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STATE OF GEORGIA
EX REL. SAMUEL S. OLENS
in his official capacity as

STATE OF SOUTH CAROLINA
EX REL. ALAN WILSON
in his official capacity as
Attorney General of South Carolina
1000 Assembly Street, Room 519

Definition of “Waters of the United States,” 80 Fed

10. Accordingly, the States ask this Court to vacate the Final Rule, to enjoin the Agencies from enforcing the Rule, and for any other relief this Court deems proper.

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11. Plaintiffs, the States appearing by and through Samuel S. Olens, Attorney General of Georgia; Patrick Morrisey, Attorney General of West Virginia; Luther Strange, Attorney General of Alabama; Pamela Jo Bondi, Attorney General of Florida; Derek Schmidt, Attorney General of Kansas; Jack Conway, Attorney General of Kentucky; Alan Wilson, Attorney General of South Carolina; Sean D. Reyes, Attorney General of Utah; Brad D. Schimel, Attorney General of Wisconsin, are sovereign States that regulate land use management and water resources within their borders through duly enacted state laws administered by state officials and constituent agencies.

12. Defendant, Regina A. McCarthy is the Administrator of the United States Environmental Protection Agency. Defendant, United States Environmental Protection Agency ("EPA") is an agency of the United States within the meaning of the Administrative Procedure Act ("APA"). *ee* 5 U.S.C. § 551(1). The Administrator and EPA are charged with administering many provisions of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 ("Clean Water Act" or "CWA").

13. Defendant, Jo-Ellen Darcy is the Assistant Secretary of the Army. Defendant, United States Army Corps of Engineers ("the Corps") is an agency of the United States within the meaning of the Administrative Procedure Act. *ee* 5 U.S.C. § 551(1). The Secretary of the Army and the Corps are charged with administering many provisions of the Clean Water Act. 33 U.S.C. §§ 1251-1387.

14. The relief requested in this action is sought against: the Defendants; the Defendants' officers, employees, and agents; and all persons acting in cooperation with the Defendants or under the Defendants' supervision, direction, or control.

J I DIC I A D E E

15. This case arises under the APA, 5 U.S.C. §§ 701–706, and under the Constitution and laws of the United States.

16. This Court has federal question jurisdiction under 28 U.S.C. § 1331.

17. The Court may award declaratory and injunctive relief under the APA, 5 U.S.C. §§ 705–706, as well as 28 U.S.C. §§ 2201–2202 and Federal Rules of Civil Procedure 57 and 65.

18. Venue is proper under 28 U.S.C. § 1391(e)(1)(C) because plaintiff State of Georgia is located in this judicial district. *ee a so* 33 U.S.C. § 1321(n) (granting U.S. district courts with jurisdiction over claims arising under 33 ng under

Maximum Daily Loads ("TMDL"); (2) National Pollutant Discharge Elimination System ("NPDES"); and (3) state certification. 80 Fed. Reg. 37,055 (June 29, 2015).

22. *First*, States must establish Water Quality Standards ("WQS") or goals for each water body within the definition of "waters of the

26. "'The discharge of a pollutant' is defined broadly to include 'any addition of any pollutant to navigable waters from any point source,' and 'pollutant' is defined broadly to include not only traditional contaminants but also solids such as 'dredged spoil, . . . rock, sand, [and] cellar dirt.'" *Rapanos v nited tates*, 547 U.S. 715, 723 (2006) (plurality opinion) (citing 33 U.S.C. §§ 1362(12), 1362(6)).

27. Obtaining a discharge permit is an expensive and uncertain process, which can take years and cost tens and hundreds of thousands of dollars. *ee* 33 U.S.C. §§ 1342, 1344 (describing the discharge permitting process).

28. Discharging into the "waters of the United States" without a permit can subject an individual to civil penalties including fines up to $37,500 per violation, per day, and even criminal penalties. 33 U.S.C. §§ 1311, 1319, 1365; 74 Fed. Reg. 626–627 (Jan. 7, 2009).

29. *hird*, all Clean Water Act permit applicants, whether for pollutants or dredge and fill material, must obtain a statement from the State in which the discharge will occur, certifying that the discharge will comply with the State's Water Quality Standards. 33 U.S.C. § 1341(a)(1).

II. n t tat s upr Court cts w c In Last Y ars A nc s Ass rt ons Aut or ty v r Intrastat on av ab at rs.

30. For a century before the CWA, the Supreme Court interpreted the phrase "navigable waters of the United States" in the CWA's predecessor statute to refer to "navigable

expand their regulatory jurisdiction to include areas never before subject to federal permitting requirements. 40 Fed. Reg. 31,320 (July 25, 1975). Those 1975 regulations defined "the waters of the United States" to include navigable waters and their tributaries, as well as non-navigable intrastate waters that could affect interstate commerce. 40 Fed. Reg. 31,324–31,325 (July 25, 1975).

33. In 1986, the Corps sought to expand its jurisdiction under the CWA yet further, to include traditional navigable waters, tributaries of those waters, wetlands adjacent to these waters and tributaries, and waters used as habitat by migratory birds that either are protected by treaty or cross state lines. 51 Fed. Reg. 41,206–60 (Nov. 13, 1986).

34. In the last fifteen years, the Supreme Court has reviewed two aspects of the Agencies' definition of "waters of the United States." In both of those instances, the Court rejected the Agencies' assertion of authority over non-navigable, intrastate waters.

35. In

Congress, the Court concluded, did not intend to create such difficult constitutional questions, or assert the outer boundaries of constitutional authority. *Id*

37. In *Rapanos v nited tates*, 547 U.S. 715 (2006), the Supreme Court also rejected the Agencies' assertion of authority over non-navigable, intrastate waters that are not

III. E A An Corps ropos A u n n at rs o t n t tat s

43. On April 21, 2014, the Agencies published in the Federal Register a proposed rule entitled “Definition of ‘Waters of the United States’ Under the Clean Water Act” (Proposed Rule). 79 Fed. Reg. 22,188–22,274 (Apr. 21, 2014).

44. The Proposed Rule defined primary waters to include “all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce” as well as “[a]ll interstate waters, including interstate wetlands” and “the territorial seas.” 79 Fed. Reg. 22,188, 22,268–22,269 (Apr. 21, 2014).

45. The Proposed Rule then declared that all intrastate “tributaries” of primary waters or “tributaries” of impoundments of primary waters

49.

Attorneys General of Georgia, West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota and the Governors Of Iowa, Kansas, Mississippi, Nebraska, North Carolina, and South Carolina, to Regina McCarthy, Adm'r, U.S. Envtl. Prot. Agency & John McHugh, Sec'y, U.S. Dep't of the Army (Oct. 8, 2014).

57. “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, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means.” 40 C.F.R. § 230.3(s)(3)(vi).

58. The Rule’s definition of tributary sweeps within the Agencies’ authority ponds, ephemeral streams, and even channels that are usually dry. *ee* 40 C.F.R. § 230.3(s)(3)(iii)).

59. The Rule’s categorization of all tributaries of primary waters as “waters of the United States” violates the CWA, under both *Rapanos* tests.

60. The Rule’s coverage of all tributaries violates Justice Kennedy’s test because the Rule places tributaries within the Agencies’ regulatory authority without regard to a tributary’s actual impact on the ’-60.5943(b)-gu ’-6-90.x(m)-3.493(p)-0.956417(a)3.15795(c)3.15789(t)-2.53536( )-301.

"[a]ll interstate waters, including interstate wetlands" and "the territorial seas." 40 C.F.R. § 230.3(s)(1)(i)-(iii).

63. The Rule then declares that all intrastate waters "adjacent" to primary waters, impoundments, or tributaries are per se waters covered by the CWA and subject to EPA and the Corps' regulatory authority. 40 C.F.R. § 230.3(s)(1)(vi).

64. "Adjacent waters" are waters "bordering, contiguous or *neighboring*" primary waters, impoundments, or tributaries. 40 C.F.R. § 230.3(s)(3)(i) (emphasis added). The category includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." 40 C.F.R. § 230.3(s)(3)(i). It includes wetlands within or abutting the ordinary high water mark of an open water such as a pond or lake. 40 C.F.R. § 230.3(s)(3)(i).

65. The term "neighboring" includes "all waters [at least partially] located within 100 feet of the ordinary high water mark of a" primary water, impoundment, or tributary. 40 C.F.R. § 230.3(s)(3)(ii)(A). It also includes "waters located within the 100-year floodplain of a" primary water, impoundment, or tributary "and not more than 1,500 feet from the ordinary high water mark of such water." 40 C.F.R. § 230.3(s)(3)(ii)(B). "Neighboring" also includes "all waters [at least partially] located within 1,500 feet of the high tide line of a" primary water "and all waters within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes." 40 C.F.R. 3056417(789(N)0.62130415789(s)-1.7389(s)-1.7358(a)3.1512s)-1.7465( )

66. The Rule exempts “waters being used for established

connection" to primary waters, impoundments, or tributaries; and (4) the definition sweeps in waters within 1,500 feet of the high tide line of a primary waters, impoundments, or tributaries with no "*continuous* surface connection" to primary waters. *Rapanos*, 547 U.S. at 742 (emphasis added).

71. The Agencies' decision to exempt farmland from CWA jurisdiction based on "adjacency" alone and not also exempt farmland under CWA jurisdiction based on the definition of "tributaries" is arbitrary and capricious in violation of the Agencies' statutory duties under the Administrative Procedure Act. *ee* 5 U.S.C. § 706(2)(A). Farmland should be exempt under both categories.

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72. The Rule defines primary wuey toincet *Rati*-120.708( )250 *p*TJ 223 *r*:38latio midph (*y*)-653486 9 toe

"significant nexus" with "waters that are or were *navigab e* in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (emphasis added).

75. The Rule's coverage of such intrastate waters violates the plurality's approach because the plurality held that "a 'wate[r] of the United States'" must have some connection to "a relatively permanent body of water connected to traditional interstate *navigab e* waters." *Rapanos*, 547 U.S. at 742 (emphasis added). The plurality required a jurisdictional water to have some connection to a traditional interstate navigable water. *Id*

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76. The Rule defines primary waters to include "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce" as well as "[a]ll interstate waters, including interstate wetlands" and "the territorial seas." 40 C.F.R. § 230.3(s)(1)(i).

77. The Rule then permits the Agencies to exercise authority on a case-by-case basis over a water not covered by any other part of the Rule—*i e* , not already included in a per se category or specifically exempted—that, alone or in combination with other waters in these categories within the watershed that drains into the nearest primary water, are deemed to have a significant nexus to a primary water. 40 C.F.R. § 230.3(s)(1)(vii).

78. Specifically, the Rule includes within federal jurisdiction, on a case-by-case basis, "all waters [at least partially] located within the 117(r)-7.6919.03rrycar f

79.

Notably, the guidance document itself asserted jurisdiction that was beyond the Agencies' statutory and constitutional authority, and has been repeatedly subject to case-by-case challenge.

84. EPA concedes, as it must, that the Rule includes more waters than the Agencies' prior practice under the 2008 guidance. 80 Fed. Reg. 37,101 (June 29, 2015). The Agencies estimated the Proposed Rule would increase federal jurisdiction compared to prior practice by 2.7 percent. U.S. Evntl. Prot. Agency & U.S. Army Corps of Eng'rs, Economic Analysis of Proposed Revised Definition of Waters of the United States 12 (2014). The Agencies project a greater increase in federal jurisdiction under the Final Rule at 2.84 to 4.65 percent. 80 Fed. Reg. 37,101 (June 29, 2015).

85. The Rule reaches more broadly than the guidance in several ways. It includes as primary waters all intersta51(w)-9.39783(a)-169(r)2.36903((w)0.621915(a)3.147820t)-2.53536(e)-6.86125(r)2.3

33 U.S.C. § 1311(b)(1)(C), § 1313(e)(3)(A); 40 C.F.

f (last visited May 28, 2015). The States will receive additional federally-mandated NPDES permit applications for discharging pollutants into waters now federally regulated as a result of the Rule. 33 U.S.C. §§ 1311, 1342. The States will then be required to process these additional federally-mandated Clean Water Act permit applications.

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property." *Id*. § 71-1-1(3). The State has carried out this statutory duty diligently, by enacting numerous laws to protect the State's waters, both on public and on private lands. *ee genera y* Utah Code Ann. § 71-1-1 *et seq*.

97. The States' use and management of the waters and lands they own directly will now be subject to greater federal regulation under the Agencies' expanded jurisdiction under the Rule. If a water or moist land falls within the Agencies' jurisdiction, any discharges into that water or sometimes wet land will now require a discharge permit under federal standards. *ee* 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12).

98. Moreover, any Georgia, West Virginia, Alabama, Florida, Kansas, Kentucky, South Carolina, Utah, and Wisconsin laws that applied to previously non-covered waters may now be preempted by the CWA with respect to those waters.

99. The Rule's displacement of state authority over water or sometimes wet land

100. The States are squarely within the Clean Water Act's zone of interest, given that

106. Each of these aspects of the Rule violate both of the controlling tests announced by the Supreme Court in *Rapanos v nited tates*, 547 U.S. 715 (2006).

107. Moreover, the Rule asserts authority at the outer boundaries of Congress' authority in violation of the CWA. The Supreme Court has explained that courts will not

115. The Rule is thus "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

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116. The States incorporate by reference the allegations

131. The Proposed Rule defined “adjacent” based on the location of waters within the riparian area or floodplain, or a hydrologic connection with a primary water, impoundment, or tributary. 79 Fed. Reg. 22,269 (Apr. 21, 2014). In contrast, the Final Rule includes waters: (1) within 100 feet of a primary water, impoundment, or tributary; (2) within the 100-year floodplain and within 1,500 of the ordinary high water mark of a primary water, impoundment, or tributary; or (3) within 1,500 feet of the high tide line. 40 C.F.R. § 230.3(s)(3)(ii). The Proposed Rule did not give adequate notice to the public of the Rule’s inclusion of these waters within the Agencies’ jurisdiction.

132. The Proposed Rule included all waters on a case-by-case basis that are determined to have a significant nexus to a primary water. 79 Fed. Reg. 22,188, 22,269 (Apr. 21, 2014). In contrast, the Final Rule includes waters within the 100-year floodplain of a primary water; within 4,000 feet of the high tide line or ordinary high water mark of a primary water, impoundment, or tributary; or within water type categories that have a significant nexus to a primary water. 40 C.F.R. § 230.3(s)(1)(viii). The Final Rule’s case-by-case category is also not a logical outgrowth of the Proposed Rule.

133. The Final Rule also exempts waters on farmland from the per se jurisdictional “adjacent waters” category and not from the per se jurisdictional “tributaries” category. *ee* 40 C.F.R. §§ 230.3(s)(3)(i), (iii). The Rule does not satisfy the logical outgrowth test because the Proposed Rule gave no indication that the Agencies were considering treating farmland differently as between the “adjacent waters” category and the “tributaries” category.

134. The Final Rule asserts that the Agencies will use remote sensing information and historical datr d Agei al ni“adda8515789(td)-0.addhatingthr36903(3)-0.956417(-2.515789(df)2.3678(a)3493(l)-

NPDES permitting program and issue additional state certifications for all federal permits.

Respectfully Submitted,

<u>s Ja s D. Coots</u>

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