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Chairman Barrasso, Ranking Member Carper, and Members of this Committee, I am grateful for the opportunity to appear before you today. My name is Misha Tseytlin and I proudly serve as Solicitor General for the State of Wisconsin. My State—led by Attorney General Brad D. Schimel—has played an important role in the multistate coalition litigating against the illegal WOTUS Rule, 80 Fed. Reg. 37,054 (June 29, 2015). Our 30-state coalition is broad and geographically diverse, comprising States from Wyoming to West Virginia; from Ohio to Oklahoma; from Alabama to Alaska; from Georgia to New Mexico.

The reason for the breadth of this coalition—to my knowledge the largest such coalition of States challenging any regulation issued by the prior Administration—is that the WOTUS Rule is a deeply intrusive assault upon traditional state authority. Under both the United States Constitution and the Clean Water Act, States have the lead role in regulating most waters and lands within their borders. The Clean Water Act states this explicitly, explaining that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). The Federal Government, in contrast, has only limited authority to protect the Nation's "navigable waters," defined as the "waters of the United States." 33 U.S.C. §§ 1362(7), 1362(12). The WOTUS Rule is a breathtaking assertion of federal

regulatory authority over local waters, which are rightfully subject to state, not federal, regulation. The Rule claims federal power over stream beds that are dry most of the year, water features connected to navigable waters only once every 100 years, and much more. Simply put, the Rule is overbroad and unlawful. This Rule was adopted without meaningfully consulting the States about their own water-protective programs. Such consultation would have revealed that States already protect these features, making federal intrusion entirely unnecessary.

Given the illegality of the WOTUS Rule, it is unsurprising how poorly it has fared in court. On October 9, 2015, our broad coalition of States secured a nationwide stay of the WOTUS Rule from the United States Court of Appeals for the Sixth Circuit. As the Sixth Circuit explained, the States demonstrated that they have a "substantial possibility of success on the merits" in their arguments that the WOTUS Rule violates the Clean Water Act and the Administrative Procedure Act ("APA"). *See In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015). The United States District Court for the District of North Dakota reached the same conclusion and thus issued a preliminary injunction blocking the WOTUS Rule. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). Our coalition was extremely pleased that the new Administration heeded the message of the federal courts and has moved forward with rescinding the WOTUS Rule. *See* 82 Fed. Reg. 12,532 (Mar. 6, 2017).

The work that this Committee is doing here today provides an extremely valuable public service. Given the current Administration's laudable and swift movement toward repealing the WOTUS Rule, the federal courts are unlikely to have

an opportunity to declare finally what the Sixth Circuit and the District of North Dakota concluded preliminarily: the Rule is unlawful. This hearing is therefore vital to establish for the public what the States were already well on their way to proving in court. My testimony today provides only a high-level overview of the Rule's illegality under the APA and the Clean Water Act. For a more complete discussion of the Rule's legal shortfalls—including its constitutional infirmities—please see Attachment 1 to this testimony, which is the State Petitioners' comprehensive opening brief before the Sixth Circuit.

OVERVIEW OF THE WOTUS RULE

Under the Clean Water Act, "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). Federal authority under the Act is therefore limited to "navigable waters," *id.* § 1362(12), defined as "waters of the United States, including the territorial seas," *id.* § 1362(7). Inclusion of a water within federal jurisdiction has significant consequences for farmers, landowners, and small businesses because of, among other things, the imposition of substantial permitting requirements under the Section 402 National Pollutant Discharge Elimination System ("NPDES") program, *id.* § 1342, and under Section 404 for the discharge of dredged or fill material, *id.* § 1344. The Supreme Court has twice invalidated regulatory efforts to unduly expand the jurisdictional reach of the Clean Water Act under a definition of the "waters of the United States." *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"); *Rapanos v. United States*, 547 U.S. 715 (2006).

The WOTUS Rule, issued by the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps"), is yet another federal effort to expand the scope of the Clean Water Act's jurisdiction beyond what Congress authorized. The Rule starts with primary waters, which it defines as waters "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," as well as "all interstate waters, including interstate wetlands" and "territorial seas." 33 C.F.R. § 328.3(a)(1)–(3).[1]

The Rule then claims *per se* federal jurisdiction over an extremely broad swath of local waters and sometimes moist lands. The Rule declares that all "tributaries," 33 C.F.R. § 328.3(a)(5), of primary waters are always within federal jurisdiction. The Rule defines a "tributar[y]" as any "water that contributes flow, either directly or through another water," to a primary water and that is "characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark." *Id.* § 328.3(c)(3). This covers even dry channels that provide "intermittent or ephemeral" flow through "any number" of links. 80 Fed. Reg. at 37,076. The Rule also asserts *per se* jurisdiction over all non-farmland waters "adjacent" to primary waters and their tributaries, 33 C.F.R. §§ 328.3(a)(6), (c)(1), including all waters "bordering, contiguous, or neighboring" primary waters, impoundments, or tributaries, *see id.* § 328.3(c)(1). The Rule defines "neighboring" as (1) "all waters" any part of which are

[1] The Rule's definition of "waters of the United States" is located in multiple parts of the Code of Federal Regulations. In my testimony, I cite to 33 C.F.R. Part 328.

within 100 feet of the ordinary high water mark of a primary water or "tributary"; (2) "all waters" any part of which are within 1,500 feet of the ordinary high water mark of a primary water or "tributary" and within its 100-year floodplain; and (3) all waters any part of which are within 1,500 feet of the high-tide line of a primary water. *Id.* § 328.3(c)(2). So, for example, the Rule sweeps in any local waters connected to navigable waters only after a once-in-a-century rainstorm.

Finally, the Rule permits even further assertions of federal jurisdiction on a case-by-case basis. Waters eligible on a case-by-case basis include "waters [at least partially] located within the 100-year floodplain" of a primary water and "waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark" of a primary water, impoundment, or tributary. *Id.* § 328.3(a)(8). Case-by-case waters are included within federal authority if such waters, "either alone or in combination with other similarly situated waters in the region, significantly affect[ ] the chemical, physical, *or* biological integrity of a [primary water]" based on "any single function or combination of functions performed by the water." *Id.* § 328.3(c)(5) (emphasis added). Under this vague multifactor approach to case-by-case waters, there is very little local water in this country that States, farmers, homeowners, and small businesses can be sure is safe from federal intrusion.

THE WOTUS RULE IS ILLEGAL IN NUMEROUS RESPECTS

I. The WOTUS Rule Violates The Administrative Procedure Act

The APA is this country's charter for agency rulemaking, providing both mandatory procedures for creating rules and substantive provisions for adjudicating

rules' legality. The APA's substantive and procedural components are inextricably linked. Under the APA's substantive requirements, a rule is unlawful if it is not supported by the administrative record. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41–42 (1983). Under the APA's procedural components, an agency must build that record by submitting the rule to notice and comment so that the public can provide its input and evidence. *See* 5 U.S.C. § 553(b). A critical aspect of this rulemaking process is that the agency may not adopt a final rule that is not a "logical outgrowth" of the proposed rule. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The rationale for this is that if the final rule is too different from the proposed rule, the final rule would not have been subjected to the mandatory rigors of public notice and comment.

The WOTUS Rule demonstrates what happens when agencies refuse to follow the APA's rulemaking process. As discussed below, five of the Rule's central components are arbitrary, having no support in the administrative record. That is a direct result of the broken rulemaking process leading to the enactment of the WOTUS Rule, where EPA shaped the rule around these five components behind closed doors, while rejecting the Corps' calls for public input.

A. Five Of The WOTUS Rule's Central Components Are Arbitrary And Have No Support In The Record

Under basic principles of administrative rulemaking, a rule is unlawful if it is unsupported by the evidence in the rulemaking record. *See State Farm*, 463 U.S. at 41–42. An agency cannot make up for a lack of record evidence with "conclusory statements." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014)

(citation omitted). EPA built the WOTUS Rule around five distance-based components, but those components have no support in the administrative record.

The WOTUS Rule's first three illegal components deal with its adjacency definition. The Rule declares that all "adjacent" non-farmland waters are always within federal jurisdiction, and then, as relevant here, defines adjacency through three concepts: (1) waters within 100 feet of a primary water, impoundment, or "tributary"; (2) waters within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or "tributary"; and (3) waters within 1,500 feet of the high-tide line of a primary water. 33 C.F.R. § 328.3(c)(2). There is no support in the record for these three concepts. To take just one example, nothing in the record supports the Rule's conclusion that every non-farmland water in this country that is connected to a primary water, impoundment, or tributary *once every hundred years*, and is within 1,500 feet of such a feature, is always subject to federal jurisdiction. As the Corps explained to EPA during the rulemaking process, the Rule's approach is "not supported by science or law." Memorandum from Lance Wood, Assistant Chief Counsel for Regulatory Affairs, U.S. Army Corps of Eng'rs, to Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Eng'rs, Legal Analysis of Draft Final Rule on Definition of "Waters of the United States" (Wood Memo), at 5 (April 24, 2015).[2] Put more simply, the inclusion of all three of these

[2] https://www.epw.senate.gov/public/_cache/files/94d5f9d0-2a56-47ee-aa44-4dcf7c9f6a94/07.17.15-army-corps-darcy-with-7-attachments-responses-to-07.16.15.pdf.

central adjacency features was an arbitrary decision, based merely on "conclusory statements," and was thus illegal under the APA. *Amerijet*, 753 F.3d at 1350.

The Rule's next two arbitrary components deal with its case-by-case waters category. The Rule provides that such waters include (1) those within the 100-year floodplain of a primary water, and (2) those within 4,000 feet of a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8). Again, there was no support for these components in the administrative record. As the Corps explained to EPA, there is "no basis in science or law" for these "arbitrary" components. *See* Wood Memo at 2. Even though the prior Administration filed a 245-page brief seeking to defend the Rule before the Sixth Circuit, it did not cite any record evidence to support the specific distances it selected either here, or as part of the adjacency definition. *See* Brief For Respondents, 2017 WL 372073 (6th Cir. Jan. 13, 2017). The reason for that glaring deficiency is obvious: no such record evidence exists.

B. The WOTUS Rule's Five Arbitrary Central Components Are The Direct Result Of EPA's Decision To Violate The APA's Rulemaking Process

The illegality of the WOTUS Rule is not mere happenstance; rather, it is the direct result of EPA's unprecedented decision to shut the public out of the rulemaking process, in plain violation of the APA's notice-and-comment requirement.

To understand the broken process that led to the WOTUS Rule, a little background is helpful. The proposed version of the WOTUS Rule, published on April 21, 2014, 79 Fed. Reg. 22,188 (Apr. 21, 2014), took an unbounded view of federal jurisdiction, such that there were no meaningful limitations on either the adjacency

or case-by-case waters categories. In light of the Supreme Court's decisions in *SWANCC* and *Rapanos*, this proposed approach was obviously illegal and could never become the law of the land. *Id.* at 22,269. In attempting to address the problem, EPA decided that the APA's mandatory rulemaking procedures were too cumbersome and took an unprecedented shortcut. Internal memoranda, available on this Committee's website, strongly suggest what occurred: EPA decided—contrary to the plain requirements of the APA and the Corps' advice—to rewrite the WOTUS Rule around the five central components discussed above, without obtaining any public input on whether these components were reasonable and lawful.

This behind-closed-doors approach violated the APA's bedrock rulemaking requirements. The APA mandates that a rule that an agency adopts must be made available for public notice and comment. 5 U.S.C. § 553(b). This process is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *See Int'l Union, UMWA v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). An agency satisfies this obligation only when the final rule is sufficiently grounded in the proposed rule, such that the final rule can fairly be said to be a "logical outgrowth" of the proposal. *Long Island*, 551 U.S. at 174. That means the agency must select its final rule only from a "range of alternatives being considered" that it informed the public about. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

In adopting the final WOTUS Rule's five distance-based components discussed above, EPA violated this notice-and-comment requirement. Specifically, the proposed rule defined adjacency without any distance-based elements whatsoever. In the final WOTUS Rule, however, adjacency was defined as (1) waters within 100 feet of a primary water, impoundment, or "tributary"; (2) waters within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or "tributary"; and (3) waters within 1,500 feet of the high-tide line of a primary water. 33 C.F.R. § 328.3(c)(2). Similarly, with regard to case-by-case waters, the proposed rule included a boundless approach, while the final Rule considered only (1) waters within the 100-year floodplain of a primary water, and (2) waters within 4,000 feet of a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8). *There was no suggestion in the proposed rule that any of these five distance-based components were being considered as the way to fix the obvious illegality of the proposal.* The Corps urged EPA to let the public know what it was up to, in order to get public input, but EPA declined to do so. *See* Wood Memo at 4 ("the public did not have the opportunity . . . to comment on [important aspects of the WOTUS Rule] during the public comment period and thus the addition of this limitation likely violates the" APA).

The result of EPA's decision to skirt the law was predictable: even though there were over one million comments submitted on the proposed rule, the prior Administration's 245-page brief before the Sixth Circuit was not able to identify even a single comment discussing the merits or demerits of these five components. As the Sixth Circuit explained in staying the Rule, EPA "failed to identify anything in the

record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered." *In re EPA*, 803 F.3d at 807. The District of North Dakota reached the same conclusion. *See North Dakota*, 127 F. Supp. 3d at 1058.

As the Petitioner States explained to the Sixth Circuit, EPA's decision to cut the public out of the process of evaluating the five distance-based components is "one of the most significant procedural failures in the history of the Administrative Procedure Act." *See* Opening Brief of State Petitioners, 2016 WL 6566251, at *4 (6th Cir. Nov. 1, 2016) (Attachment 1). In prior cases, courts have invalidated agency rules even for failure to get public input on narrow issues, such as the definition of a "small refinery," *Small Refiner*, 705 F.2d at 549, or whether the listing of wastes would play a "supplementary" or "heavy" role in an analysis, *Shell Oil Co. v. EPA*, 950 F.2d 741, 751–52 (D.C. Cir. 1991). The procedural defect in this case was far more serious. EPA decided it could change the meaning of the entire Clean Water Act—an Act that significantly impacts States, farmers, homeowners, and small businesses throughout the country—without even letting the public know that it was considering its five distance-based components. Had EPA taken the lawful approach that the APA requires, and that the Corps urged, the States would have been eager to provide EPA with detailed maps, comments, and data, explaining why the components in the WOTUS Rule were overbroad. EPA's decision to cut the public out of the rulemaking process predictable led to situation where the final Rule that it adopted is entirely arbitrary.

II. The WOTUS Rule Violates The Clean Water Act

The WOTUS Rule is illegal for another reason: it asserts federal authority far beyond what Congress has authorized under the Clean Water Act.

Two Supreme Court decisions are relevant to understanding the WOTUS Rule's violation of the Clean Water Act. First, in *SWANCC*, the Court held that the Corps could not sweep waters into federal jurisdiction simply because those waters "are or would be used as habitat" by migratory birds. 531 U.S. at 164. Second, in *Rapanos*, the Supreme Court held that the Corps had improperly asserted authority over intrastate wetlands that were not substantially connected to navigable-in-fact waters. The Court majority in *Rapanos* included an opinion written by Justice Scalia for four Justices and a separate opinion written by Justice Kennedy. Justice Scalia concluded that the Clean Water Act extends "to only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)), and "wetlands with a continuous surface connection to" those waters, *id.* at 742. Justice Kennedy, for his part, concluded that the Act extends only to navigable-in-fact waters and waters having a "significant nexus" to navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment). Justice Kennedy explained that federal jurisdiction does not extend to all "wetlands (however remote)" or all "continuously flowing stream[s] (however small)." *Id.* at 776.

The WOTUS Rule violates *SWANCC* and *Rapanos* in numerous respects.

A. *Per Se* Jurisdiction Over All Tributaries. The WOTUS Rule's conclusion that all "tributaries" are *per se* within federal jurisdiction violates *Rapanos*. The Rule defines "tributaries" as any features with "a bed and banks and an ordinary high water mark" that "contributes" any amount of "flow," "either directly or through another water," to a primary water. 33 C.F.R. § 328.3(c)(3). This includes "perennial, intermittent, [and] ephemeral" streams with "flowing water only in response to precipitation events in a typical year." 80 Fed. Reg. at 37,076. The Rule's inclusion of intermittent and ephemeral streams violates Justice Scalia's approach, given that Justice Scalia explained that "channels containing merely intermittent or ephemeral flow" fall outside of federal jurisdiction. 547 U.S. at 733 (Scalia, J., plurality). It also violates Justice Kennedy's approach. Justice Kennedy criticized the Corps' prior reliance on the concept of ordinary high water mark to establish federal jurisdiction, explaining that relying upon this measure could impermissibly sweep in "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id.* at 781 (Kennedy, J., concurring in the judgment). As the District of North Dakota explained, "the breadth of the definition of a tributary set forth in the Rule . . . is precisely the concern Justice Kennedy had in *Rapanos*." *North Dakota*, 127 F. Supp. 3d at 1056.

B. *Per Se* Jurisdiction Over All "Adjacent" Waters. The WOTUS Rule's coverage over all non-farmland adjacent waters—including waters near tributaries or near navigable-in-fact waters only during once-in-a-century floods—similarly violates *Rapanos*. *See* 33 C.F.R. § 328.3(c)(2). The Rule's adjacency approach is

contrary to Justice Scalia's opinion in *Rapanos*, which requires a federal jurisdictional water to be connected through a "relatively permanent, standing or flowing bod[y] of water." *See Rapanos*, 547 U.S. at 732 (Scalia, J., plurality). The Rule's adjacency category just as plainly violates Justice Kennedy's test. Justice Kennedy explained that the Corps' prior "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 782 (Kennedy, J., concurring in the judgment). The Rule adopts precisely the approach that Justice Kennedy held was "prelude[d]," sweeping into federal jurisdiction any water near the 100-year flood plain of a tributary. 33 C.F.R. § 328.3(a)(8). More generally, the Rule's approach to adjacency—covering waters based upon a hydrological connection once a century—is contrary to Justice Kennedy's explanation that "[a] mere hydrologic connection should not suffice in all cases." *Id*. at 784–85.

C. Expansive Approach To Case-By-Case Waters. Under the Rule, a water that is (1) "located within the 100-year floodplain" of a primary water or (2) "located within 4,000 feet of the high-tide line or ordinary high water mark" of a primary water, impoundment or tributary, falls under federal jurisdiction if the water has a "significant nexus" to a primary water. 33 C.F.R. § 328.3(a)(8). The way that the Rule defines "significant nexus" is unlawful. The Rule findings significance by looking at the "chemical, physical, or biological" impact of an isolated water on

primary waters, "either alone or in combination with other similarly situated waters in the region." 33 C.F.R. § 328.3(c)(5). This includes concepts such as "[c]ontribution of flow," "[e]xport of organic matter," "[e]xport of food resources," and "[p]rovision of life cycle dependent aquatic habitat" for "species located in" primary waters, such as "[p]lants and invertebrates" "'hitchhiking'" on waterfowl. *Id.* §§ 328.3(c)(5)(vi)–(ix); Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence ("Connectivity Study"), 5-5, EPA-HQ-OW-2011-0880-20859.

This approach violates Supreme Court precedent in numerous respects. Most obviously, the Court's decision in *SWANCC* held that the Corps could not base federal jurisdiction on migratory birds regularly landing in a particular intrastate water. *SWANCC*, 531 U.S. at 164. The WOTUS Rule would sweep in these exact waters because "[p]lants and invertebrates" "'hitchhik[e]'" on migratory birds. Connectivity Study at 5-5. And that is just the tip of the iceberg. Under the WOTUS Rule, EPA would no longer need to adopt the sort of issue-specific rules that the Supreme Court invalidated in *SWANCC*. Had the Rule gone into effect, EPA would have been able to assert jurisdiction over almost any water it wanted by relying upon any number of the virtually limitless concepts that it embedded in its case-by-case waters category.

CONCLUSION

Thank you for giving me the opportunity to testify before this Committee today. I look forward to answering any questions you may have.