UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; and Greater Atlanta Homebuilders Association, Inc., Plaintiffs, v. United States Environmental Protection Agency; United States Army Corps of Engineers; Gina McCarthy, Administrator, United States Environmental Protection Agency; John McHugh, Secretary, United States Army; Jo Ellen Darcy, Assistant Secretary of the Army (Civil Works); and Lieutenant General Thomas P. Bostick, Commander and Chief of Engineers, Defendants.	)	Civil Action No. _____

COMPLAINT

Plaintiffs Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; and Greater Atlanta Homebuilders Association, Inc., file this Complaint against the United States Environmental Protection Agency ("EPA"); the United States Army Corps of Engineers ("USACE"); Gina McCarthy,

Administrator, EPA; John McHugh, Secretary, United States Army; Jo Ellen Darcy, Assistant Secretary of the Army (Civil Works); and Lieutenant General Thomas P. Bostick, Commander and Chief of Engineers, Defendants herein, and allege as follows:

1. Plaintiffs bring this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, seeking review of a final action by Defendants. Plaintiffs seek an order holding unlawful, vacating, and setting aside a final rule promulgated by the Defendants under various sections of the Clean Water Act, 33 U.S.C. 1251, *et seq.* ("CWA"), entitled "Clean Water Rule: Definition of Waters of the United States," and published in the Federal Register at 80 Fed. Reg. 37053 (June 29, 2015) (attached as **Exhibit A**). The challenged rule amends the definition of the term "waters of the United States" appearing at 33 C.F.R. § 328.3 and 40 C.F.R. §§ 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, Appendix E to § 300 (at 1.5), 302.3, and 401.11, and hereinafter will sometimes be referred to as the "waters of the U.S." or "WOTUS" Rule.

PARTIES

2. Plaintiff Southeastern Legal Foundation, Inc. ("SLF") is a Georgia non-profit corporation with its principal place of business and registered office at 2255 Sewell Mill Road, Suite 320, Marietta, GA 30062. SLF represents the

interests of numerous commercial and industrial entities engaged in property development and other operations in areas located on or near "waters of the U.S." as defined by the WOTUS Rule.

3. Plaintiff Georgia Agribusiness Council, Inc. ("GAC") is a Georgia non-profit corporation with its principal place of business and registered office at 1655 S. Elm St., Commerce, GA 30529. GAC represents the interests of its 880 members engaged in various agricultural businesses throughout the state of Georgia. Most of GAC's members own land or are otherwise engaged in food and fiber production and processing operations located on or near "waters of the U.S." as defined by the WOTUS Rule.

4. Plaintiff Greater Atlanta Homebuilders Association, Inc. ("GAHBA") is a Georgia non-profit corporation with its principal place of business and registered office at 1484 Brockett Road, Tucker, GA 30084. GAHBA represents the interests of over 1,200 member companies, including developers, custom and speculative builders, multifamily builders, manufactured housing companies, residential remodelers and general contractors, many of whom own land or are engaged in current or planned developments in areas located on or near "waters of the U.S." as defined by the WOTUS Rule.

5. The WOTUS Rule obligates Plaintiffs' members and constituents to obtain jurisdictional determinations and/or permits for planned and ongoing development and agricultural, silvicultural, and industrial operations or risk penalties for noncompliance. The jurisdictional determinations and permits are costly, will delay the entities' property development and other operations, and will add cost and decrease the profitability of the entities' property development and other operations. The WOTUS Rule will also decrease the value of Plaintiffs' members' and constituents' property values.

6. Plaintiffs each have standing to bring this action, because their members and constituents would have standing to bring this action in their own right, the interests Plaintiffs seek to protect herein are germane to Plaintiffs' purposes as policy and public interest organizations and trade associations, and neither the claims Plaintiffs assert nor the relief Plaintiffs request requires that an individual member or constituent of any Plaintiff participate in this action. Plaintiffs' members and constituents are injured by Defendants' actions, because they must comply with the challenged rule or risk penalties for non-compliance and because Defendants' actions reduce the value of their property. The relief requested herein, including vacatur of the challenged rule or portions thereof, would redress Plaintiffs' members' and constituents' injuries.

7. Defendant EPA is an agency of the United States with the primary authority for implementing the CWA. EPA developed and promulgated the challenged rule, under the direction of the Administrator.

8. Defendant Gina McCarthy is the Administrator of EPA, and is being sued in her official capacity. The Administrator has the authority to promulgate such regulations as are necessary to carry out the functions of the CWA, pursuant to 33 U.S.C.A. § 1361(a). The Administrator signed the rule challenged here, and caused it to be published in the Federal Register.

9. Defendant USACE is a branch of the United States Army and an agency of the United States. USACE, through the Secretary of the United States Army, is authorized under Section 404 of the Clean Water Act to issue permits for the discharge of dredged and fill material into "navigable waters" (33 U.S.C. § 1344(a)) and enforce any violations thereof (33 U.S.C. § 1319). USACE developed and promulgated the challenged rule, under the direction of the Assistant Secretary.

10. Defendant John McHugh is the Secretary of the United States Army, and is being sued in his official capacity. The Secretary is authorized under Section 404 of the Clean Water Act to issue permits for the discharge of dredged

and fill material into "navigable waters" (33 U.S.C. § 1344(a)) and enforce any violations thereof (33 U.S.C. § 1319).

11. Defendant Jo Ellen Darcy is the Assistant Secretary of the Army (Civil Works), and is being sued in her official capacity. The Assistant Secretary signed the rule challenged here, and caused it to be published in the Federal Register.

12. Defendant Lieutenant General Thomas P. Bostick is the U.S. Army Chief of Engineers and Commanding General of the USACE, and is being sued in his official capacity. The authorization given to the Secretary under the CWA is as "acting through the Chief of Engineers," as set forth in 33 U.S.C.A. § 1344(d).

JURISDICTION

13. This Court has subject matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). The Court has the authority to grant the relief sought herein pursuant to 5 U.S.C. §§ 702-706, 28 U.S.C. § 2201, and Fed. R. Civ. P. 65.

VENUE

14. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1), because Defendants include agencies of the United States and officers or employees of agencies of the United States acting in their official capacity.

Plaintiff SLF resides in this District, because its registered office is located in Cobb County, Georgia. GAHBA also resides in this District, because its registered office is located in Gwinnett County, Georgia. GAC also resides in this District, because its registered office is located in Jackson County, Georgia.

STATUTORY BACKGROUND AND RULEMAKING PROCEEDINGS

15. The CWA confers federal authority over "navigable waters," which is defined at 33 U.S.C. § 1362(7) as "waters of the United States, including the territorial seas."

16. Among other things, the CWA regulates "navigable waters" by prohibiting the discharge of "pollutants" and certain other materials into "navigable waters" absent a permit or certain other measures. *See* 33 U.S.C. §§ 1311, 1342, 1344, 1362.

17. EPA and USACE have promulgated several regulations attempting to expand the term "waters of the United States" under the CWA, and the U.S. Supreme Court has considered several of these regulations.

18. USACE's original interpretation of the term appeared in 1974, two years after the CWA's enactment. USACE defined "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible

for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1). USACE further clarified, "It is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." 33 C.F.R. § 209.260(e)(1).

19. In 1975, USACE issued interim final regulations, and in 1977 Congress enacted a revised CWA, both of which expanded the scope of "waters of the United States" to include wetlands adjacent to traditional navigable waters.

20. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("*Riverside Bayview*"), the Supreme Court considered the provision of USACE's 1975 regulations that included wetlands adjacent to traditional navigable waters in the definition of "waters of the United States," and found it to be a reasonable interpretation of the CWA, primarily because of the statutory revisions in 1977. The Supreme Court expressly did not rule on any of the other provisions of the 1975 regulations.

21. In 1986, USACE issued the "Migratory Bird Rule," 51 Fed. Reg. 41,217 (Nov. 13, 1986) and 53 Fed. Reg. 20,765 (Jun. 6, 1988), expanding federal jurisdiction to waters serving as habitat for migratory birds or endangered species or that irrigated crop lands.

22. In *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Supreme Court found these regulations exceeded USACE's authority under the CWA and encroached on traditional state power.

23. The Supreme Court in *SWANCC* found no "indication that Congress intended" for the CWA to "invoke[] the outer limits of Congress' power." 531 U.S. at 172-74.

24. According to a memorandum from the General Counsel of Defendant EPA, *SWANCC* was "a significant new ruling by the Supreme Court pertaining to the scope of regulatory jurisdiction under the Clean Water Act." According to the same memorandum, "Although the *SWANCC* case itself specifically involved section 404 of the CWA, the Court's decision affects the scope of regulatory jurisdiction under other provisions of the CWA as well, including ... sections 402, 404, 311, and any other provision of the CWA which applies the definition of 'waters of the United States.'"

25. On July 17, 2002, EPA promulgated a new expanded definition of "navigable waters" in its revisions to regulations at 40 C.F.R. § 112, pursuant to § 311(j)(1)(C) of the CWA, 33 U.S.C. 1251.

26. The 2002 regulations contained the following definition of navigable waters: "(i) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide; (ii) All interstate waters, including interstate wetlands; (iii) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters: (A) That are or could be used by interstate or foreign travelers for recreational or other purposes; or (B) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or, (C) That are or could be used for industrial purposes by industries in interstate commerce; (iv) All impoundments of waters otherwise defined as waters of the United States under this section; (v) Tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition; (vi) The territorial sea; and (vii) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (1) of this definition." 2002 SPCC Rule, 40 C.F.R. § 112.2(1).

27. Upon challenge of that rule in the District Court for the District of Columbia, EPA conceded and the court agreed that *SWANCC* found that the

"CWA does not permit regulation to the full extent permitted under the Commerce Clause." *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 184 (D.D.C. 2008) ("*Am. Petroleum*"). Because "EPA's new regulatory definition, however, appears to assume that Clean Water Act jurisdiction does extend to the outer boundaries of Congress' Commerce Clause power," the court vacated the new expanded definition as arbitrary and capricious. *Id.*, at 183.

28. In *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"), the Supreme Court considered EPA's authority to regulate certain wetlands and concluded EPA had exceeded its authority, with Justice Scalia issuing a plurality opinion and Justice Kennedy issuing a concurrence.

29. Justice Scalia found that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 547 U.S. at 742.

30. Justice Kennedy found that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if 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.' When, in contrast, wetlands' effects on water

quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*, at 780.

31. Justice Kennedy further found that "[t]hrough regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.*, at 780-81.

32. Justice Kennedy further found that "[t]he Corps' existing standard for tributaries, however, provides no such assurance. As noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a 'line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,' § 328.3(e)." *Id.*, at 781.

33. Justice Kennedy further found that "the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption as the determinative measure of whether adjacent

wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Id.*, at 781-82.

34. On April 21, 2014, Defendants published a proposed rule in the Federal Register to expand the definition of the term "waters of the United States" appearing at 33 C.F.R. § 328.3 and 40 C.F.R. §§ 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, Appendix E to § 300 (at 1.5), 302.3, and 401.11. *See* "Definition of 'Waters of the United States' Under the Clean Water Act" (Docket No. EPA-HQOW-2011-0880), 79 Fed. Reg. 22,188 (Apr. 21, 2014) (the "Proposed Rule").

35. Defendants established the deadline for submission of public comments on the Proposed Rule as November 14, 2014.

36. SLF, on its own behalf and on behalf of its constituents, submitted timely comments to the Proposed Rule on November 14, 2014.

37. GAC, on its own behalf and on behalf of its members, submitted timely comments to the Proposed Rule on October 20, 2014.

38. Defendants published the final WOTUS Rule in the Federal Register on June 29, 2015.

39. In their promulgation of the WOTUS Rule, Defendants failed to adequately address the issues raised in Plaintiffs' and others' comments.

40. As set forth in the WOTUS Rule and 40 C.F.R. § 23.2, the WOTUS Rule is considered issued for purposes of judicial review at 1:00 p.m. Eastern time on July 13, 2015.

41. The WOTUS Rule is scheduled to become effective on August 28, 2015.

THE WOTUS RULE

42. The WOTUS Rule expands federal jurisdiction to cover five categories of waters automatically: "(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (ii) All interstate waters, including interstate wetlands; (iii) The territorial seas; (iv) All impoundments of waters otherwise identified as waters of the United States under this section; (v) All tributaries."

43. The WOTUS Rule further expands federal jurisdiction to cover "waters adjacent to a water identified in [¶ 42], including wetlands, ponds, lakes, oxbows, impoundments, and similar waters."

44. The WOTUS Rule further expands federal jurisdiction to cover the following waters when they have a significant nexus to waters in ¶ 42(i) – (iii):

prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools and Texas coastal prairie wetlands.

45. The WOTUS Rule further expands federal jurisdiction to cover "[a]ll waters located within the 100-year floodplain of a water identified in [¶ 42(i) - (iii)] and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in [¶ 42(i) - (iii)] where they are determined on a case-specific basis to have a significant nexus to" such water.

46. The WOTUS Rule further expands federal jurisdiction by defining "adjacent" as "bordering, contiguous, or neighboring a water identified in [¶ 42(i) - (iii)], including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark."

47. The WOTUS Rule further expands federal jurisdiction by defining "neighboring" as "[a]ll waters located within 100 feet of the ordinary high water mark of a water identified in [¶ 42(i) - (iii)]" and "[a]ll waters located within the 100-year floodplain of a water identified in [¶ 42] and not more than 1,500 feet from the ordinary high water mark of such water" and "[a]ll waters located within

1,500 feet of the high tide line of a water identified in [¶ 42(i) - (iii)], and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes."

48. The WOTUS Rule further expands federal jurisdiction by defining "tributary" as "a water that contributes flow, either directly or through another water (including an impoundment …), to a water identified in [¶ 42(i) - (iii)] that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. … A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not [otherwise] excluded… [A] tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break."

49. The WOTUS Rule further expands federal jurisdiction by defining "significant nexus" to mean that "a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in [¶ 42(i) - (iii)]" and explaining that "[f]or purposes of determining whether or not a water

has a significant nexus, the water's effect on downstream … waters shall be assessed by evaluating … (A) Sediment trapping, (B) Nutrient recycling, (C) Pollutant trapping, transformation, filtering, and transport, (D) Retention and attenuation of flood waters, (E) Runoff storage, (F) Contribution of flow, (G) Export of organic matter, (H) Export of food resources, and (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area)."

50. Defendants published several documents showing their methodology and foundation for the WOTUS Rule, including the "Technical Support Document for the Clean Water Rule: Definition of Waters of the United States" (May 2015), "Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence" (January 2015), and "Economic Analysis of the EPA-Army Clean Water Rule" (May 2015).

51. Defendants rely on these documents as support for their claim that they engaged in the reasoned decisionmaking required for agency action under the APA.

52. In the "Economic Analysis of the EPA-Army Clean Water Rule" (May 2015), Defendants admitted that "[t]he agencies have determined that the vast majority of the nation's water features are located within 4,000 feet of a

covered tributary, traditional navigable water, interstate water, or territorial sea. We believe, therefore, that very few waters will be located outside 4,000 feet and within a 100-year floodplain."

53. In the "Economic Analysis of the EPA-Army Clean Water Rule" (May 2015), Defendants concede the WOTUS Rule will result in increased costs of between $158.4 and $306.6 million and between a 2.84 and 4.65 percent increase in positive jurisdictional determinations annually.

COUNT I
VIOLATION OF APA, 5 U.S.C. § 706:
NOT IN ACCORDANCE WITH THE LAW AS SET FORTH IN APPLICABLE JUDICIAL PRECEDENT

54. The allegations of paragraphs 1 through 53 are hereby incorporated by reference, restated, realleged, and made a part hereof as if each such allegation were fully set forth herein.

55. Defendants violated the APA, 5 U.S.C. § 706(2)(A), because the WOTUS Rule is not in accordance with the law as set forth in *SWANCC*, *Rapanos*, *Am. Petroleum*, and other judicial precedent.

56. Defendants' inclusion of "all tributaries" and other waters in proximity with "all tributaries" in the definition of waters of the U.S. in the WOTUS Rule contravenes the Supreme Court decision in *Rapanos*, in particular Justice Kennedy's instruction that only certain "categories of tributaries … are

significant enough" and that the agency must determine significance based on such factors as "volume of flow (either annually or on average) [and] their proximity to navigable waters."

57. Defendants' definition of "tributary" as the "presence of the physical indicators of a bed and banks and an ordinary high water mark" in the WOTUS Rule contravenes the Supreme Court decision in *Rapanos*, in particular Justice Kennedy's instruction that the "[t]he Corps' existing standard for tributaries … provides no such assurance" that the Corps would only regulate tributaries with a significant nexus to navigable waters, because it was based on whether the tributary "possesses an ordinary high-water mark."

58. Defendants' definition of "tributary" as described in the Preamble to the WOTUS Rule to include waters where the "banks … may be very low or may even disappear at times … [or] lose their ordinary high water mark" contravenes the Supreme Court decision in *Rapanos*, because it includes waters even less significant than those "high-water mark" waters Justice Kennedy determined were not jurisdictional and therefore includes waters without sufficient volume, frequency, and duration of flow to meet Justice Kennedy's "significant nexus" test.

59. Defendants' inclusion in the definition of waters of the U.S. in the WOTUS Rule of "[a]ll waters which are currently used, were used in the past, or

may be susceptible to use in interstate or foreign commerce" contravenes *SWANCC*, 531 U.S. at 172-74, and *Am. Petroleum*, because it "appears to assume that Clean Water Act jurisdiction does extend to the outer boundaries of Congress' Commerce Clause power," which interpretation the courts rejected.

60. Defendants' inclusion of waters adjacent to "all tributaries" in the definition of waters of the U.S. in the WOTUS Rule contravenes the Supreme Court decision in *Rapanos*, in particular Justice Kennedy's instruction that "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."

61. Defendants' definition of "adjacency" and its incorporated term "neighboring" in the definition of waters of the U.S. (including waters variously within 100-feet, the 100-year flood plain and 1,500-feet of other waters) contravenes the Supreme Court decisions in *Rapanos*, *SWANCC*, and *Riverside Bayview*, and numerous decisions of the United States Circuit Courts of Appeals (including, *e.g.*, *Summit Petroleum Corporation v. U.S. EPA*, 690 F.3d 733 (6th Cir. 2012)) and District Courts, because it extends the term beyond its traditional

scope of "adjoining" or "physically abutting," and into the impermissible sphere of "functionally related."

62. Defendants' definition of "significant nexus" and inclusion of a significant nexus analysis for non-wetland waters and for waters beyond the traditional scope of "adjacency" in the definition of waters of the U.S. contravenes the Supreme Court decision in *Rapanos* and *SWANCC*, in particular Justice Kennedy's instruction that "the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."

63. Defendants' definition of "significant nexus" in the definition of waters of the U.S. as "contribut[ing] significantly to the chemical, physical, **or** biological integrity of the nearest water" contravenes the Supreme Court decision in *Rapanos*, in particular Justice Kennedy's instruction that "wetlands possess the requisite nexus … if the wetlands … significantly affect the chemical, physical, **and** biological integrity of other covered waters," because "Congress enacted the law to 'restore and maintain the chemical, physical, **and** biological integrity of the Nation's waters,' 33 U.S.C. § 1251(a)."

64. Defendants' inclusion of some ditches in the definition of waters of the U.S. contravenes the Supreme Court decision in *Rapanos*, in particular Justice

Kennedy's instruction that "the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption" and, further, "a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it."

65. Defendants' inclusion of ephemeral streams and ditches as "tributaries," all waters adjacent to certain other covered waters, and waters with a significant nexus to certain other covered waters in their definition of waters of the U.S. contravenes the plurality opinion in *Rapanos*.

66. Defendants' definition of "significant nexus" in the WOTUS Rule to include the "[p]rovision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area)" contravenes the Supreme Court decision in *SWANCC*, which found that provision of habitat for migratory birds was insufficient to establish federal jurisdiction.

67. Defendants' definition of "navigable" waters as described in the Preamble to the WOTUS Rule to include all "waters currently being used for … commercial recreation (for example boat rentals, guided fishing trips, or water ski tournaments) [or] … are susceptible to being [so] used in the future" contravenes

the Supreme Court decision in *SWANCC*, because it asserts jurisdiction over "isolated ponds, some only seasonal, wholly located" intrastate, which the Court decided were not "navigable waters." 531 U.S. at 171.

68. Because the WOTUS Rule is not in accordance with the law as set forth in *SWANCC*, *Rapanos*, *Am. Petroleum*, and other judicial precedent, Defendants violated the APA, 5 U.S.C. § 706(2)(A), and the WOTUS Rule must be vacated and set aside.

COUNT II
VIOLATION OF APA, 5 U.S.C. § 706:
ARBITRARY AND CAPRICIOUS

69. The allegations of paragraphs 1 through 68 are hereby incorporated by reference, restated, realleged, and made a part hereof as if each such allegation were fully set forth herein.

70. Defendants violated the APA, 5 U.S.C. § 706(2)(A), because their promulgation of the WOTUS Rule is arbitrary and capricious.

71. Defendants' "significant nexus" requirement for various waters within 4,000 feet of other covered waters in the definition of waters of the U.S. in the WOTUS Rule is arbitrary and capricious, because the 4,000-foot radius lacks reasonable explanation or scientific support.

72. Defendants admitted in their "Economic Analysis of the EPA-Army Clean Water Rule" (May 2015) that nearly all waters in this country are covered by the rule's 4,000-foot radius provision.

73. This admission undermines Defendants' justification in the WOTUS Rule's Preamble and Technical Support Document that "[t]he vast majority of the waters that the Corps has determined have a significant nexus are located within 4,000 feet."

74. Defendants' definition of "neighboring" in the WOTUS Rule to include waters within a 1,500-foot radius is arbitrary and capricious, because the 1,500-foot radius lacks reasonable explanation or scientific support.

75. Neither the 4,000-foot nor the 1,500-foot radii appear in Defendants' scientific support document "Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence" (Jan. 2015).

76. Because the 4,000-foot and 1,500-foot radii are arbitrary and capricious, Defendants violated the APA, 5 U.S.C. § 706(2)(A), and the WOTUS Rule must be vacated and set aside.

77. Defendants' definition of "tributary" as described in the Preamble to the WOTUS Rule to include waters where the "banks … may be very low or may

even disappear at times … [or] lose their ordinary high water mark" contradicts Defendants' definition of "tributary" in the WOTUS Rule as only including waters with "a bed and banks and an ordinary high water mark," which definition Defendants explained was necessary to "demonstrate there is [sufficient] volume, frequency, and duration of flow" to meet Justice Kennedy's "significant nexus" test in *Rapanos*.

78. Defendants' definition of "tributary" as described in the Preamble to the WOTUS Rule to include waters where the "banks … may be very low or may even disappear at times … [or] lose their ordinary high water mark" is arbitrary and capricious, and, therefore, the WOTUS Rule must be vacated and set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

79. Defendants' inclusion in the definition of waters of the U.S. in the WOTUS Rule of "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce" is arbitrary and capricious, because it contradicts EPA's earlier position that the "CWA does not permit regulation to the full extent permitted under the Commerce Clause" in the *Am. Petroleum* litigation. *See* 541 F. Supp. 2d at 184.

80. Because Defendants' inclusion in the definition of waters of the U.S. in the WOTUS Rule of "[a]ll waters which are currently used, were used in the

past, or may be susceptible to use in interstate or foreign commerce" is arbitrary and capricious, the WOTUS Rule must be vacated and set aside pursuant to the APA, 5 U.S.C. § 706(2)(A).

81. Defendants' definition of "neighboring" in the WOTUS Rule to include waters in the 100-year flood plain and Defendants' "significant nexus" requirement for various waters within the 100-year flood plain is arbitrary and capricious, because the 100-year flood plain metric lacks reasonable explanation or scientific support.

82. In the Preamble to the WOTUS Rule, Defendants admit that "[i]n drawing lines, the agencies chose the 100-year floodplain in part because FEMA and NRCS together have generally mapped large portions of the United States, and these maps are publicly available, well-known and well-understood."

83. Defendants' selection of an "adjacency" and "significant nexus" metric based on the availability of maps is arbitrary and capricious, because it is devoid of any scientific or legal foundation.

84. FEMA's flood maps were produced for flood hazard purposes in support of the National Flood Insurance Program based on a risk of loss assessment, not based on any analysis of chemical, physical, and biological connectedness with navigable waters.

85. Defendants' selection of an "adjacency" and "significant nexus" metric based on FEMA maps generated for insurance purposes is arbitrary and capricious, because it is devoid of any scientific or legal foundation.

86. In the Preamble to the WOTUS Rule, Defendants admit that "[i]t is important to recognize, however, that much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground."

87. Defendants' selection of an "adjacency" and "significant nexus" metric based on the availability of maps when they concede maps are actually generally unavailable or inaccurate is arbitrary and capricious.

88. Because the selection of the 100-year floodplain as an "adjacency" and "significant nexus" metric is arbitrary and capricious, Defendants violated the APA, 5 U.S.C. § 706(2)(A), and the WOTUS Rule must be vacated and set aside.

89. Defendants' calculation of the alleged benefits of the WOTUS Rule as set forth in "Economic Analysis of the EPA-Army Clean Water Rule" (May 2015) is arbitrary and capricious and incorrect, including because it failed to consider state protections of state waters and so falsely and without foundation presumed all waters not encompassed in the WOTUS Rule would be unprotected.

90. Defendants utilized the "Economic Analysis of the EPA-Army Clean Water Rule" (May 2015) to justify the WOTUS Rule and demonstrate compliance with the various procedural requirements in promulgating a significant regulatory action.

91. Because the WOTUS Rule rests on faulty support, Defendants violated the APA, 5 U.S.C. § 706(2)(A), and the WOTUS Rule must be vacated and set aside.

COUNT III
VIOLATION OF APA, 5 U.S.C. § 706:
EXCESS OF STATUTORY JURISDICTION, AUTHORITY, OR LIMITATIONS

92. The allegations of paragraphs 1 through 91 are hereby incorporated by reference, restated, realleged, and made a part hereof as if each such allegation were fully set forth herein.

93. Defendants violated the APA, 5 U.S.C. § 706(2)(C), because they acted in excess of their statutory jurisdiction, authority, or limitations in promulgating the WOTUS Rule by exceeding the statutory limits of the CWA.

94. In promulgating the WOTUS Rule, Defendants violated the Congressional policy behind the CWA of preserving state authority and responsibility of land and water resources, as set forth at 33 U.S.C. § 1251(b), "It is the policy of the Congress to recognize, preserve, and protect the primary

responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."

95. In expanding federal jurisdiction to encompass traditionally state waters, Defendants exceeded the statutory jurisdiction, authority, or limitations of the CWA.

96. Defendants concede in the Preamble to the WOTUS Rule that they have never interpreted the term "water of the United States" to include groundwater and that they intend the WOTUS Rule to exclude groundwater.

97. The WOTUS Rule regulates groundwater in several instances, including:

a. its regulation of pocosins (by defining these features as having "no standing water present in these peat-accumulating wetlands, but a shallow water table leaves the soil saturated for much of the year");

b. as a basis for a significant nexus determination ("the rule does not include a provision defining neighboring based on shallow subsurface flow, though such flow may be an important factor in evaluating a

water on a case-specific basis under paragraph (a)(8), as appropriate");

c. as a basis for asserting jurisdiction over waters in a 1,500-foot radius of other waters ("Wetlands, ponds, lakes, oxbows, impoundments, and similar water features within 1,500 feet of these waters are physically connected to such waters by surface and shallow subsurface flow."); and

d. as a basis for asserting jurisdiction over waters in a 4,000-foot radius of other waters ("waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary can have a confined surface or shallow subsurface connection to such a water" and "When assessing whether a water within the 4,000 foot boundary performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters.").

98. Because the WOTUS Rule expands federal agency jurisdiction to cover groundwater, Defendants' promulgation of that rule exceeds their statutory authority under the CWA.

99. Because the WOTUS Rule expands federal agency jurisdiction to cover groundwater, Defendants' promulgation of that rule is arbitrary and capricious because it contradicts their longstanding interpretation of the CWA without any justification or explanation.

100. Because Defendants acted in excess of their statutory jurisdiction, authority, or limitations in promulgating a rule that exceeds the statutory limits of the CWA, the WOTUS Rule must be vacated and set aside pursuant to the APA, 5 U.S.C. § 706(2)(C).

COUNT IV
VIOLATION OF APA, 5 U.S.C. § 706:
EXCESS OF CONSTITUTIONAL RIGHT AND POWER

101. The allegations of paragraphs 1 through 100 are hereby incorporated by reference, restated, realleged, and made a part hereof as if each such allegation were fully set forth herein.

102. Defendants violated the APA, 5 U.S.C. § 706(2)(B), because they acted contrary to their constitutional right and power in promulgating the WOTUS Rule.

103. The WOTUS Rule exceeds the grant of authority to Congress under the Commerce Clause and impinges on the States' traditional and primary power over land and water use.

104. Defendants' inclusion in the WOTUS Rule of all "interstate waters" and inclusion of certain waters adjacent to or with a significant nexus to "interstate waters" or that form tributaries to "interstate waters" exceeds the bounds of the Commerce Clause, because "interstate waters" is not synonymous with "interstate commerce."

105. Defendants' inclusion in the WOTUS Rule of all tributaries to other covered waters exceeds the bounds of the Commerce Clause, because every such tributary does not affect "navigable" waters or otherwise impact interstate commerce.

106. Defendants' inclusion in the WOTUS Rule of all waters adjacent to certain other covered waters exceeds the bounds of the Commerce Clause, because every such water does not affect "navigable" waters or otherwise impact interstate commerce.

107. Defendants' requirement in the WOTUS Rule of a significant nexus analysis for prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands, regardless of their proximity to

"navigable" waters exceeds the bounds of the Commerce Clause, because many such waters do not affect "navigable" waters or otherwise impact interstate commerce.

108. Defendants' requirement in the WOTUS Rule of a significant nexus analysis for waters within the 100-year flood plain or within 4,000 feet of another covered water exceeds the bounds of the Commerce Clause, because many such waters do not affect "navigable" waters or otherwise impact interstate commerce.

109. By Defendants' admission, asserting jurisdiction over waters within 4,000 feet of another covered water means expanding jurisdiction to cover nearly every water across the entire country, which is beyond the bounds of the Commerce Clause.

110. Defendants' definition of "navigable" waters as described in the Preamble to the WOTUS Rule to include all "waters currently being used for … commercial recreation (for example boat rentals, guided fishing trips, or water ski tournaments) [or] … are susceptible to being [so] used in the future" exceeds the bounds of the Commerce Clause, because it extends federal jurisdiction to cover wholly intrastate commerce.

111. Because Defendants acted contrary to their constitutional right and power in promulgating the WOTUS Rule, the WOTUS Rule must be vacated and set aside pursuant to the APA, 5 U.S.C. § 706(2)(B).

COUNT V
VIOLATION OF APA, 5 U.S.C. § 706:
VIOLATION OF TENTH AMENDMENT STATE SOVEREIGNTY

112. The allegations of paragraphs 1 through 111 are hereby incorporated by reference, restated, realleged, and made a part hereof as if each such allegation were fully set forth herein.

113. Defendants violated the APA, 5 U.S.C. § 706(2)(B), because they invaded the province of state sovereignty reserved by the Tenth Amendment to the U.S. Constitution in promulgating the WOTUS Rule.

114. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people." U.S. Const. amend. X.

115. Among the rights and powers reserved to the States under the Tenth Amendment is the authority to regulate intrastate land use and water resources, which power is referenced in *SWANCC* ("the States [have] traditional and primary power over land and water use," 531 U.S. at 174) and preserved in the CWA ("It is the policy of the Congress to recognize, preserve, and protect the primary

responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…" 33 U.S.C. § 1251(b)).

116. Defendants' inclusion in the WOTUS Rule of certain waters adjacent to or with a significant nexus to "interstate" and other covered waters or that form tributaries to "interstate" or other covered waters encroaches on state Tenth Amendment sovereignty, because this provision of the WOTUS Rule regulates wholly intrastate waters.

117. Defendants' requirement in the WOTUS Rule of a significant nexus analysis for prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands encroaches on state Tenth Amendment sovereignty, because this provision of the WOTUS Rule regulates wholly intrastate waters.

118. Defendants' requirement in the WOTUS Rule of a significant nexus analysis for waters within the 100-year flood plain or within 4,000 feet of another covered water encroaches on state Tenth Amendment sovereignty, because this provision of the WOTUS Rule regulates wholly intrastate waters.

119. By Defendants' admission, asserting jurisdiction over waters within 4,000 feet of another covered water means expanding jurisdiction to cover nearly

every water across the entire country, which encroaches on state Tenth Amendment sovereignty.

120. Because Defendants encroached on state Tenth Amendment sovereignty in promulgating the WOTUS Rule, the WOTUS Rule must be vacated and set aside pursuant to the APA, 5 U.S.C. § 706(2)(B).

COUNT VI
VIOLATION OF APA, 5 U.S.C. § 706, 5 U.S.C. § 553:
FAILURE TO OBSERVE STATUTORY PROCEDURES

121. The allegations of paragraphs 1 through 120 are hereby incorporated by reference, restated, realleged, and made a part hereof as if each such allegation were fully set forth herein.

122. Defendants violated the APA, 5 U.S.C. § 706(2)(D) and 5 U.S.C. § 553 by acting without observance of the procedures required by law in promulgating the WOTUS Rule, because they failed to provide a full opportunity for notice and comment.

123. Several provisions of the WOTUS Rule fundamentally differ from the Proposed Rule such that Plaintiffs and the public were never given adequate notice or the opportunity to comment.

124. Defendants' inclusion in the WOTUS Rule of a 4,000-foot radius for the significant nexus analysis, a 1,500-foot radius in the definition of

"neighboring," and the 100-year flood plain for both significant nexus and "neighboring" purposes are all entirely new provisions that did not appear in the Proposed Rule.

125. The Proposed Rule contained the contradictory explanation that "[w]hen determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use (for example, 10 to 20 year flood interval zone)," which did not provide adequate notice of Defendants' intent to expand well beyond the 10- to 20-year interval to the 100-year zone.

126. Defendants did not publish the "Technical Support Document for the Clean Water Rule: Definition of Waters of the United States" until May 2015, the "Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence" until January 2015, and the "Economic Analysis of the EPA-Army Clean Water Rule" until May 2015, all well after public comment on the Proposed Rule closed on November 14, 2014.

127. Because Defendants did not publish the foundational support documents for the WOTUS Rule until after the conclusion of the public comment period and did not publish the 4,000-foot and 1,500-foot radii and 100-year floodplain provisions until their promulgation of the final WOTUS Rule, Plaintiffs

and the rest of the public had no notice of and could not comment on these aspects of the WOTUS Rule.

128. None of the new supporting documents or new provisions of the final WOTUS Rule were a logical outgrowth of the proposed rule.

129. Because Defendants promulgated the WOTUS Rule without a full opportunity for notice and comment, the WOTUS Rule must be vacated and set aside pursuant to the APA, 5 U.S.C. § 706(2)(D).

COUNT VII
VIOLATION OF APA, 5 U.S.C. § 706:
FAILURE TO COMPLY WITH APPLICABLE PROCEDURAL LAWS

130. The allegations of paragraphs 1 through 129 are hereby incorporated by reference, restated, realleged, and made a part hereof as if each such allegation were fully set forth herein.

131. Defendants violated the APA, 5 U.S.C. § 706(2), because they acted arbitrarily, capriciously, in abuse of their discretion, not in accordance with the law, and without observance of certain procedures required by law in promulgating the WOTUS Rule.

132. Defendants violated the Anti-Lobbying Act, 18 U.S.C. § 1913, by using Congressionally appropriated money to lobby in favor of the WOTUS Rule through social media, including, but not limited to, Twitter "#ditchthemyth" and

"#CleanWaterRules" campaigns, Facebook postings, and a "Thunderclap" promotional effort, all aimed at soliciting support for the rule, not merely encouraging public comment.

133. Because Defendants violated the Anti-Lobbying Act, their conduct was not in accordance with the law and without observance of mandatory procedural requirements and the WOTUS Rule must be vacated and set aside pursuant to 5 U.S.C. § 706(2).

134. Defendants violated the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, by failing to follow its requirements for avoiding undue impacts on small businesses.

135. The WOTUS Rule will have a significant impact on small businesses, including because, at Defendants' admission, it will require significant nexus analyses for all waters within a 4,000-foot radius of certain other waters which includes nearly every water in the United States, which is a significant increase in the number of jurisdictional determinations required under the current rule.

136. Defendants' estimates of the WOTUS Rule's increased costs of between $158.4 and $306.6 million and increased jurisdictional determinations of between 2.84 and 4.65 percent are underestimates, but nevertheless reflect a significant burden on small businesses.

137. The text of WOTUS and Defendants' concessions as to increased costs and expansion of jurisdictional waters conflict with Defendants' statement in the Preamble to the WOTUS Rule that "[b]ecause fewer waters will be subject to the CWA under the rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required."

138. Defendants' assertion that the Regulatory Flexibility Act does not apply to the WOTUS Rule, which resulted in Defendants' failure to follow the mandates of the Regulatory Flexibility Act, is arbitrary and capricious.

139. Specifically, in their economic analysis, Defendants violated the Regulatory Flexibility Act by failing to account for the costs of even ascertaining whether a jurisdictional determination is necessary, which will now be a mandatory component of nearly every commercial, industrial or agricultural operation, with a particular burden on small businesses without the in-house capacity to interpret the implications of the WOTUS Rule.

140. Defendants violated the Regulatory Flexibility Act by failing to publish "a brief description of the subject area of any rule which the agency

expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities," as required by 5 U.S.C. § 602.

141. Defendants violated the Regulatory Flexibility Act by failing to publish an initial regulatory flexibility analysis, as required by 5 U.S.C. § 603.

142. Defendants violated the Regulatory Flexibility Act by failing to publish a final regulatory flexibility analysis, as required by 5 U.S.C. § 604.

143. Defendants violated the Regulatory Flexibility Act by failing to ensure that small entities have been given an opportunity to participate in the WOTUS Rule rulemaking by including in the notice of proposed rulemaking a statement that the proposed rule may have a significant economic effect on a substantial number of small entities; publishing the notice of proposed rulemaking in publications likely to be obtained by small entities; directly notifying interested small entities; conducting open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and adopting or modifying agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities, as required by 5 U.S.C. § 609(a).

144. Defendants violated the Regulatory Flexibility Act by failing to notify the Chief Counsel for Advocacy of the Small Business Administration and provide

the Chief Counsel with information on the potential impacts of the Proposed Rule on small entities and the type of small entities that might be affected, convene a review panel for the WOTUS Rule consisting wholly of USACE and EPA officials, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel, and modify the WOTUS Rule based on the results of that panel, as required by 5 U.S.C. § 609(b).

145. Defendants failed to follow the procedural requirements for waiving the requirements of 5 U.S.C. § 609(b) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process, as required by 5 U.S.C. § 609(e).

146. This court has jurisdiction to review these claims for noncompliance with the Regulatory Flexibility Act pursuant to 5 U.S.C. § 611, because this court has jurisdiction to review the WOTUS Rule for compliance with 5 U.S.C. § 553 and other provisions of law.

147. Additionally, because Defendants' violation of the Regulatory Flexibility Act render their promulgation of the WOTUS Rule not in accordance with law and without observance of procedures required by law, the WOTUS Rule must be set aside pursuant to 5 U.S.C. § 706(2).

148. The Unfunded Mandates Reform Act, 2 U.S.C. § 1531-38, requires, in part, that, "before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" containing various items, including an assessment of costs to state, local and tribal governments; the extent to which such costs to state, local, and tribal governments may be paid by the Federal Government; any disproportionate budgetary effects on any particular regions or communities; and estimates of the effect on the national economy.

149. The WOTUS Rule is a final rule for which a general notice of proposed rulemaking was published.

150. Defendants failed to prepare the written statement described in the Unfunded Mandates Reform Act.

151. Additionally, before promulgating the WOTUS Rule, Defendants failed to identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative for state, local, and tribal governments and/or the private sector, as required by the Unfunded Mandates Reform Act.

152. Instead, Defendants state the WOTUS Rule "does not contain any unfunded mandate …, does not significantly or uniquely affect small governments

…[,] imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments."

153. Defendants' statement (referenced in ¶ 152) contradicts with their concession that the WOTUS Rule will result in an increase in jurisdictional determinations (at least 2.84 to 4.65 percent) and a cost of between $158M - $307M, which will be borne in part by the 46 States that administer the NPDES program under section 402 and the two States that administer the section 404 program, in addition to any state or local entity that funds a project or operation implicating waters of the U.S.

154. Defendants arbitrarily and capriciously failed to comply with the Unfunded Mandates Reform Act.

155. Additionally, because Defendants' violation of the Unfunded Mandates Reform Act render their promulgation of the WOTUS Rule not in accordance with law and without observance of procedures required by law, the WOTUS Rule must be set aside pursuant to 5 U.S.C. § 706(2).

COUNT VIII
VIOLATION OF APA, 5 U.S.C. § 706
FAILURE TO COMPLY WITH APPLICABLE EXECUTIVE ORDERS

156. The allegations of paragraphs 1 through 155 are hereby incorporated by reference, restated, realleged, and made a part hereof as if each such allegation were fully set forth herein.

157. The WOTUS Rule has federalism implications, because it has substantial direct effects on the States, on the relationship between the national government and the States, and/or on the distribution of power and responsibilities among the various levels of government.

158. Executive Order 13132 of August 4, 1999 (64 Fed. Reg. 43,255 – 43,259) (Aug. 10, 1999) applies to the WOTUS Rule.

159. The WOTUS Rule limits the policymaking discretion of the States without clear constitutional and statutory authority for the rule and/or without the presence of a problem of national significance.

160. In Defendants' consultations with the States before promulgating the WOTUS Rule, they failed to inquire, explore, or determine whether any federal objectives could be attained by other means.

161. Defendants failed to grant the States the maximum administrative discretion possible in the WOTUS Rule.

162. In promulgating the WOTUS Rule, Defendants failed to encourage and work with States to develop their own policies to achieve the WOTUS objectives, failed to defer to the States to establish standards; and failed to consult with appropriate state and local officials to determine whether uniform national standards were necessary or whether any alternatives would otherwise preserve state prerogatives and authority.

163. Defendants violated Executive Order 13132 of August 4, 1999, in promulgating the WOTUS Rule.

164. Because Defendants violated Executive Order 13132 of August 4, 1999, in promulgating the WOTUS Rule, Defendants acted arbitrarily, capriciously, in abuse of their discretion, not in accordance with the law, and without observance of certain procedures required by law, and the WOTUS Rule must be set aside pursuant to the APA, 5 U.S.C. § 706(2).

165. The WOTUS Rule is a significant regulatory action.

166. Executive Order 12866 of September 30, 1993 (58 Fed. Reg. 51,735 (Oct. 4, 1993)) and Executive Order 13563 of January 18, 2011 (76 Fed. Reg. 3,821 – 3,823) (Jan. 21, 2011)) apply to the WOTUS Rule.

167. In promulgating WOTUS, Defendants failed to adequately identify the failures of private markets or any alternatives to direct regulation.

168. Defendants failed to design the WOTUS Rule in the most cost-effective manner to achieve their goals.

169. In promulgating the WOTUS Rule, Defendants failed to consider incentives for innovation and failed to consider consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

170. Defendants failed to assess the effects of the WOTUS Rule on state, local, and tribal governments, including specifically the availability of resources to carry out its mandates, and failed to seek to minimize those burdens.

171. Defendants failed to tailor the WOTUS Rule to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities).

172. Defendants failed to draft the WOTUS Rule to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

173. Defendants failed to conduct a full assessment of the WOTUS Rule's anticipated costs (including, but not limited to, the direct cost both to the government in administering the WOTUS Rule and to businesses and others in complying with the WOTUS Rule, and the WOTUS Rule's adverse effects on the

efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with a quantification of those costs.

174. Defendants failed to conduct an assessment of the costs and benefits of potentially effective and reasonably feasible alternatives to the WOTUS Rule and an explanation why the WOTUS Rule is preferable to the identified potential alternatives.

175. Defendants violated Executive Order 12866 and Executive Order 13563 in promulgating the WOTUS Rule.

176. Because Defendants violated Executive Order 12866 and Executive Order 13563 in promulgating the WOTUS Rule, Defendants acted arbitrarily, capriciously, in abuse of their discretion, not in accordance with the law, and without observance of certain procedures required by law, and the WOTUS Rule must be set aside pursuant to the APA, 5 U.S.C. § 706(2).

COUNT IX
PRELIMINARY INJUNCTION

177. The allegations of paragraphs 1 through 176 are hereby incorporated by reference, restated, realleged, and made a part hereof as if each such allegation were fully set forth herein.

178. Absent judicial intervention, the WOTUS Rule becomes effective on August 28, 2015.

179. Defendants state in the Preamble to the WOTUS Rule that "the agencies' actions are governed by the rule in effect at the time the agency issues a jurisdictional determination or permit authorization, not by the date of a permit application, request for authorization, or request for a jurisdictional determination."

180. USACE typically requires several months to complete a jurisdictional determination, and EPA and USACE typically require even more time to issue a CWA permit.

181. Any submissions after June 29, 2015, to EPA and USACE for jurisdictional determinations or CWA permits must comply with the WOTUS Rule, because by the time EPA and USACE issue the requested determinations and permits, the WOTUS Rule will be effective.

182. Plaintiffs and their members and constituents have already begun incurring costs to comply with the WOTUS Rule and suffering other economic harm, which will continue and increase when the WOTUS Rule becomes effective on August 28, 2015.

183. Plaintiffs are substantially likely to prevail on the merits, because Defendants well exceeded their statutory and Constitutional authority and violated the APA in promulgating the WOTUS Rule.

184. There is a substantial threat Plaintiffs will suffer irreparable injury to their business, property and economic interests if an injunction is not granted.

185. Defendants also will incur significant costs to comply with the WOTUS Rule, including training numerous USACE and EPA employees charged with issuing jurisdictional determinations and permits under the new regulations.

186. Maintaining the status quo will not cause Defendants any harm.

187. Much of the public will be subjected to increased costs and decreased property values as a result of the WOTUS Rule and so would suffer less harm if this Court issues an injunction than if the WOTUS Rule were allowed to take effect.

188. The public is best served by a government that operates within its legal and Constitutional confines and by administering agencies that operate within the bounds established by the law and the elected officials in Congress, and, therefore, an injunction against enforcing an unlawful rule is within the public interest.

189. Defendants have shown no harm to the public from the previously effective definitions of "waters of the U.S."

190. A preliminary injunction will not cause any public harm or otherwise disserve the public interest.

191. Pursuant to 5 U.S.C. § 705 and Fed. R. Civ. P. 65(a), Plaintiffs are entitled to a preliminary injunction to preserve the status quo and enjoin Defendants from enforcing, applying or implementing the WOTUS Rule pending judicial review.

COUNT X
COSTS AND FEES

192. The allegations of paragraphs 1 through 191 are hereby incorporated by reference, restated, realleged, and made a part hereof as if each such allegation were fully set forth herein.

193. This lawsuit is a civil action brought against the United States, agencies of the United States, and officials of the United States acting in their official capacities in a court having jurisdiction of such action, pursuant to 28 U.S.C. § 2412(a)(1).

194. Plaintiffs have incurred and will continue to incur, in an amount to be shown, fees, costs, expenses and attorneys' fees in this litigation.

195. Plaintiffs SLF, GAC, and GAHBA are organizations described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) as exempt from taxation under section 501(a) of such Code, and each has less than 500 employees at the time of filing this action.

196. Defendants acted in bad faith and without substantial justification in promulgating the WOTUS Rule.

197. If Plaintiffs prevail in this lawsuit, Plaintiffs are entitled to a judgment for costs against Defendants, jointly and severally, in an amount equal to Plaintiffs' costs incurred in the litigation pursuant to 28 U.S.C. § 2412(a)(1), plus reasonable fees and expenses of attorneys pursuant to 28 U.S.C. § 2412(a)(2)(b), plus fees and other expenses pursuant to 28 U.S.C. § 2412(d)(1)(a).

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in Plaintiffs' favor, and:

(i) Declare the WOTUS Rule unlawful;

(ii) Enjoin Defendants from enforcing, applying or implementing the WOTUS Rule, both preliminarily and permanently;

(iii) Vacate and set aside the WOTUS Rule;

(iv) Remand the WOTUS Rule to Defendants to promulgate a new rule:

a. within the bounds of the Clean Water Act, the U.S. Constitution, the Supreme Court decisions of *Rapanos*, *SWANCC*, *Riverside Bayview*, *Am. Petroleum*, and other applicable jurisprudence,

b. fully supported by reasoned scientific and economic analysis, and

c. in accordance with the APA, 5 U.S.C. § 706, the Anti-Lobbying Act, 18 U.S.C. § 1913, the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, the Unfunded Mandates Reform Act, 2 U.S.C. § 1531-38, and all applicable Executive Orders;

(v) Award Plaintiffs a judgment for costs against Defendants, jointly and severally, in an amount equal to Plaintiffs' costs incurred in this litigation, reasonable fees and expenses of Plaintiffs' attorneys, and Plaintiffs' other litigation fees and expenses, pursuant to 28 U.S.C. § 2412; and

(vi) Grant Plaintiffs such other and further relief at law or in equity as may be justified by the evidence and the law and as this Court may deem just and proper.

This 13th day of July, 2015.

/s/ Shannon L. Goessling

Shannon L. Goessling
Georgia Bar No. 298951
Southeastern Legal Foundation, Inc.
2255 Sewell Mill Road, Suite 320
Marietta, GA 30062
Tel.: (770) 977-2131
Fax: (770) 977-2134
shannon@southeasternlegal.org

Richard A. Horder
Georgia Bar No. 366750
Shelly Jacobs Ellerhorst
Georgia Bar No. 243743
Jennifer A. Simon
Georgia Bar No. 636946
Kazmarek Mowrey Cloud Laseter LLP
1230 Peachtree Street, NE, Suite 3600
Atlanta, GA 30309
Tel.: (404) 812-0843
Fax: (404) 812-0845
rhorder@kmcllaw.com

Attorneys for Plaintiffs