IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

STATE OF TEXAS,

Texas Department of Agriculture,
Texas Commission on Environmental Quality,
Texas Department of Transportation,
Texas General Land Office,

5. The Final Rule violates the Clean Water Act, the Administrative Procedure Act, and the United States Constitution, as noted below. Plaintiffs ask this Court to vacate the Final Rule, to enjoin the Federal Agencies from enforcing the Final Rule, and for any other relief as this Court deems proper.

State of Mississippi also brings this action as *parens patriae* for all Mississippi residents who are adversely affected by the Final Rule's violations of the Clean Water Act, the Administrative Procedure Act, and the United States Constitution.

10. Defendant United States Environmental Protection Agency ("EPA") is a federal agency within the meaning of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 551(1). Pursuant to the Clean Water Act, the EPA is provided with the authority, *inter alia*, to administer pollution control programs over navigable waters.

11. Defendant the Honorable Gina McCarthy is Administrator of the EPA and a signatory of the Final Rule.

12. Defendant United States Army Corps of Engineers ("Corps") is a federal agency within the meaning of the APA. *See* 5 U.S.C. § 551(1). The Corps, *inter alia*, administers the Clean Water Act's Section 404 program, regulating the discharge of dredged or fill material in navigable waters.

13. Defendant the Honorable Jo-Ellen Darcy is Assistant Secretary of the Army (Civil Works) and a signatory of the Final Rule.

II. JURISDICTION AND VENUE

14. This Court has jurisdiction over this action by virtue of 28 U.S.C. §§ 1331 (federal question), 2202 (further necessary relief), and 5 U.S.C. §§ 701–706 (APA). There is a present and actual controversy between the parties, and Plaintiffs are challenging a final agency action pursuant to 5 U.S.C. §§ 551(13), and 704. The Court may issue further necessary relief pursuant to 28 U.S.C. § 2202, 5 U.S.C. §§ 706(1), 706(2)(A) and (C), as well as pursuant to its general equitable powers.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C), because (1) Defendants are either (a) agencies or instrumentalities of the United States or (b) officers or employees of the United States, acting in their official capacities; (2) Plaintiff State of Texas and its agencies are residents of the Southern District of Texas;[2] and (3) no real property is involved in this action.

16. Because there may be a dispute between the parties as to whether original jurisdiction to review the Final Rule lies in this Court, pursuant to 28 U.S.C. § 1331, or in the U.S. Court of Appeals for the Fifth Circuit, pursuant to 33 U.S.C. § 1369(b)(1), and because the deadline for a circuit court petition for review of this agency action is only 120 days, *id*., Plaintiffs have—out of an abundance of caution—filed a petition in the U.S. Court of Appeals for the Fifth Circuit, to challenge the Final Rule on similar grounds as those asserted herein. Such "dual filing" is common and prudent when jurisdiction may be disputed, and "careful lawyers must apply for judicial review [in the court of appeals] of anything even remotely resembling" an action reviewable under section 509(b)(1), *see Am. Paper Inst. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989), even when they believe that jurisdiction may lie elsewhere. *See Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 554 (2nd Cir. 1978) (complaint filed in district court and petition filed in circuit court "as a precaution").

III. BACKGROUND

A. The Clean Water Act Maintains the States' Regulatory Authority Over Land and Water

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

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water

[2] *See Delaware v. Bender*, 37 d7d7sæ

> resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b).

18. The Clean Water Act does, however, grant limited authority to the Federal Agencies to regulate the discharge of certain materials into "navigable waters." *See, e.g.*

federalism under the Clean Water Act and determines whether Congress's wish "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" will be honored. 33 U.S.C. § 1251(b).

B. The Meaning of "the Waters of the United States"

23. More than 100 years before the passage of the Clean Water Act Amendments of 1972, the Supreme Court defined the phrase "navigable waters of the United States" as "navigable in fact" interstate waters. *The Daniel Ball*, 10 Wall. 557, 563 (1871).

24. In 1974, the Corps issued a rule defining "navigable waters" as those waters that

32. In *SWANCC*, the Court reiterated its holding in *Riverside Bayview* that federal jurisdiction extends to wetlands that actually abut navigable waters, because protection of these adjacent, actually-abutting wetlands was consistent with congressional intent to regulate wetlands that are "inseparably bound up with 'waters of the United States.'" *Id.* at 172 (quoting *Riverside Bayview*, 474 U.S. at 134).

iii. *Rapanos*

33. In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court again rejected the Corps' assertion of expanded authority over non-navigable, intrastate waters that are not significantly connected to navigable, interstate waters. The Court emphasized that the traditional concept of "navigable waters" must inform and limit the construction of the phrase "the waters of the United States." *Rapanos* raised the question of whether wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters" are "waters of the United States." *Rapanos*, 547 U.S. at 729. The court of appeals held they w

technical expertise." Final Rule at 37,054. The Federal Agencies assert that the rule will "increase CWA program predictability and consistency by clarifying the scope of "waters of the United States" protected under the Act." *Id.*

40. On May 27, 2015, Administrator McCarthy and Assistant Secretary Darcy took final agency action when they signed the Final Rule.

41. On June 29, 2015, the Final Rule was published in t

characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark." *Id*. § 328.3(c)(3).

46. Under the Final Rule, a tributary can be "natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches . . . ." *Id*. A water does not lose its classification as a tributary—even when it has man-made or natural breaks, no matter the length—"so long as a bed and banks and ordinary high water mark can be identified upstream of the break." *Id*.

47. "Ordinary high water mark" is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, chang15789(t)-2053536(e)3.158(89(26125(c)3-2.53597(u)-0.957028(c)028(

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at 782 (Kennedy, J., concurring in the judgment).[4] Not only do the Federal Agencies adopt the "ordinary high water mark" as a determinative measure for tributaries in the Final Rule—they greatly expand it from the Proposed Rule. The Proposed Rule required "the *presence* of a bed and banks and ordinary high water mark," *see* Proposed Rule at 22,199, while the Final Rule requires the "presence of *physical indicators* of a bed and banks and ordinary high water mark." 33 C.F.R. § 328.3(c)(3) (2015) (emphasis added).

50. Assuming, *arguendo*, that Justice Kennedy intended the "significant nexus" test in *Rapanos* to be stretched to tributaries, the Final Rule would fail that test, because it places all tributaries of traditional waters under the Federal Agencies' authority without regard to the tributaries' actual impact on the "chemical, physical, and biological integrity of" any traditional waters. *See Rapanos*, 547 U.S. at 717. Under the Final Rule, a tributary that only has a small, infrequent, and historically-traceable flow into a traditional water, is nevertheless within the Federal Agencies' jurisdiction. 33 C.F.R. § 328.3(c)(3) (2015).

51. The Final Rule's inclusion of tributaries also violates the plurality's opinion in *Rapanos* because the definition includes a feature with any flow into a traditional water, even if that flow does not constitute a "continuous surface connection." *Rapanos*, 547 U.S. at 742.

iii. The Federal Agencies Broadly Define "Significant Nexus" and Claim *Per se* Federal Jurisdiction Over Certain Waters They Deem to Have a "Significant Nexus" to Traditional Waters

52. For the purpose of determining whether or not a water has a "significant nexus," the Final Rule requires that the water's effect on a downstream traditional water be assessed by evaluating the following functions: (i) sediment trapping; (ii) nutrient recycling; (iii) pollutant

trapping, transformation, filtering, and transport; (iv) retention and attenuation of flood waters; (v) runoff storage; (vi) contribution of flow; (vii) export of organic matter; (viii) export of food resources; and (ix) provision of life-cycle-dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a traditional navigable water, interstate water, and/or territorial sea. 33 C.F.R. § 328.3(c)(5) (2015).

53. Under the Final Rule, a water has a "significant nexus" "when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, and biological integrity" of the downstream traditional navigable water, interstate water, and/or territorial sea. *Id*. This definition exceeds Clean Water Act authority under *SWANCC* and *Rapanos*. In *SWANCC*, the Court refused the federal government's assertion of jurisdictional authority over an isolated,

there is a significant nexus and whether or not there is a continuous surface connection—the Final Rule goes beyond the authority of the Clean Water Act and the opinions in *Rapanos*.

55. "Adjacent waters" are waters "bordering, contiguous or neighboring" traditional waters, impoundments, or tributaries. *Id*. at § 328.3(c)(1). The category includes "wetlands, ponds, lakes, oxbows, impoundments, and similar water features," as well as "waters separated by constructed dikes or barriers, natural river berms, beach dunes." *Id*. at § 328.3(a)(5).

56. "Neighboring" is defined as "(1) [w]aters located in whole or part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary; . . .(2) [w]aters located in whole or part in the 100-year floodplain and that are within 1,500 feet of the ordinar0n3678(d)-0.95(0)-0.956417(0)-0.956

subcategories of "waters" that will be subject to case-by-case determinations. 33 C.F.R. § 328.3(a)(7) (2015). These include prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands. *Id.* These "a(7) waters" are deemed jurisdictional when they are determined on a case-specific basis to have a "significant nexus" to a traditional navigable water, interstate water, or territorial sea. *Id.* The Final Rule further states that "a(7) waters" that lie within the same watershed are "similarly situated" by rule and, therefore, will be aggregated for purposes of the Federal Agencies' significant nexus analysis. *Id*. § 328.3(c)(5).

70. The second category, referred to as "a(8) waters" are "[a]ll waters located within the 100-year floodplain of a [traditional water] and all waters located within 4,000 feet of the high tide line or ordinary high water mark of anffl71(a)3.15789(l)-2.mi10med

72.

76. Instead, the Final Rule relies almost exclusively on a "significant nexus" standard

80. The Federal Agencies' almost exclusive reliance on a "significant nexus" standard does not provide a valid legal justification for the overly expansive definition of "the waters of the United States" in the Final Rule. The Final Rule still must comply with the Clean Water Act, the Constitution, and guiding precedent. It does not. On the contrary, the Final Rule attempts to confer federal jurisdiction to waters that were not contemplated as jurisdictional under any reasonable reading of *Rapanos*, *SWANCC*, and *Riverside Bayview*. Moreover, it is noteworthy that Justice Kennedy's concern was that both the majority- and minority-plurality opinions would expand CWA jurisdiction beyond permissible limits, *see Rapanos*, 547 U.S. at 776–77 (Kennedy, J., concurring in the judgment), thereby reinforcing Plaintiffs' position that the Federal Agencies are not properly relying on Justice Kennedy's "significant nexus" standard.

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ephemeral tributaries, innumerable ponds, prairie potholes, Texas coastal prairie wetlands, and ditches. The states will be required to certify that federal actions meet those standards under CWA Section 401, 33 U.S.C. § 1341. This will impose significant, immediate harms to the states and

95. The Final Rule exceeds the Federal Agencies' statutory authority and is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" because it confers jurisdiction to the Federal Agencies over lands and waters that fall outside of the law established by the Clean Water Act, as interpreted by *Riverside Bayview*, *SWANCC*, and *Rapanos*. *See* 5 U.S.C. § 706(2).

96.

100.

Amendment. *See SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("Among the rights and powers reserved to the States under the Tenth Amendment is the authority to its land and water resources."); *FERC v. Mississippi*, 456 U.S. 742, 768, n.30 (1982) ("regulation of land use is perhaps the quintessential state activity"); *see also* 33 U.S.C. § 1251(b).

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106. The courts traditionally expect a "clear and manifest" statement from Congress to

with, and in excess of, the EPA's and U.S. Army Corps of Engineers' statutory authority under the CWA;

(2) Adjudge and declare that the Final Rule is arbitrary, capricious, an abuse of discretion, and not in accordance with law;

(3) Adjudge and declare that the Final Rule violates the Constitution of the United States.

(4)