No. 15-3751 (and related cases: 15-3799, 15-3817, 15-3822, 15-3823, 15-3831, 15-3837, 15-3839, 15-3850, 15-3853, 15-3858, 15-3885, 15-3887, 15-3948, 15-4159, 15-4162, 15-4188, 15-4211, 15-4234, 15-4305, 15-4404)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: ENVIRONMENTAL PROTECTION AGENCY
AND DEPARTMENT OF DEFENSE,
FINAL RULE: CLEAN WATER RULE:
DEFINITION OF "WATERS OF THE UNITED STATES"
80 Fed. Reg. 37,054, Published on June 29, 2015

On Petitions for Review of a Final Rule of
the U.S. Environmental Protection Agency and
the United States Army Corps of Engineers

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF THE BUSINESS AND MUNICIPAL PETITIONERS AND THE STATE PETITIONERS, URGING THAT THE RULE BE VACATED

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November 8, 2016

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Washington Legal Foundation states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company.

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INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation ("WLF") is a public-interest law firm and policy center headquartered in Washington, DC, with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has frequently appeared in this and other federal courts to ensure that administrative agencies adhere to the rule of law. *See, e.g.*, *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016). In particular, WLF on a number of occasions has sought invalidation of federal rules because the promulgating agency failed to comply with the notice-and-comment requirements of the Administrative Procedure Act (APA). *See, e.g., Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles concerning the procedural requirements with which federal agencies must comply when adopting regulations. *See*, *e.g.*, Lawrence S. Ebner, *DC Circuit Shuts Down Another Federal Regulatory "Switcheroo,"* WLF Legal Opinion Letter (May 23, 2014).

The APA requires federal agencies, before adopting substantive regulations,

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[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. WLF believes that all parties have consented to the filing of this brief.

to provide notice sufficient to alert interested parties regarding the regulations to be adopted and permit them a meaningful opportunity to participate in the rulemaking. 5 U.S.C. § 553(b) & (c). WLF is concerned that numerous interested stakeholders did not receive adequate advance notice regarding how the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (collectively, the "Agencies") would ultimately define the term "waters of the United States." As a result, WLF believes, these stakeholders were denied a meaningful opportunity to participate in the rulemaking process that culminated in the Agencies' adoption of the Final Rule in June 2015. WLF is also concerned that the Agencies failed to adequately explain their rationales for several critical provisions included in the Final Rule. In WLF's view, that failure constitutes arbitrary and capricious rulemaking, in violation of the APA.

WLF fully concurs with other arguments raised by the Business and Municipal Petitioners and the State Petitioners, including that the Rule is inconsistent with the language of the Clean Water Act (CWA) and that it violates the Constitution's Commerce Clause and principles of federalism. WLF does not, however, address those issues separately in this brief.

STATEMENT OF THE CASE

The facts of these consolidated petitions are set out in detail in the briefs of the Business and Municipal Petitioners and the State Petitioners. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

The CWA prohibits the discharge of any pollutant into "navigable waters" from a point source, except as authorized under the Act. 33 U.S.C. § 1311(a). It defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). As the federal agencies charged with administering the CWA, EPA and the U.S. Army Corps of Engineers have struggled for decades to arrive at an acceptable definition of "waters of the United States."[2] These petitions are challenges to the Agencies' latest effort to do so.

On April 21, 2014, the Agencies published in the Federal Register their Proposed Rule to define "waters of the United States" ("WOTUS"). 79 Fed. Reg. 22,187-22,274 (Apr. 21, 2014). The Agencies stated that their goal was not to expand the scope of their regulatory authority; rather, they sought "to promulgate a rule that is clear and understandable and protects the nation's waters, supported by

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[2] A principal point of contention throughout these struggles has been the proper balance between federal and state regulation. The CWA is not, of course, the sole font of government regulation of water resources. Throughout our Nation's history, state governments have played a preeminent role in managing and conserving those resources. The Final Rule and similar efforts to expand the scope of federal regulation of water resources by definition serve, if upheld by the courts, to revise the federal-state balance by reducing the States' role.

science and consistent with the law." *Id.* at 22,198.

The Agencies explained that the Proposed Rule divided "waters" into eight defined categories to assist in determining when waters qualified as WOTUS. The Agencies declared that the first six categories were "jurisdictional" waters; that is, waters that the Agencies would deem always to fall within the definition of WOTUS.[3] Whether a seventh category ("other waters, including wetlands" determined to have a "significant nexus" to any one of the first three categories) would fall within the definition was to be determined "on a case-specific basis." *Id.* at 22,193. An eighth category included "specified waters and features" (such as waste-treatment systems) that were always to be excluded from the definition, even if they would otherwise satisfy the regulatory requirements for any of the first six categories. *Ibid*.

The Proposed Rule repeatedly stressed that whether waters qualified as "adjacent waters" (for purposes of the sixth category), and whether waters would

[3] Those six categories were: (1) all waters which are currently used, were used in the past, or may be susceptible to use in interstate commerce, including all waters which are subject to the ebb and flow of the tide; (2) all interstate waters, including interstate wetlands; (3) the territorial seas; (4) all impoundments of a traditional navigable water, interstate water, the territorial seas, or a tributary; (5) all tributaries of a traditional navigable water, the territorial seas, or impoundment; and (6) all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment, or tributary. *Id.* at 22,193. Among those six categories, the fifth and sixth ("tributaries" and "adjacent" waters) are the principal focus of Petitioners' challenges.

be determined under the seventh category to have the requisite "significant nexus," would be determined on the basis of the best scientific evidence. At no point did the Proposed Rule state that those determinations would hinge on distance-based criteria (*e.g.*, that a feature would be deemed "adjacent" to one of the first five categories of "jurisdictional" waters if it were located within a specified number of feet of such waters). Nor, apparently, did those commenting on the Proposed Rule understand it as stating that the Agencies were contemplating adoption of distance criteria: of the more than one million comments filed, virtually none addressed whether the Final Rule should include distance criteria.

On June 29, 2015, the Agencies published their Final Rule in the Federal Register. 80 Fed. Reg. 37,054-37,127. Unlike the Proposed Rule, the Final Rule included a substantial number of specific distance criteria (described in more detail *infra*) that are to be used by the Agencies in making "adjacent waters" and "significant nexus" determinations. The Agencies stated that it adopted these distance criteria in defining "adjacent waters" because "based on the agencies' expertise and experience implementing the CWA and in light of the science," the distance criteria established a "reasonable and practical boundary within which to conclude the waters significantly affected the integrity" of other jurisdictional waters. *Id.* at 37,085. The Agencies provided a nearly identical explanation for establishing distance criteria in defining what constitutes a "significant nexus" with jurisdictional waters. *Id.* at 37,088-90.

Numerous commenters objected to the Proposed Rule's very broad definition of "tributary" and to the Agencies' proposal that such "tributaries" should be categorized as "WOTUS" under all circumstances. In particular, many commentators asserted that the definition inappropriately included significant amounts of totally dry land in the arid Southwest. The Final Rule retained the broad definition of "tributary" yet did not respond to the scientific evidence submitted by commenters who objected to the broad definition.

SUMMARY OF ARGUMENT

The APA requires that a federal agency, before adopting substantive regulations of the sort at issue here, provide notice sufficient to alert interested parties regarding the regulations to be adopted. 5 U.S.C. § 553(b). A principal purpose of the notice requirement is "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." *Int'l Union, UMW v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). The Agencies failed to provide the requisite notice in this instance. They added to the Final Rule numerous distance criteria—to be used in determining whether land is subject to federal regulation under the CWA—that were neither included nor even hinted at in the Proposed Rule. The result was that affected parties were denied an opportunity to comment on those distance criteria and to introduce evidence that those criteria lacked both scientific and statutory support. Accordingly, the Final Rule should be vacated and the Agencies should be directed on remand to provide interested parties an opportunity to comment on the distance criteria set forth in the Final Rule.

Agencies are entitled, of course, to make *some* changes to proposed rules without re-opening the comment period. Indeed, if changes were not permitted, there would be no point in authorizing affected parties to file comments suggesting changes. But the APA notice requirement limits changes by mandating that any final rule adopted by an agency must be "a logical outgrowth of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

The Final Rule issued by the Agencies does not satisfy the "logical outgrowth" standard. In general, a changed final rule qualifies as a "logical outgrowth" of the proposed rule if and only if interested parties should have anticipated that the changes were a realistic possibility and thus "should have filed their comments on the [new provisions] during the notice-and-comment period." *Int'l Union*, 407 F.3d at 1259. Nothing in the Proposed Rule would have tipped off a reasonable observer that the Agencies might ultimately adopt a Final Rule that substituted arbitrary distance criteria (when determining whether features constitute "adjacent waters" or have a "significant nexus" to jurisdictional waters) for the science-based criteria promised in the Proposed Rule. That none or virtually none of the million-plus comments discussed the pros or cons of distance criteria is a strong indication that commenters were not adequately alerted to the possibility of the change and thus that a Final Rule containing distance criteria cannot qualify as a "logical outgrowth" of the Proposed Rule.

Petitioners have demonstrated that they were prejudiced by inclusion in the Final Rule of significant provisions not included in the Proposed Rule. They were thereby deprived of an opportunity to persuade the Agencies of the inappropriateness of relying on the distance criteria. They were also deprived of the opportunity to include evidence in the administrative record demonstrating inappropriateness; if they had been granted that opportunity and the Agencies nonetheless adopted a final rule that incorporated the distance criteria, the expanded record could then have been used to bolster a judicial challenge. Reviewing courts routinely conclude that affected parties are prejudiced (and thus are entitled to relief) when a federal agency violates the APA by failing to provide adequate advance notice of a final rule.

The Final Rule also fails to satisfy basic precepts of reasoned decision-making under the APA, 5 U.S.C. § 706. The Agencies adopted distance criteria despite an absence of any scientific evidence supporting that approach. Indeed, EPA's Scientific Advisory Board (SAB) advised against that approach, cautioning EPA that "adjacent waters and wetlands should not be defined solely on the basis of geographical proximity to jurisdictional waters." 80 Fed. Reg. at 37,064. "One basic procedural requirement of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). When, as here, an "agency has failed to provide even a minimal level of analysis" in support of its decision, its action is "arbitrary and capricious," in violation of the APA. *Ibid* (citing 5 U.S.C. § 706(2)(A)). The Agencies' vague assurances that unspecified agency "experience" justifies adoption of the distance criteria do not constitute reasoned decision-making.

The Agencies also acted arbitrarily and capriciously in adhering to their broad definition of "tributary" without providing any sort of response to commenters' substantial evidence that the definition lacked scientific support. In particular, a number of commenters submitted substantial scientific evidence that the Agencies' definition of "tributaries" would inappropriately include significant amounts of totally dry land in the arid Southwest. The Final Rule either totally ignored or summarily dismissed those comments. The Supreme Court has made clear that dismissing substantive comments in this manner violates the APA: "An agency must consider and respond to significant comments received during the period for public comment." *Perez*, 135 S. Ct. at 1203 (citing 5 U.S.C. § 553 and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

The Agencies' multiple violations of the APA require, at a minimum, that the Court vacate the Final Rule and remand with directions that any new rule be adopted in compliance with APA procedures.

ARGUMENT

I. THE AGENCIES FAILED TO COMPLY WITH THE APA'S NOTICE REQUIREMENT

A federal agency may not adopt a substantive regulation without first providing interested parties with notice of the regulation, 5 U.S.C. § 553(b), and a meaningful opportunity to "participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c).

Federal appeals courts have concluded that the APA's notice-and-comment requirements are intended to achieve three distinct purposes:

> (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.

Miami-Dade County v. EPA, 529 F.3d 1049, 1058 (11th Cir. 2008); *Council Tree Communications, Inc. v. FCC*, 619 F.3d 235, 250 (3d Cir. 2010); *Int'l Union*, 407 F.3d at 1259; *accord*, *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 680 (6th Cir. 2005) ("the primary purpose of Congress in imposing notice and comment requirements for rulemaking [is] to get the wisest rules.").

Those purposes are undercut when an agency's final rule deviates substantially from its proposed rule. The final rule will not be "tested via exposure to diverse public comment" if the final rule was not fairly encompassed within the proposed rule on which the public commented. "Fairness to affected parties" cannot be assured if the proposed rule did not provide those parties with fair warning regarding the provisions of the final rule. Finally, affected parties will not have an "opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review" if they object to provisions in the final rule that the proposed rule did not include.

A. The Final Rule Included Distance Criteria that Were Not Included in the Proposed Rule

It is not open to serious question that the Final Rule adopted by the Agencies in 2015 differed substantially from the Proposed Rule that they issued in 2014. In particular, the Agencies for the first time in the Final Rule adopted a number of distance criteria that play a crucial role in determining whether features will be deemed "waters of the United States" and thus subject to the Agencies' CWA jurisdiction.

The Final Rule utilizes three distance criteria to determine when features qualify as "adjacent waters" and thereby are automatically categorized as "waters of the United States." None of those criteria were included in the Proposed Rule. The Proposed Rule stated that "adjacent" waters are features "bordering, contiguous, or neighboring" any of the other five categories of jurisdictional waters. 79 Fed. Reg. at 22,269. "Neighboring" waters were, in turn, defined as those "located in the riparian area or floodplain" of jurisdictional waters or having "a hydrologic connection" to one. *Ibid*.

The Final Rule changed the definition of "neighboring" by adding three distance criteria, thereby expanding the definition of "adjacent waters" to cover numerous features not included within that term under the Proposed Rule. Under the new definition, "neighboring" waters now include features any part of which are located:

> (1) within 100 feet of the ordinary high water mark (OHWM) of any of the first five categories of jurisdictional waters;
>
> (2) within the 100-year floodplain of any of the first five categories of jurisdictional waters, and not more than 1,500 feet from the OHWM of such waters; or
>
> (3) within 1,500 feet of the high tide line of any of the first three

> categories of jurisdictional waters or within 1,500 feet of the OHWM of the Great Lakes.

33 C.F.R. § 328.3(c)(2).

The Final Rule also added two distance criteria for use in determining whether features have a "significant nexus" to jurisdictional waters—and thus are eligible for categorization as "waters of the United States" on a case-by-case basis. The Proposed Rule concluded that a feature could be determined to possess the requisite "significant nexus" without regard to its geographical location. 79 Fed. Reg. at 22,269 (stating that "significant nexus" means that water or wetlands "significantly affects the chemical, physical, or biological integrity" of any of the first three categories of jurisdictional waters).

The Final Rule for the first time introduced specific distance criteria into the definition of "significant nexus." The Final Rule provides that features are eligible for categorization as "waters of the United States" on a case-by-case basis, even if they do not fit within any of the six categories of jurisdictional waters, if:

> (1) they are located within the 100-year floodplain of any of the first three categories of jurisdictional waters; or
>
> (2) they are located within 4,000 feet of the high tide line or OHWM of any of the first five categories of jurisdictional waters.

33 C.F.R. § 328.3(a)(8). The Final Rule includes no discussion of any scientific evidence that supports adoption of these seemingly arbitrary distance criteria.

B. The Distance Criteria Were Not "Logical Outgrowths" of the Proposed Rule

Agencies are entitled, of course, to make *some* changes to proposed rules without re-opening the comment period. As the D.C. Circuit has explained, if no changes were permitted, a principal "purpose of notice and comment—to allow an agency to reconsider, and sometimes change, its proposal based on the comments of affected persons—would be undermined. Agencies would either refuse to make changes in response to comments or be forced into perpetual cycles of new notice and comment periods." *Assoc. of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000).

But the APA notice requirement limits such changes by mandating that any final rule adopted by an agency must be "a logical outgrowth of the rule proposed." *Long Island Care*, 551 U.S. at 174. The arbitrary distance criteria included in the Final Rule do not satisfy the "logical outgrowth" standard because nothing in the Proposed Rule alerted affected parties that the Agencies were contemplating adopting such criteria in its final rule.

In a significant majority of cases in which a court determined that an agency's revised regulation satisfied the "logical outgrowth" standard, the preamble to the proposed regulation explicitly stated that the agency was contemplating the very revision that was later adopted. *See, e.g., Miami-Dade*

County, 529 F.3d at 1062 (in proposing a regulation governing injection of effluents into underground wells, EPA explicitly asked whether its rule should be extended to all future wells; thus, the final rule's extension of the rule to all future wells was a logical outgrowth of the proposed rule); *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (similar); *Owner-Operator Independent Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188, 209-210 (D.C. Cir. 2007) (similar). In contrast, courts have determined that a final rule was not a "logical outgrowth" where "the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

Key to any "logical outgrowth" determination is whether the "purposes of notice and comment have been adequately served" by the agency's rulemaking procedures. *Battery Recyclers*, 208 F.3d at 1059. If affected parties could reasonably be expected during the initial comment period to have raised objections to features belatedly added to the final rule, then the "logical outgrowth" standard is satisfied and there would be little point in requiring a new round of comments. But the standard is not satisfied "unless all interested persons would reasonably be expected to perceive," based on the proposed rule, that the agency was contemplating adding the very features that were ultimately added to the final rule. *Council Tree*, 619 F.3d at 255.

Although the Agencies do not argue that they ever stated explicitly that they were contemplating adopting any distance criteria—let alone the specific distance criteria ultimately included in the Final Rule—they point to snippets in the Proposed Rule that, they allege, should have placed affected parties on notice that the Final Rule might include distance criteria. Respondents' Opp. to Motion for Stay of Rule Pending Review at 5-7 (citing 79 Fed. Reg. at 22,263, 22,208, 22,209), Dkt. 50-1 (filed Sept. 23, 2015). Those isolated snippets cannot be deemed sufficient to have alerted affected parties that they should introduce evidence demonstrating why the specific distance criteria ultimately adopted lacked both scientific and statutory support.[4] The federal appeals courts have not

[4] For example, the Proposed Rule requested "comment for additional clarification" regarding whether features should be deemed "adjacent waters," adding, "Commenters should support where possible from scientific literature any suggestions for additional clarification of current explicit limits on adjacency, such as a specific distance or a specific floodplain interval." 79 Fed. Reg. at 22,209. At most, that statement alerted commenters that the Agencies might consider imposing additional distance-based *limits* on the definition of adjacency, provided that commenters could marshal scientific evidence that would support such limits. It did not provide notice that the Agencies were intending to use distance criteria to *expand* the definition of adjacency by including features within the definition of "waters of the United States" based solely on their location within 1,500 feet of the OHWM of jurisdictional waters, and not based on any specific scientific evidence demonstrating the features' connectivity to those waters.

permitted agencies to satisfy the "logical outgrowth" standard by pointing to isolated statements in a lengthy proposed rule from which a detective might have inferred that the agency was considering specific changes in the rule:

> If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration. A contrary rule would allow an agency to reject innumerable alternatives in its Notice of Proposed Rulemaking only to justify *any* final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy "notice." Such an exercise in looking over a crowd and picking out your friends does not advise interested parties how to direct their comments and does not comprise adequate notice under APA § 553(c).

Environmental Integrity Project v. EPA, 425 F.3d 992, 998 (D.C. Cir. 2005) (emphasis in original) (citations omitted).

Both this Court and the North Dakota federal district court expressed skepticism regarding the Agencies' assertion that the Proposed Rule put affected parties on notice that they were contemplating adopting the precise distance criteria ultimately adopted in the Final Rule. In its order granting a stay of the Final Rule, this Court stated:

> Whether such general notice satisfies the "logical outgrowth" standard requires closer scrutiny. Nor have respondents identified specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose. Their argument that "bright-line tests are a fact of regulatory life" and that they used "their technical expertise to promulgate a practical rule" is undoubtedly true, but not sufficient.

In re: EPA, 803 F.3d 804, 807-08 (6th Cir. 2015).

The North Dakota court concluded that the plaintiffs were likely to succeed on the merits of their claim that the Agencies violated the APA's notice requirement, ruling that the Final Rule's inclusion of distance criteria within its new definition of "significant nexus" was "not likely a logical outgrowth of its definition in the proposed rule." *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1058 (D.N.D. 2015). It added, "Nothing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance." *Ibid.* Academics from across the ideological spectrum have concluded that the Agencies violated the APA's notice requirement by including new distance criteria in the Final Rule without providing an additional commenting opportunity to affected parties. *See, e.g.*, Patrick Parenteau, *A Bright Line Mistake: How EPA Bungled the Clean Water Rule*, 46 Envtl. L. 379, 388-90 (2016).

Perhaps the strongest evidence that the distance criteria added to the Final Rule were not "logical outgrowths" of the Proposed Rule is that virtually no commenters (among the more than one million comments filed) discussed the appropriateness of including distance criteria, and none discussed the specific distance criteria ultimately adopted in the Final Rule. If the Proposed Rule actually provided fair notice to affected parties that the addition of distance criteria was on the table, one could reasonably expect that a significant number of comments would have addressed the issue. Moreover, even if one or two particularly perceptive commenters could have figured out what the Agencies had in mind, that would be insufficient to meet the "logical outgrowth" standard. As the Third Circuit has explained, "[E]ven if some sophisticated observers would have [discerned that the federal agency might adopt the changes that were, in fact, adopted in the final rule], the proper question under the APA [is] whether the agency had provided notice to all interested parties. ... [T]he inferential notice purportedly provided by the [agency] did not satisfy that standard." *Council Tree*, 619 F.3d at 256 (citations omitted). When, as here, an agency's efforts to demonstrate "logical outgrowth" amount to nothing more than "picking and choosing [citations] within the four corners of a lengthy 'notice,'" it should be deemed to be "us[ing] the rulemaking process to pull a surprise switcheroo on regulated entities," *Environmental Integrity Project*, 425 F.3d at 998, 996, not providing them with the adequate notice mandated by the APA.

C. Petitioners Were Prejudiced by the Notice Violation and Are Entitled to Relief

The APA requires reviewing courts to take "due account ... of the rule of prejudicial error." 5 U.S.C. § 706(2)(F). Thus, Petitioners are not entitled to relief based on the Agencies' APA violations unless the Court determines that they were prejudiced by those violations.

Petitioners easily meet that standard in this case. As the D.C. Circuit has noted, "We have not been hospitable to government claims of harmless error in cases in which the government violated § 553 of the APA by failing to provide notice." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014). The prejudice to affected parties is readily apparent here: in the absence of notice that the Agencies were contemplating the adoption of specific distance criteria in the Final Rule, affected parties were denied the opportunity to submit evidence demonstrating that those distance criteria were scientifically unsound and inconsistent with provisions of the CWA. The absence of comments addressing distance criteria provides strong evidence of prejudice because, as *Allina* concluded, the absence of comments on changes adopted as part of the final rule indicates that an agency did not have an opportunity to consider all relevant views before adopting the changes. *Id.* at 1110.

In opposing the State Petitioners' motion for a stay, the Agencies asserted that those petitioners could not demonstrate that they were prejudiced by the inclusion of distance criteria within the definition of "significant nexus," because that inclusion made it *less* likely that features would be subject to a case-by-case analysis of whether those features had a "significant nexus" with jurisdictional waters. That assertion overlooks the harm the State Petitioners suffered simply by virtue of being denied the opportunity to comment on the new distance criteria, and has no relevance to the distance criteria adopted in connection with the definition of "adjacent waters." More importantly, that argument is premised on a questionable assumption: that the addition of the distance criteria to the definition of "substantial nexus" does not increase the likelihood that the Agencies will assert case-by-case jurisdiction over features that satisfy the distance criteria.

The appropriate remedy for the Agencies' APA notice violation is vacatur of the Final Rule and remand with directions to provide affected parties with an additional commenting opportunity. "[D]eficient notice is a 'fundamental flaw' that almost always requires vacatur." *Ibid* (quoting *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009)). Vacatur would not "lead to disruptive consequences," *ibid*; it would simply delay enforcement of a new definition of "waters of the United States" until after the Agencies fully complied with all APA procedural requirements.

D. A Study Undertaken by Congress Concurs that Notice Was Inadequate

Petitioners' assertion that the Agencies promulgated the Final Rule in violation of the APA is bolstered by a comprehensive report recently issued by the

Committee on Oversight and Government Reform of the U.S. House of Representatives. The October 27, 2016 report (the "Report"), entitled "Politicization of the Waters of the United States Rulemaking," concluded that "the rulemaking process, and the outcome it produced, were deeply flawed because of numerous shortcuts and process violations." Report at 3.[5]

In particular, the Report concluded that once the Agencies decided that substantial changes were to be made in the Proposed Rule, the Agencies should have provided affected parties an opportunity to comment on the revised rule before adopting it in final form. Report at 163-64. The Report concluded that the Agencies decided not to provide a second comment period in part because doing so "would not comport with the administration's schedule" for release of the Final Rule. *Id.* at 163. The Report explicitly found, "The agencies pushed the rule through on an accelerated timetable that appeared to have been motivated by political considerations." *Id.* at 10. Indeed, even the comments submitted during the first round of commenting were not fully considered by the Agencies: "Public comments were not fully reviewed and considered before agencies drafted the final rule," the Committee found. *Ibid.*

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[5] The report is available online at https://oversight.house.gov/wp-content/uploads/2016/10/WOTUS-OGR-Report-final-for-release-1814-Logo-1.pdf (last visited November 7, 2016).

II. THE FINAL RULE IS ARBITRARY AND CAPRICIOUS

A. The Agencies Failed to Provide Reasoned Justifications for Their Distance Criteria

An agency's actions in promulgating regulations may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review under the "arbitrary and capricious" standard is narrow, and a court is not to substitute its judgment for that of the agency. Nevertheless, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Because the Agencies utterly failed to articulate a "satisfactory explanation" for their decision to add distance criteria to the final rule, that decision cannot pass muster under the APA's arbitrary and capricious standard.

The three distance criteria that the Final Rule applies to "adjacent waters" determinations dictate that all features within a specified number of feet of a specified landmark (*e.g.*, within 1,500 feet of the high tide line of any of the first three categories of jurisdictional waters) will, without regard to any site-specific information, *always* be classified as a part of the "waters of the United States." Yet, the Final Rule makes no effort to explain why this across-the-board rule is justified by sound science.[6] Instead, the Agencies simply asserted that application of these distance criteria was "reasonable and practical" because the "drawing of clear lines" eases administrative burdens for Agencies and landowners alike. 80 Fed. Reg. at 37,085-91. But the Agencies made no effort to explain why the "clear lines" that it drew are superior to any other clear lines that it might have drawn, or why they are authorized by the Clean Water Act.

"One basic procedural requirement of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars*, 136 S. Ct. at 2125. When, as here, an "agency has failed to provide even a minimal level of analysis" in support of its decision, its action is "arbitrary and capricious," in violation of the APA. *Ibid* (citing 5 U.S.C. § 706(2)(A)). The Agencies' vague assurances that unspecified agency "experience" justifies adoption of the distance criteria do not constitute reasoned decision-making.

B. The Agencies Failed to Provide Reasoned Justifications for Their Expansive Definition of Tributaries

The Agencies also acted arbitrarily and capriciously in adhering to their broad definition of "tributary" without providing any sort of response to

[6] Indeed, the EPA's own Scientific Advisory Board advised against reliance on distance criteria in determining the scope of jurisdictional waters, cautioning that "adjacent waters and wetlands should not be defined solely on the basis of geographical proximity to jurisdictional waters." 80 Fed. Reg. at 37,064.

commenters' substantial evidence that the definition lacked scientific support. In particular, a number of commenters submitted substantial scientific evidence that the Agencies' definition of "tributaries" would inappropriately include significant amounts of totally dry land in the arid Southwest. The Final Rule failed to respond to those comments, as required by the APA.

1. The Agencies Arbitrarily Relied on Randomly Distributed Physical Indicators and Unrepresentative, Water-Rich Systems to Assert Jurisdiction over the Arid Southwest

The Agencies adopted a Final Rule that categorically declares vast tracts of bone-dry American desert to be "waters" subject to federal jurisdiction under the CWA. They have done so, as relevant here, by regulating not only mainstem "rivers" (themselves often dry in the arid Southwest), but also a huge expanse of upland features deemed to be "tributaries" of those rivers, even if water has not flowed there for years or decades.

This assertion of federal authority rests on two highly dubious propositions that lack evidentiary support. First, the Agencies assert that erosional features in the arid American Southwest, which may flow *at most* a few times a year, can be regulated as if they were water-rich stream systems whose *default condition* is regular flow. In particular, the Final Rule rests on vague findings of "connectivity"—*i.e.*, physical, biological, and chemical connections between upland "tributaries" and traditional navigable waters. But those findings are based on river systems that bear no resemblance to arid southwestern geologic features.

Second, the Final Rule purports to distinguish between jurisdictional and exempt channels based on the presence of such ubiquitous geological features as physical indicators of a bed, banks, and ordinary high water mark (OHWM). But, according to the Army Corps's own studies, in the arid Southwest such features do not correlate with the actual presence of water, and instead are distributed randomly throughout the landscape.[7] In the desert, such features are no more indicators of the sustained presence of flowing waters than is the similar lunar landscape.

The connection between physical indicators of a bed, banks, and OHWM, on the one hand, and regular and ongoing water flows, on the other, derives from the behavior of humid, water-rich river systems. As the Agencies have explained, "OHWM forms due to some regularity of flow and does not occur due to extraordinary events." Clean Water Rule Technical Support Document 239 (citing

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[7] *See, e.g.*, Comments of Arizona Mining Association at 10-11 (Nov. 13, 2014) ("AMA Comments") (citing R.W. Lichvar *et al.*, U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability in Identifying the Limits of "Waters of the United States" in Arid Southwestern Channels* at 14 (2006)); *id*. at 11(citing U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns Across Arid West Landscapes* at 17 (2013)).

M.K. Mersel & R.W. Lichvar, U.S. Army Corps of Eng'rs, *A Guide to Ordinary High Water Mark Delineation for Non-perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States* (2014)).

This rationale falls apart in the arid Southwest. *See* Comments of Freeport-McMoRan Inc., Exhibit 1, at 7 (Nov. 12, 2014) ("Freeport Comments"). There, erosional features often reflect one-time, extreme water events, and are *not* reliable indicators of regular flow conditions. In the desert, rainfall occurs infrequently, and sandy, lightly-vegetated soils are highly susceptible to erosion. As a result, washes, arroyos and other erosional features often reflect physical indicators of a bed, banks, and OHWM, even if they were formed by a long-past historical flood event, and the topography has persisted for years or even decades without again experiencing flow. Because arid systems lack regular flow, the channels do not "heal" or return to an equilibrium state. *Ibid*.

Commenters raised these concerns during the rulemaking, explaining that the single Southwestern river system the agencies had examined in any meaningful way (the *semi*-arid San Pedro River, which has water flowing three-quarters of the time) is the opposite of typical arid systems like Arizona's Santa Cruz River, which flows only a few days a year, and whose "tributaries" are even drier. Commenters urged the agencies not to delineate federal jurisdiction based on features that are "distributed randomly" in arid landscapes, and not to assert categorical jurisdiction over all tributaries, without regard to their specific characteristics. Freeport Comments, Exhibit 1, at 11-15.

2. The Agencies Failed to Respond to Comments on the Arid Southwest

The Agencies failed to provide any meaningful response to commenters' concerns about applying a broad definition of "tributary" to the arid Southwest. *See* Freeport Comments at 5; AMA Comments at 8, 9; *see also* Comments of ASARCO LLC, *et al*. at 2 (Nov. 13, 2014); Comments of Arizona Farm Bureau Federation at 2 (Nov. 14, 2014); Comments of Arizona Rock Products Association at 4-6 (Nov. 10, 2014); Comments of New Mexico Mining Association at 1-2 (Nov. 13, 2014). These comments explained why evidence of a bed, banks, and OHWM is not a reliable indicator of regular flow in the arid Southwest, and cited the Army Corps's studies concluding that physical indicators of such features are distributed "randomly" throughout the landscape. *See e.g.*, AMA Comments 7-8; 8-11; Freeport Comments 5-6. The comments criticized the Agencies for not providing a workable basis to distinguish between jurisdictional ephemeral tributaries and exempt gullies and rills. *See* AMA Comments 13; Freeport Comments 7-8. And commenters showed that the San Pedro watershed is not representative of arid systems. *See* Freeport Comments, Exhibit 1, at 14-15.

The Agencies offered no response—meaningful or otherwise—to these extensive comments. *See* Clean Water Rule Response to Comments—Topic 12 Implementation Issues at 122-23 (no response to concern that San Pedro is not representative); *id.* Topic 8 at 506-07, 316-17, 345-49 (no response to concern that bed, banks, and OHWM do not show regular flow in arid Southwest); *id.* Topic 8 at 349-50, 533 (no response to concern about lack of workable basis to distinguish among tributaries, gullies, and rills).

The Supreme Court has made clear that dismissing substantive comments in this manner violates the APA: "An agency must consider and respond to significant comments received during the period for public comment." *Perez*, 135 S. Ct. at 1203. Agency action is arbitrary and capricious when the agency "entirely fails to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The Agencies' failure to consider and respond to substantial comments regarding its capacious definition of "tributary"—particularly as applied to the arid Southwest—requires (at a minimum) that the Final Rule be vacated and that the matter be remanded to the Agencies.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court vacate the Final Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,757, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

November 8, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of November, 2016, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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