequency, and duration of flow of water sufficient to be a tributary.[22] Clearly, this is not a category designed to regulate

[21] The pre-2015 regulatory definition, superseded by the Rule, had been in place since the 1970s and was never invalidated by any court, more broadly protects tributaries to other broad categories of jurisdictional waters. *See* 40 C.F.R. § 230.3(s).

[22] In other litigation, Waterkeepers maintain the Rule is *narrower* in its definition of tributaries than dictated by science, case law and the Clean Water Act. Many comments and the SAB observed that bed, bank, and high water mark, should not

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"land" or "the entire land area of the United States that lies within a some drainage basin" as Appellants claim. Aplnts' Brf. at 30 (quoting *Rapanos*.)

With regard to the significant nexus standard and the objective of the Clean Water Act, the Report demonstrates that tributaries and adjacent waters play fundamental roles in determining the course a river takes and its physical, biological and chemical composition. *Id*. at 3-45 to 3-46. Tributaries supply flow (from snowmelt or channeling precipitation, or from springs or upwellings) as well as materials that form the river's bed and banks, such as sediment, and the materials that fill it, such as nutrients and organisms. *See, e.g.*, Report 3-47 tbl.3-1, 4-40 tbl.4-3. Tributaries can filter or settle out, or delay the delivery of, materials like contaminants or floodwaters. *Id*. at 3-47 tbl.3-1, 4-40 tbl.4-3.

To understand the significance of connections between tributaries or adjacent waters and downstream waters, one must consider the combined effect across the watershed and over time. *Id*. at 6-10. Tributaries cover a larger geographic expanse than the rivers into which they flow (and are often rivers themselves), collecting water and other materials, delivering it toward a concentrated point downstream. *Id*. at 3-5. Further, river networks expand and

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be considered exclusive indicators and that by using solely those indicators, the Rule will likely exclude from protections some tributary waters that need to be protected and, in fact, are protected under the pre-2015 definition of tributary.

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contract as the seasons change in response to precipitation. Figure 1 below, illustrates watershed connections during different precipitation cycles.

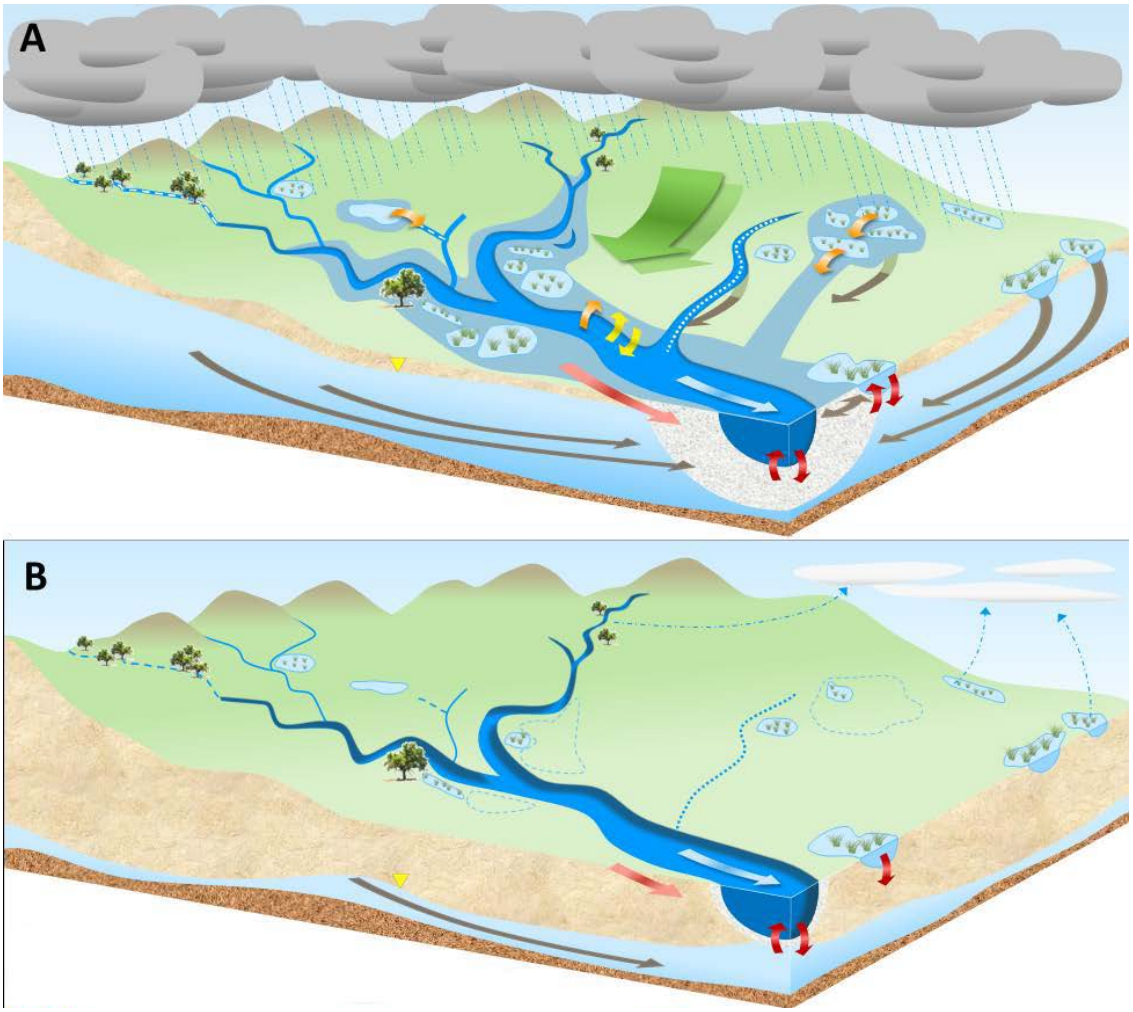

Fig. 1: A river system during wet and dry periods. Source: Science Report 1-7 fig.1-2.

Looking only at the connections between the river and its visibly adjacent wetlands during the dry period, one might underestimate the significance of the connections. In the arid West where a majority of tributaries are seasonally dry, *id.* at 2-29, flows from ephemeral tributaries (without visible surface water at all

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times), are still major drivers of flows in downstream rivers. *Id.* at B-59. For instance, when a storm in New Mexico dropped up to one-quarter of the area's annual rainfall in two days, flood flows from the Rio Puerco, an ephemeral tributary to the Rio Grande River, accounted for 76% of the flood flow in the river (*id.* at 3-7 to 3-8 citing Vivoni 2006), replenishing nutrients and building aquatic habitat in downstream waters.

Fig. 2: Floodwaters swelling and receding in the Rio Puerco, an ephemeral tributary. Source: Vivoni 2006.

Even when water in ephemeral tributaries sinks into the ground before reaching downstream rivers, it plays a critical role in replenishing shallow

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groundwater flows. Anyone familiar with water in arid landscapes understands these groundwater flows are a vital source of surface water for the downstream rivers when they resurface through springs or base flow. *Id*. at B-59, 5-8, B-39. Shallow groundwater is a vital connection between waterbodies, serving physical and biological functions for rivers. *See*, *id.* at ES-2 to 3, ES-8 to 9, 2-11, 2-34, 4-11, 4-14, 4-22 to 23 and 28, and 5-2. The effects of tributaries and adjacent waters on downstream waters are cumulative, and connections between those waters must be analyzed together over time. Report at 6-10.

Tributaries also have a major influence on chemical composition of downstream waters (*id*. at 3-46, 6-1 to 2), both good and bad. *Id*. at 3-22. Organic material important for biological productivity can accumulate in ephemeral channels during dry periods and be carried downstream when those channels fill with floodwater. *See id*. at 3-29, B-48 (in the San Pedro River, dissolved organic carbon doubled or tripled during storm events from a flush of terrestrial organic matter and nutrients). Tributaries can also affect the chemical makeup of downstream waters by contributing, removing, transforming, or delaying the delivery of harmful chemicals discharged upstream. *Id*. at 3-47 tbl. 3-1.

The Rule requires an ordinary high water mark *and* a bed and banks *and* the contribution of flow to a downstream water. The Rule plainly requires all *three* indicators, *combined*, to define a tributary under the Rule. 33 C.F.R. § 328.3(c)(3)

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and Report at 3-45 and 5-6.[23] Frequent or regular flow is not a prerequisite to a water body exerting a significant influence on downstream waters. In arid areas, infrequent, heavy rains are *the normal precipitation* pattern, and supply much of the water that flows in some rivers. Ephemeral tributaries are responsible for carrying a substantial amount of precipitation, pollutants and other materials to rivers in arid regions and thus are just as important as tributaries in wetter areas. The Report recognizes that water bodies can be just as significantly connected if a flow is substantial but infrequent (or subsurface) as if the flow is small but visible and constant. Report at 1-8, 1-10. *See also Rapanos*, 547 U.S. at 770. The scientific evidence is overwhelming that tributaries, including intermittent or ephemeral ones, contribute significantly to the health and composition of downstream waters.

There is no legal or scientific basis for Appellant's claim that the Rule is too expansive in its protection of tributaries.

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[23]*See also*, Letter from SAB to EPA Administrator McCarthy, Re: Science Advisory Board Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act" (Sept. 30, 2014), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-7531; and Memorandum from Dr. Rodewald to Dr. Allen, Re: Comments to the chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act" (Sept. 2, 2014); *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-7617.

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2. Adjacent Waters

Under the Rule, adjacent waters are "bordering, contiguous, or neighboring" to foundational waters, impoundments, or tributaries. 33 C.F.R. § 328.3(a)(6) & (c)(1). "Neighboring" waters are close to a foundational water, impoundment, or tributary (within 100 feet, *id.* § 328.3(c)(2)(i), within 1,500 feet of tidally influenced waters or the Great Lakes, *id.* § 328.3(c)(2)(iii)), or within the 100-year floodplain, out to a distance of 1,500 feet, *id.* § 328.3(c)(2)(ii)).[24] The Report found clear evidence that floodplain wetlands are "highly connected" to rivers and tributaries, even when the river is not in flood. *Id*. at 4-39. Even infrequent floods allow rivers and wetlands to exchange water and other materials, and shallow groundwater flows may provide a connection. *Id*. at 4-1, 4-39. Floodplain wetlands reduce floods downstream by storing water. *Id*. at 4-1, 6-4. Tributaries and rivers are not discrete "pipes" that simply carry water from one place to another. *Id*. at 2-21. They are porous, and water from a river's channel regularly enters the shallow subsurface, where it may mix with other subsurface water

[24] As to adjacent/neighboring waters, the Rule does not fully afford protections required by the Act and case law, and the distance limitations are too narrow as they will artificially exclude waters that must be protected. The distance limitations mean that the Rule is in fact narrower and less protective than the significant nexus test articulated by Justice Kennedy and the pre-2015 definition. Certainly, for the purposes of this litigation, Appellants are not likely to be successful in their claim that the Rule's application to adjacent/neighboring waters is too expansive. Just the opposite is true.

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(including from neighboring wetlands) before returning to the channel or even to other surface waters. *Id*. at 2-12, 4-7. These shallow subsurface flows can connect rivers to floodplain wetlands during both high-flow and low-flow periods. *Id*. at 2-12, 4-7; *see* fig.3.

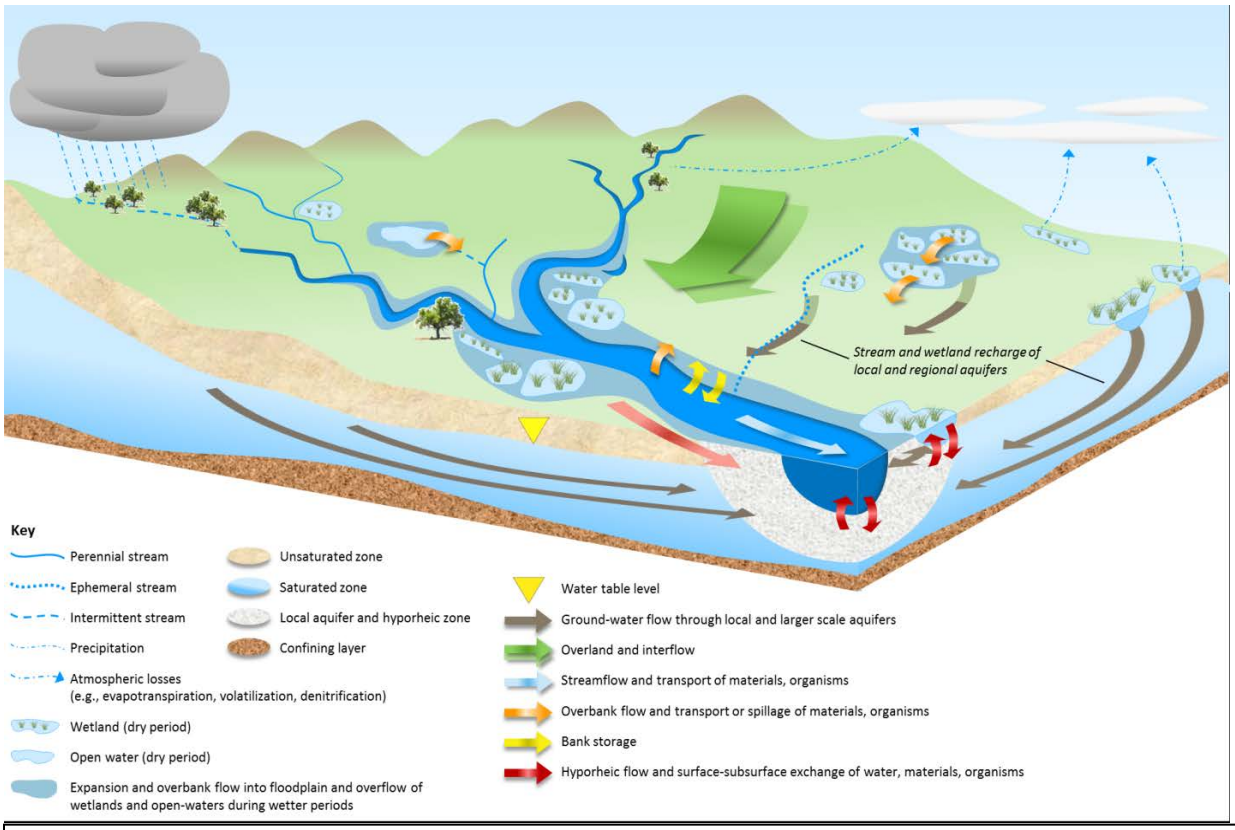

Fig. 3: Subsurface exchanges of water between a river and its floodplain wetlands (i.e., wetlands in the light blue band bordering the river). Science Report at 1-5 fig.1-1A.

The subsurface or flood-stage flows connecting floodplain wetlands to rivers also convey or capture chemicals. *Id*. at 4-11. An important function of floodplain wetlands is to intercept contaminants, by filtering them through the roots of

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wetland plants. The plants absorb the contaminants and prevent them from reaching the river. *Id.* at 4-11, 4-14.

Appellants argue that adjacent waters within the Rule's distance limits should not be protected under the Act, but the overall approach in the Rule is well within existing Supreme Court case law and supported by the record, (although too constrained and less protective than required by applicable law). Appellants provide no support for their argument that the distance limits are arbitrary and capricious because the "implications" of adjacency differ from place to place. Aplnts. Br. at 43.

In *Riverside Bayview*, the Court deferred to the Corps' conclusion that wetlands "in reasonable proximity to other waters of the United States" were "inseparably bound up with" those neighboring waters from an ecological perspective, including via subsurface and biological connections. *Riverside Bayview*, 477 U.S. at 134. *SWANCC* dealt with undisputedly nonadjacent mine pits under the Migratory Bird Rule and, thus, had nothing to say about the meaning of "adjacent." In *Rapanos*, Justice Kennedy not only accepted the Corps' definition of "adjacent" as "reasonable," *id.* at 775, but affirmed that the Corps was free, by regulation, to "identify categories of tributaries that, due to their volume of flow . . . their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of

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cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 780-82.

3. Case-by-Case nexus determinations.

Appellants also attack the Rule's framework for case-by-case determinations of significant nexus. Appellants complain about physical proximity considerations and the 100-year floodplain, complaints that have been shown to lack support in the science or record, and in fact, the measures used in the case-by-case part of the Rule actually function to *limit* the scope of covered waters not expand them as asserted by Appellants. Only waters that fit within the specific ecological descriptions or distance measures are eligible for case-by-case consideration. The "functions" in the Rule for assessing and determining whether a significant nexus exists, originate in Justice Kennedy's own language about significant nexus. The "functions" set forth for assessing case-by-case waters go to protecting the physical, chemical, and biological integrity of waters, the very purpose of the Clean Water Act. All "other waters" do not even get a case-by-case analysis, an approach that is in fact too narrow and artificially constrained under the law and applicable science.

Appellants further misapply and misrepresent the purpose and direction of the Act, as well as Justice Kennedy's opinion when they contort the Act's direction to restore and protect the "chemical, physical and biological" integrity of the

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nation's waters, 33 U.S.C. § 1251, into a limiting principle not found in Congress' statements within the Act or any Congressional history. Aplnts. Br. at 4, 7, and 32. The Act says that all three must be *protected*, not that all three effects must be present for a water to be a "waters of the United States." Such an interpretation is contrary to the plain language and objective of the Act, and would improperly *limit* the reach of the Act's protections. The Act directs *protecting* all three in every waterbody—they are not the measure of whether it *is* a waterbody. Appellants misrepresent the very purpose and intent and language of the Act to their efforts to strip clean water protections for waters in Oklahoma when they suggest that Justice Kennedy was using that phrase in a manner that would, for example, allow pollution or destruction to the physical flows or biology of a waterbody as long as the pollution did not result in a chemical alteration. That argument should be rejected as contrary to the plain language of the Act.

Appellants have not demonstrated that the Rule's provisions for tributaries, adjacent waters, and case-by-case determinations expand Clean Water Act jurisdiction over waters in a manner that is contrary to law, that the Agencies failed to consider an important aspect of the problem identified by Appellants, or that protection of the waters included in the Rule is unsupported by the ample record. Appellants have not demonstrated a likelihood of success on the merits of these Clean Water Act arguments.

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E. Appellants Have Not Demonstrated A Likelihood of Success on Their Claims Regarding Violation Of APA Notice And Comment Requirements.

The Administrative Procedure Act ("APA") requires notice and comment on the substance of a proposed rule or a description of the subjects and issued involved. 5 U.S.C. § 553(b)(3). The notice need not use the precise language that is ultimately adopted and can even incorporate fairly-substantial changes as long as the final rule is a "logical outgrowth" of the proposed rule and where the proposed rule and topics addressed was sufficient to fairly apprise interested parties of the issues and proposals in play. *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007); *Market Synergy Group, Inc. v. U.S. Dep't of Labor*, 885 F.3d 676, 681 (10th Cir. 2018); and *Zen Magnets, LLC v. Consumer Product Safety Comm'n*, 841 F.3d 1141, 1154 (10th Cir. 2016).

Appellants argue that the Rule violates the notice and comment provisions of the APA because the Rule expands Clean Water Act jurisdiction over adjacent waters, tributaries, and case-by-case significant nexus waters through distance limits or definitions that could not have been anticipated by them from the information provided in the Proposed Rule. Aplnts. Brf. at 34-37.

First, the Rule's distance limitations for neighboring waters and case-by-case determinations, as well as the definitions for those waters, do not expand the number and types of waters that were ultimately in the final Rule beyond those in

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the Proposed Rule. These and other provisions in the Rule actually reduced and excluded waters from both the pre-2015 definition and the definitions in the Proposed Rule.

For example, the Proposed Rule broadly included, "[o]n a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this definition." 79 Fed. Reg. 22,188, 22268 (April 21, 2014). By comparison, the final Rule limited case-by-case significant nexus analysis to a subset of the originally-proposed waters to waters that were either (1) of a type expressly listed in the Rule or (2) located within certain distances of other defined "waters of the United States." 80 Fed. Reg. at 37114. Similarly, the definition of "neighboring" for the purpose of determining "adjacency" in the Proposed Rule broadly included waters in the floodplain and riparian areas and did not include any distance limits, whereas the final Rule narrowed that through definitional changes that include distance limits. 9 Fed. Reg. at 22268; 80 Fed. Reg. at 37115.

The Proposed Rule definition of tributary included "a water physically characterized by the presence of a bed and banks and ordinary high water mark . . . which contributes flow . . . " whereas the Rule included "a water that contributes flow . . . that is characterized by the presence of the physical indicators of a bed

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and banks and an ordinary high water mark . . .” *Id.* The change in phrasing does not expand jurisdiction over tributaries. To the contrary, the Rule definition reduced jurisdiction from the Proposed Rule tributary definition through other changes like removing wetlands, lakes and ponds from the definition. *Id.*

Second, the Agencies’ decision to add distance limitations to the Rule provisions for adjacent waters and case-by-case significant nexus determinations appears to be in response to, or at least consistent with, the positions taken in comments submitted by at least one of the Appellants and others during the rulemaking process. For example, the U.S. Chamber submitted comments claiming that the Agencies’ approach to both significant nexus and adjacency in the Proposed Rule would encompass vast and indeterminate areas of the country. *See* Comments of U.S. Chamber of Commerce, et al, on Docket No. EPA-HQ-OW-2011-0880, at pp. 26027-28 (Nov. 12, 2014). Overall, Appellants’ only claim is really that these changes didn’t go far enough, not that they were deprived of notice and comment. With regard to tributaries, the Chamber expressed objections that are strikingly similar to the legal challenges in this case, i.e. that the Agencies required only “the bare minimum evidence of a water’s flow through any channel” and minimal evidence of a high water mark, demonstrating during the comment period they were aware of the issues they have identified in this case. *Id.* at p. 27. It is beyond dispute that the Agencies did, in fact, identify maps and remote

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sensing as a possible method for identifying tributaries in the Proposal Rule, 22202, contrary to Appellants assertion in their Opening Brief.

The Proposed Rule stated its purpose was to identify waters protected under the Act and, for waters not categorically protected, it set forth definitions and processes for how the future determinations will be made. In particular, the Proposed Rule asked for comment on the definitions for tributaries and adjacency. 79 Fed. Reg. at 22,192-93, 22,250-51, and 22,261. Appellants have not demonstrated in this case that the Agencies' violated APA notice and comment requirements based on their claims.[25] At least one of the appellants was aware of, and even advocated for, changes to the Proposed Rule on topics they now claim lacked notice and comment. Appellants are unlikely to be successful on the merits of their specific notice and comment claims.

VI. APPELLANTS DID NOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THEIR CONSTITUTIONAL CLAIMS.

Appellants are also unlikely to succeed on the merits of their constitutional claims. Appellants failed to carry their burden, because their motions did not adequately describe or support the claims.

[25] While Waterkeeper Alliance is challenging the distance limitations that exclude waters from protections in a separate case pending in the Northern District of California, the claims there are significantly different in kind and Waterkeepers' arguments in this brief are specific to appellants' particular claims and appeal of the denial of injunctive relief here.

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A. There Is No Commerce Clause Or Tenth Amendment Violation.

The Constitution grants Congress authority to regulate interstate commerce. U.S. Const., art. I, § 8. The Act's regulation of navigable and interstate waters, and their tributaries, adjacent waters, and other waters with a significant nexus, as described in the Rule, falls comfortably within this authority. Congress's Commerce Clause authority unquestionably extends to regulation of waters that are navigable—by definition, channels of commerce. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (Congress may regulate "the channels of interstate commerce"); *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012) (waters are "navigable in fact" when they are or may be used "as highways for commerce"); *see also Utah v. United States*, 403 U.S. 9, 10-11 (1971); (*United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974) (Water pollution is "a direct threat to navigation"). As set forth above, the Supreme Court has also long accepted federal authority over interstate waters, without regard to navigability. *See, e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 and 105 n.6 (1972).

By extension, the regulation of waters that significantly affect navigable and interstate waters is also within Congress' authority to regulate channels of commerce. *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring) (explaining that in *SWANCC*, the requirement of a "significant nexus" to navigable waters

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avoided constitutional or federalism concerns); *id*. at 782-83 (citing Supreme Court case law explaining, *inter alia*, that regulation of tributaries may be required in order to manage a navigable water); *Ashland Oil*, 504 F.2d at 1326 (Congress may regulate non-navigable stretches of a river to preserve commerce on the navigable portions); *id*. at 1326-28 (federal authority to preserve navigable waters must extend to tributaries of such rivers, lest they become "a mere conduit for upstream waste"). The Rule also covers some waters that have a significant impact on interstate channels of commerce. *See, e.g.*, Final Rule, 80 Fed. Reg. at 37,079. The Rule falls squarely within Congress's power to regulate the channels of commerce, and Congress' Commerce power to protect the nation's waters is much broader than that.[26]

Appellants do not dispute these core principles and offer little to no argument on the merits of their Constitutional claims, which are all premised on their wholly unsupported assertions that the Rule "massively expands" federal jurisdiction over waters in Oklahoma. For example, Appellants claim the Rule is unconstitutional because it regulates waters that "either have an attenuated or no connection whatsoever to interstate commerce," but utterly failed to provide any

[26] See e.g., *Int'l Paper Co. v. Ouellette*, 479 U.S. at 499; *United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974); *United States v. Earth Scis., Inc.*, 599 F.2d at 375.

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evidence that this is actually the case, and their assertions are countered by an extensive scientific record compiled by the agencies and discuss in the Preamble and supporting record. Aplnts. Br. at 38. Appellants can only state that "[i]f a land or water feature has no effects on interstate commerce, even when examined in combination with other similar waters, it is hard to see how federal regulation of them can meet even the broad standards of the Commerce Clause." Aplnts. Br. at 39. Appellants have not identified a single waterbody in Oklahoma covered by the Rule that either lacks any effect on interstate commerce or lacks connection or has an attenuated connection to interstate commerce.

Again, Congress intended, and the Supreme Court has long held, that waters that are not navigable in fact are protected by the Act, and it is beyond argument that it is within Congress' power under the Commerce Clause to protect waters that affect interstate and navigable waters, as intrastate tributaries and other waters with a significant nexus included in the Rule unquestionably do. In fact, Congress' Commerce Clause authority to protect the Nation's waters is far more broad than that--but here, with this Rule, the Agencies have only relied on the more narrow view by regulating only navigable waters, interstate waters and waters with a significant nexus to them.[27] A constitutional claim must be supported by facts and

[27] In *SWANCC*, the Supreme Court expressly declined to address the reach of Commerce Clause jurisdiction. *See* 531 U.S. at 162, 174; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003) (observing that in *SWANCC*, the

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law. Appellants failed to show that any water protected under the Rule has little or no connection to interstate commerce, and have not identified a single instance of any harm tied to that constitutional claim.

Appellants' largely unsupported Tenth Amendment claim appears also premised on a contention that the Rule covers waters lacking a significant nexus. That claim fails because the Rule plainly finds that support in the Science Report, and Appellants have not identified any waters that lack significant nexus in the State of Oklahoma. Moreover, the Tenth Amendment gives way to valid exercise of Commerce Clause power—only those rights not reserved to the federal government fall to the states. Finally, water protected by the Act can *also* be regulated by states imposing more stringent protections; the Act's protections are a floor; a *minimum standard* of protection below which Congress determined, as a nation, we should not allow our most precious resources to fall. *See* 33 U.S.C. § 1370; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 499 (1987).

The Rule does not expand jurisdiction beyond the scope and purpose of the Act or violate the Constitution as interpreted and directed by the Supreme Court.

Supreme Court "expressly declined to reach" the Commerce Clause question.) Similarly, none of the opinions of the Supreme Court in *Rapanos* commanded a majority of the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act. *Rapanos*, 547 U.S. at 758 (C.J. Roberts, concurring opinion).

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CONCLUSION

For all of the foregoing reasons, the Court should affirm the district court's denial of the injunction.

ORAL ARGUMENT STATEMENT

Absent the Court desiring oral argument in order to address specific questions of the Court, Waterkeepers do not believe oral argument is necessary given the posture and issues in this case.

Respectfully submitted this 25th day of November, 2019 by counsel for Waterkeepers.

Respectfully submitted,

/s/ Janette K. Brimmer

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies, in accordance with Fed. R. App. P. 32(g) and Tenth Circuit Rule 32(g), excluding the parts of the document exempted by Fed. R. App. P. 32(f), that the foregoing *Principal and Response Brief of Waterkeeper Alliance, et al.* contains 12,347 words, as counted by counsel's word processing system. Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 using size 14 Times New Roman font.

DATED: November 25, 2019 /s/ Janette K. Brimmer
Janette K. Brimmer

ECF CERTIFICATION

Counsel hereby certifies that the Motion complies with CM/ECF User Manual Section II(J) because (i) all required privacy redactions have been made; (ii) the required paper copies of this brief are exact copies of the version of the brief submitted electronically; and (iii) the ECF submission was scanned for viruses with Sophos Endpoint Protection, and, according to the program, is free of viruses.

DATED: November 25, 2019 /s/ Janette K. Brimmer
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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2019, I electronically filed the foregoing NOTICE OF FILING with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon counsel of record.

DATED: November 25, 2019 /s/ Janette K. Brimmer
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