Case No. 15-3751 (and related cases: 15-3799; 15-3817; 15-3820; 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)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MURRAY ENERGY CORPORATION, et al. Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al. Respondents.	)	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 June 29, 2015 (MCP No. 135) On petition for review from the Environmental Protection Agency and the U.S. Army Corps of Engineers

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF STATE PETITIONERS AND BUSINESS AND MUNICIPAL PETITIONERS

Jeffrey S. Longsworth
Barnes & Thornburg LLP
1717 Pennsylvania Avenue, NW
Suite 500
Washington, DC 20006
Tel: (202) 408-6918
Jeffrey.longsworth@btlaw.com

Tammy Helminski
Barnes & Thornburg LLP
171 Monroe Avenue N.W. Suite 1000
Grand Rapids, Michigan 49503
Tel: (616) 742-3926
Tammy.helminski@btlaw.com

L. Rachel Lerman
Barnes & Thornburg LLP
2029 Century Park East Suite 300
Los Angeles, CA 90067-2904
Tel: (310) 284-3871
Rachel.lerman@btlaw.com

Date: November 8, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Rules

Regulations

Constitutional Provisions

Other Authorities

IDENTITY, INTEREST, AND SOURCE OF AUTHORITY OF *AMICI CURIAE*[1]

Amici curiae are 21 Senators and 67 Representatives (hereinafter "*Amici*") duly elected to serve in the Congress of the United States in which "[a]ll legislative Powers" granted by the Constitution are vested. U.S. Const. art. I, § 1. A list of *Amici* is attached as an Addendum hereto. *Amici* have strong institutional interests in preserving Congress's role in making law for the nation. In light of the statutory interpretation issues in this case involving the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq*., *Amici* seek to provide our insight regarding congressional statutory intent and legislative history for the benefit of the Court as it considers this important matter.

[1] Pursuant to the Federal Rules of Appellate Procedure Rule ("FRAP") 29(c)(5), no party's counsel authored this amicus brief in whole or in part. No party or any party's counsel contributed money to fund this amicus brief. Finally, no outside party contributed money that was intended to fund preparing or submitting this brief. Amici are authorized to file this brief pursuant to FRAP 29(b) and its accompanying Motion for Leave to File the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively, "the Agencies") have jointly promulgated a final rule to redefine the Federal Water Pollution Control Act's term "navigable waters." 80 Fed. Reg. 37,054 (June 29, 2015) (the "WOTUS Rule" or the "Rule"). The Rule's expansive redefinition is an unlawful attempt to federally regulate both land and water that Congress deliberately left to the authority of the states.

In the 1972 Amendments to the Federal Water Pollution Control Act ("1972 Amendments"), Congress established a federalism approach to protect water quality by creating federal and state permitting authorities to protect navigable waters from pollution and by encouraging states to protect their own groundwater and non-navigable intrastate waters. Congress's 1972 Amendments defined the term "navigable waters" as "waters of the United States," expanding the 1965 Federal Water Pollution Control Act jurisdiction, which covered only interstate navigable waters and their tributaries, to include both interstate and intrastate navigable waters and their tributaries. The legislative history of the 1972 Amendments confirms this federal intent.

In past administrative actions, the Agencies attempted to read the term "navigable" out of the statute by claiming jurisdiction over any "other" water that Congress could regulate under the Commerce Clause of the U.S. Constitution. 40

C.F.R. § 125.1 (1973), promulgated at 38 Fed. Reg. 13,528, 13,529 (May 22, 1973) (EPA regulations) and 33 C.F.R. § 323.2 (1977), promulgated at 42 Fed. Reg. at 37,127, 37,144 (July 19, 1977) (Corps regulations).

In 2001, the Supreme Court held that the Agencies were not entitled to disregard congressional intent to base jurisdiction under the Federal Water Pollution Control Act on Congress's traditional jurisdiction over navigable water. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159, 172 (2001) ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Federal Water Pollution Control Act ("Act"), also known as the Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.").

The WOTUS Rule is the Agencies' latest attempt to reclaim the jurisdiction that they believe they lost as a result of *SWANCC*. Instead of reading the term "navigable" out of the Act, the Agencies now want to disregard the term "water pollution control." Through the WOTUS Rule, the Agencies seek to expand their authority under the Act beyond the scope established by Congress – which legislated to control pollution entering navigable waters – to encompass regulation of both water flows and wildlife habitat across the nation.

With this new rulemaking, the Agencies are encroaching on traditional state authorities over land use and water quantity (as opposed to water quality), contrary to the clear text and intent of the 1972 Amendments, its legislative history, and the Supreme Court's decision in *SWANCC*, which warned that such an attempt to expand agency jurisdiction should receive no judicial deference. *SWANCC*, 531 U.S. at 174. Congress, not federal agencies, has the sole and exclusive right to make law. The Executive Branch, for its part, must "take Care that the Laws be *faithfully executed*." U.S. Const. art. II, sec. 3 (emphasis added). The Agencies have failed to carry out that responsibility. Accordingly, this Court should reject the Agencies' attempt to alter the federal-state framework of the Federal Water Pollution Control Act and vacate the WOTUS rule.

ARGUMENT

I. THE WOTUS RULE ENCROACHES ON TRADITIONAL STATE POWERS

The definition of "navigable waters" adopted by Congress in the 1972 Amendments did not encompass regulation of land and water use that traditionally has been left to state authority. Despite the absence of any congressional directive authorizing such regulation, the Agencies created a Rule that would allow them to federally regulate land and waters reserved to state control, raising significant federalism concerns. *Amici* urge this Court to reject the Agencies' attempt to

disturb the federal-state balance set forth by Congress in the 1972 Amendments. *See SWANCC*, 531 U.S. at 174.

A. The Federal Water Pollution Control Act Protects Navigable Waters from Pollution, and Leaves Regulation of Land and Non-Navigable, Intrastate Waters to the States.

In its Federal Water Pollution Control Act, Congress delegated the Agencies authority to protect navigable water from pollution. While that authority initially was limited to interstate navigable waters, Congress expanded federal protection in the 1972 Amendments to include intrastate navigable waters. However, Congress did not abandon the Act's water pollution control mission or its focus on navigable waters.

The Federal Water Pollution Control Act was first enacted in 1948 and addressed interstate waters and tributaries thereof. Pub. L. No. 80-845, 62 Stat. 1155 (1948). In 1965, Congress created federal authority to enforce state water quality standards, but that authority applied to interstate waters and their tributaries only, not all navigable waters. Pub. L. No. 89-234, § 5(a), 79 Stat. 909 (1965) (adding § 10(c)(5)). Implementing the 1965 Amendments, the Corps and the nascent EPA recognized the Act's limited jurisdictional scope and exercised jurisdiction only over navigable water that crossed state lines. U.S. EPA, Office of General Counsel, A Collection of Legal Opinions, Vol. 1, at 406-07 (General Counsel Opinion, "Definition of Navigable Waters," Dec. 9, 1971)(available at

http://www.epw.senate.gov/public/_cache/files/0ab3e804-bdb0-4433-959d-e688c2d00a6d/epa-legal-opinions-vol-1.pdf) (last visited November 7, 2016); 37 Fed. Reg. 18,289, 18,290 (Sept. 9, 1972) (Corps rulemaking revising 33 C.F.R. § 209.260).

In 1972, Congress amended the Act to establish its current jurisdictional reach. Pub. L. No. 92-500, 86 Stat. 816 (1972) ("1972 Amendments"). As amended, the Act regulates "navigable waters" and defines "[t]he term 'navigable waters' [to mean] the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (added by Pub. L. No. 92-500, § 2, 86 Stat. 886 (1972)). In doing so, Congress expressed the intent to adopt "the broadest possible constitutional interpretation *unencumbered by agency determinations which have been made or may be made for administrative purposes.*" Conference Report to accompany S. 2770, S. Rep. 92-1236, 92nd Cong., 2d Sess. at 144 (1972) (describing final bill); H. Rep. No. 92-911, 92nd Cong. 2d. Sess. at 818 (1972) (describing the House bill, which defined "navigable waters" as "the navigable waters of the United States") (emphasis added). In context, the "agency determinations" referred to in the congressional committee reports are the EPA and Corps interpretations referenced above (enforcing water quality standards for interstate navigable waters only), and the broad constitutional interpretation referred to is Congress' authority over all forms of interstate transportation,

allowing Congress to regulate intrastate navigable waters that form part of a "highway of commerce."

The 1972 Amendments' legislative history supports this interpretation. For example, in a 1972 Senate floor statement, Senator Edmund Muskie explained that, "the term 'navigable waters' [is intended to] include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are *navigable in fact.*" 118 Cong. Rec. 33699 (1972) (Muskie statement) (emphasis added). "[S]uch waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters *or other systems of transportation*, such as highways or railroads, *a continuing highway over which commerce is or may be carried on* with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today." *Id.* (emphasis added).

Congressman John Dingell made the same point in the House of Representatives: "[I]t is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation…. The '*gist of the Federal test' is the waterway's use 'as a highway*,' not whether it is 'part of a navigable interstate or international commercial highway.'" 118 Cong. Rec. 33756-57 (1972) (emphasis added) (citations omitted).

Both the Senate and House of Representatives also made it clear that to protect the water quality of navigable waters, jurisdiction under the 1972 Amendments included tributaries of navigable waters. The Senate Committee report explained that water pollution control requirements must extend to tributaries because pollution must be controlled at the source. *See* S. Rep. No. 92-414, 92nd Cong. 1st Sess. at 77 (1971). Congressman Dingell echoed this point on the House floor, stating: "this new definition clearly encompasses all water bodies, including main streams and their tributaries for *water quality* purposes." 118 Cong. Rec. 33756-57 (1972) (emphasis added).

Further, to protect navigable waters from pollutants, the 1972 Amendments prohibited the "discharge of pollutants" from a "point source" into "waters of the United States," unless authorized by a permit. 33 U.S.C. § 1311. The Act delegated to EPA the authority to issue permits allowing point sources to discharge pollutants, while granting the Corps the authority to issue permits for discharges of dredged and fill material. 33 U.S.C. §§ 1342 and 1344 (respectively). The Act also allows the Agencies to authorize state permitting programs in lieu of federal permitting programs. *Id.*

But Congress's delegation of authority to the Agencies is limited. Maintaining a balance between federal and state authorities, Congress declined to regulate land under the Act, even when rainwater flows over land during or shortly

after a storm (whether such ephemeral flow is in or outside of a channel), and even when diffuse non-point source rainwater runoff carries pollution to navigable water. *See e.g.*, 33 U.S.C. § 1362(14) (defining the term "point source"); 33 U.S.C. § 1329 (authorizing financial assistance for voluntary State non-point source management plans). Similarly, Congress did not authorize the regulation of groundwater. *See* 33 U.S.C. § 1288 (relegating groundwater to a State area-wide waste treatment management planning process, not through federal regulatory programs).

The limits set by Congress's 1972 Amendments are confirmed in statements by the congressionally-chartered National Water Commission in its 1973 Report to the President and Congress, which specifically identified the regulation of intrastate, non-navigable water as a gap in federal jurisdiction. *See* National Water Commission (June 1973), *Water Policies For The Future: Final Report to the President and to the Congress of the United States* at 200-201 (available at http://www.epw.senate.gov/public/_cache/files/09fa2cfd-e480-40e6-bdf6-fc9fc8b5b0e3/water-policies-for-the-future-final-report-1973.pdf (last visited November 7, 2016). The National Water Commission also recommended that s*tates* protect from drainage and development s*tate-owned* wetlands that have primary value for waterfowl propagation or other wildlife purposes. *Id*. at 279.

Clearly, in 1973 it was understood that the Federal Water Pollution Control Act specifically left these waters to s*tate*, not federal, control.

Associational Petitioners argue that a 1975 district court case, *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), is informative. Brief of Pet. Nat'l Wildlife Fed. *et al*., at 7-8, 40. It is not. In 1974, the Corps issued regulations defining "waters of the United States" for the purpose of implementing section 404 of the Act that reaffirmed the Corps' view that its dredge and fill jurisdiction was equal to its traditional jurisdiction under the Rivers and Harbors Act of 1899. The Natural Resources Defense Council and the National Wildlife Federation challenged the Corps' regulation because they believed that the definition of navigable waters should include tributaries or coastal marshes above the mean high tide mark, and wetlands adjacent to navigable waters that extended beyond the ordinary high water mark. These groups also expressed concern about lakes, isolated wetlands, and potholes. *See* 42 Fed. Reg. 37,123-124 (July 19, 1977). In a terse decision, the U.S. District Court for the District of Columbia ordered the Corps to rescind its 1974 regulations, concluding that Congress had asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. *Callaway*, 392 F. Supp. at 685 ("[a]ccordingly, as used in the Water Act, the term [navigable water] is not limited to the traditional tests of navigability").

The district court's reasoning in *Callaway* was rejected by the Supreme Court decision in *SWANCC*, which repudiated the view that the Act's jurisdiction is based on general Commerce Clause jurisdiction rather than Congress' authority over navigable waters. *SWANCC*, 531 U.S. at 168 ("Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974"), 172 (the Act is based on Congressional authority over navigation, not general Commerce Clause authority).

In sum, the Act and its legislative history demonstrate that Congress intended the "waters of the United States" to mean navigable waters, whether interstate or intrastate, including those tributaries that must be regulated to protect the water quality of those navigable waters. Congress left the regulation of land and any other water to the states.

B. The WOTUS Rule Improperly Encompasses Land and Water that Congress Left to the Purview of the States.

Despite the Act's limited scope of federal authority, the Agencies' WOTUS Rule unlawfully expands federal jurisdiction to regulate land and water that is traditionally within the sole purview of the states, including wholly intrastate non-navigable ponds and wetlands as well as land over which water flows when it rains. This claim of authority contradicts the careful balance between federal interests and traditional state authorities crafted by Congress's 1972 Amendments.

For example, the WOTUS Rule defines the term "tributary" to include any area where agency officials decide they can discern a current or past "bed, bank, and ordinary high water mark." 33 C.F.R. § 328.3(c)(3) (2015). With this new definition, the WOTUS Rule unlawfully expands the definition of "waters of the United States" to include not only "intermittent" streams with seasonal flow, but also the ephemeral flow of water over land. The Agencies took this action despite the fact that various Corps district offices previously took the position that ephemeral "streams" are *not* tributaries and accordingly fall outside federal control. *See* Branch Guidance Letter, Corps of Engineers, Baltimore District, CENAB-OP-R, No.95-01, Oct. 17, 1994 [EPA-HQ-OW-2011-0880-15822] ("Project Managers are frequently required to determine the upstream limits of regulatory jurisdiction, including differentiating between intermittent streams, which are regulated (33 C.F.R. § 328.3(a)(3)), and ephemeral streams, which are not regulated.").

The Rule's new definition of "tributary" also unlawfully includes manmade drainage ditches that are not specifically exempted, despite the fact that Congress included ditches in the definition of "point source" from which pollutants could be discharged *into* waters of the United States, not in the definition of "navigable waters." 33 U.S.C. § 1362(14) (P.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 887). The Agencies even erroneously claim the authority to regulate dry land as a "tributary" if they find historic evidence they believe suggests the prior existence of a stream

filled in by past land use modifications. 80 Fed. Reg. at 37,076. This new and unsupported definition of "tributary" directly conflicts with the 1972 Amendments delineation of waters regulated by the federal government versus those left to state authorities.

The Agencies also attempt to expand the meaning of the term "adjacent" to claim jurisdiction over isolated water bodies. *Amici* do not dispute that, to regulate discharges of pollutants into navigable waters, the Agencies must make a *factual* determination of where open waters end and dry land begins (*see United States v. Riverside Bayview Homes, Inc*, 474 U.S. 121, 132 (1985)). But the term "adjacent" in the WOTUS Rule is employed in a way that far exceeds the authority Congress granted the Agencies. The WOTUS Rule expands the lateral extent of a "water of the United States" to include water, even a wetland, that is *separated* from navigable waters and their tributaries by *dry land*, whether the separation is 100 feet,[2] 1,500 feet,[3] 4,000 feet,[4] an unlimited distance,[5] or is based on inundation by flood waters once every 100 years.[6] Such waters are not navigable waters or tributaries of navigable waters; they are intrastate, non-navigable waters – the same

---

[2] 33 C.F.R. § 328.3(c)(2)(i) (2015).
[3] 33 C.F.R. § 328.3(c)(2)(ii) (2015); and 33 C.F.R. § 328.3(c)(2)(iii) (2015).
[4] 33 C.F.R. § 328.3(a)(8) (2015).
[5] 33 C.F.R. § 328.3(a)(7) (2015).
[6] 33 C.F.R. § 328.3(c)(2)(ii) (2015); and 33 C.F.R. § 328.3(a)(8) (2015).

waters that experts from the National Water Commission recognized were left unregulated by the 1972 Amendments. *See* § I.A, *supra*.

The very term "waters of the United States" means that there must also be waters of the individual states. As noted by the Supreme Court in *SWANCC*, in the absence of a clear statement of congressional intent, this Court should decline to uphold any interpretation of the Federal Water Pollution Control Act that encroaches on traditional state authority over land and water. *SWANCC*, 531 U.S. at 174.

II. THE ACT'S TEXT, STRUCTURE, AND LEGISLATIVE HISTORY DO NOT SUPPORT THE WOTUS RULE

The Agencies concede, as they must after *SWANCC*, that they cannot claim jurisdiction based on Congress' general Commerce Clause authority. WOTUS Rule Technical Support Document, at 78 [EPA-HQ-OW-2011-0880-20869]. Yet the Agencies still remain unwilling to concede their jurisdiction is limited. Instead, the Agencies use the WOTUS Rule to impermissibly concoct a new, even broader, jurisdictional reach.

To uphold the WOTUS Rule, this Court would have to agree not only that federal jurisdiction is created by a "significant nexus" to navigable water derived from the Act's objective of restoring and maintaining the "chemical, physical, and biological integrity" of navigable waters (33 U.S.C. § 1251(a)), but also that the objectives of "physical" and "biological" "integrity" extend beyond protecting

water quality to include regulation of both the quantity of water and its use as habitat. Under this contrived theory – adapted from an *amicus* brief that Justice Stevens cited to support his *dissenting* opinion in *SWANCC*[7] – the Act's goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" is somehow transformed into a jurisdictional statement authorizing the Agencies to regulate any water they claim may have any chemical, physical, or biological impact on navigable water. 80 Fed. Reg. at 37,055-56, *citing* 33 U.S.C. § 1251(a).

To implement this new theory, the WOTUS Rule lists "retention and attenuation of flood waters," "runoff storage," "contribution of flow," "export of organic matter," "export of food resources," and "provision of life cycle dependent aquatic habitat" as "functions" that now suddenly create federal jurisdiction over non-navigable intrastate waters and wetlands. 33 C.F.R. § 328.3(c)(5) (2015). The Agencies' jurisdictional expansion, based on these "functions," lacks any statutory (including legislative history) support from the 1972 Amendments. The flaws in the Agencies' premise that a "significant nexus" creates jurisdiction is addressed in Petitioners' briefs and incorporated by reference here. Bus. and Mun.

---

[7] Brief for Dr. Gene Likens et al. as *Amici Curiae* in SWANCC, listed as "Supporting and Related Material" in the Final Rule docket [EPA-HQ-OW-2011-0880-8591]; *SWANCC*, 531 U.S. at 176 n. 2 (Justice Stevens, dissenting).

Pet. Br., at 42-49. *Amici* focus below on the Agencies' invalid theory that the Act's jurisdiction can be based on the regulation of water quantity and wildlife habitat land use.

A. The Act Regulates Water Pollution, not Flows or Habitat.

The text, structure, and legislative history of the Federal Water Pollution Control Act demonstrate that Congress intended to regulate *water pollution,* **not** *the flow of water* and **not** *wildlife habitat*.

The text of Section 101(a) states: "The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The text is clear: the words "chemical, physical, and biological integrity" describe water quality – not habitat, not water flows, and not jurisdiction. The words "chemical, physical, and biological" are used in seven other substantive sections of the Act. In these sections, the phrase irrefutably refers to the quality of water and the impacts of pollution on that water quality.[8]

To affirm the Agencies' new interpretation of the Act, this Court would have to conclude that Congress meant the phrase "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" in Section 101 to include water flows (quantity) and wildlife habitat, even though that phrase in the

---

[8] *See* 33 U.S.C. § 1362(11), § 1362(15), § 1362(19), § 1314(a)(1)(B), § 1314(b)(1)(A), § 1254(b), and § 1255(d)(3).

remainder of the Act clearly relates only to the effects of pollution on water quality. This interpretation would violate ordinary principles of statutory construction. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). Accordingly, the Agencies' interpretation of Section 101 is at odds with the plain language of the statute. The WOTUS Rule, which relies heavily on this interpretation, should thus be vacated.

The Act's structure also contradicts the Agencies' interpretation of Section 101. The Act's objectives must be achieved through pollution control measures. The first sentence of Section 101(a) states the Act's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The next sentence lists goals and policies through which Congress planned "to achieve this objective" "consistent with the provisions of this Act." 33 U.S.C. § 1251(a). Each of the seven goals and policies listed pertains to control of water pollution and achieving a *quality* of water to allow its use for various purposes.

For example, one of the tools authorized by Congress is the adoption and implementation of state water quality standards. Section 303 of the Act authorizes states to establish water quality standards, which consist of both a designated use of a water body as well as criteria to protect that use from discharges of pollutants. 33 U.S.C. § 1313(c)(2)(A). One use a state may designate is use of a body of

water by aquatic life. The Agencies' new theory assumes that all bodies of water have "aquatic life" as the "designated use," which is not true. The Agencies further assume that they may protect aquatic life, not by regulating pollutant discharges, but by regulating land use, which is contrary to how the Act has been interpreted and implement over its forty-year history. The Act's goals and policies are directly and specifically related to the control of water pollution and the Agencies' new interpretation to the contrary deserves no deference from this Court.

The legislative history contradicts the Agencies' attempt to expand the reach of the Federal Water Pollution Control Act beyond controlling water pollution. On December 7, 1971, in testimony before the House Committee on Public Works, EPA Administrator Ruckelshaus made it clear that the phrase "physical, chemical, and biological" refers to water quality, stating that: "water quality standards are premised on a determination of the beneficial uses to be made of a given body of water. They include a description of the quality necessary for such uses. *The quality is stated in physical, chemical, and biological measures.*"[9]

---

[9] Administration Testimony, Hearings on H.R. 11896 Before the Comm. on Pub. Works, House of Representatives, 92nd Cong., 2d Sess. at 284 (1971), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972* v. 2, Committee Print, 93rd Cong., 1st Sess. at 1182 (1973).

Similarly, when reviewing the Senate bill that became the 1972 Amendments the members of the Senate Public Works Committee discussed the objective of the legislation as controlling water pollution to protect water quality. For example, Senator Muskie, the lead author of the Senate Bill, described the objective of the Act as follows: "First, in Section 30l(a) [later moved to 101], it states in terms of *water quality, that is the chemical, physical and biological integrity of the Nation's waters*, and Subparagraph (b), in terms of the control mechanism that we intend to use, and there it is stated that what we are aiming for is a no-discharge standard. In these two paragraphs, you have both the water quality and the effluent discharge standard that we are shooting for." [10] Notably, each member of the Committee that opined on the Act's objective also focused exclusively on the *quality* of the water to be achieved by eliminating pollution. None suggested that regulating water flows (quantity) or preserving habitat was the goal of the legislation.[11]

---

[10] Stenographic Transcript of Hearings before the Subcomm. on Air and Water of the Comm. on Pub. Works, United States Senate, Executive Session, at 10-11 (Sept. 30, 1971) (emphasis added), available at https://archive.org/details/ldpd_10928649_024 (last visited November 7, 2016).
[11] *Id.* at 10-13; 25-26.

B. The WOTUS Rule Would Unlawfully Regulate Water Flows.

The WOTUS Rule asserts that the runoff of water, the infiltration of water into the ground, or the storage of water are impacts on the "physical integrity" of water and form a basis to create federal jurisdiction. To affirm this new theory of jurisdiction, this Court would have to find that Congress intended "physical integrity" of water to be based on water *quantity*, not water quality. Such a finding would enable the Agencies to regulate any isolated pond or wetland that retains water or any ephemeral flow of rainwater that infiltrates diffusely into a groundwater aquifer, solely based on the potential impact to the "physical integrity" of "downstream water" resulting from perceived impacts on "flow." *See* 80 Fed. Reg. at 37,060 ("Contribution of flow can significantly affect the physical integrity of downstream waters" and retaining and attenuating stormwater "affect the physical integrity of downstream waters"). This theory of jurisdiction has no support in the text, structure, or legislative history of the Federal Water Pollution Control Act.

The Act's text does not support the Agencies' attempt to regulate the flow of water. *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486, 504 (2d Cir. 2005) (the Act "authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants"); *Virginia Department of Transportation v. U.S. Environmental Protection Agency*, No. 1:12-cv-775 2013

U.S. Dist. LEXIS 981, at 9 (E.D. Va. Jan. 3, 2013) (EPA has no authority to regulate flow as a surrogate for pollutants). To the contrary, under the plain language of the statute, regulation of water quantity is left to the states. The text of Section 101(g) of the Act states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act.

33 U.S.C. § 1251(g).

Despite this statutory language, the Agencies allege that "retention and attenuation of flood waters," "runoff storage," and "contribution of flow" all can create federal jurisdiction over water. 33 C.F.R. § 328.3(c)(5) (2015). Although the Agencies do not define the term "flow" in the Rule, the Technical Support Document accompanying the Rule makes clear that the newly claimed jurisdiction encompasses the authority to regulate flow that is provided through groundwater[12] or to facilitate or prevent the sheet flow of water over the land when it rains.[13] This claim of authority is barred by section 101(g) and should be rejected by this Court.

The structure of the Act also undermines the Agencies' theory that water storage, runoff, or groundwater recharge creates jurisdiction. In Section 102 of the

---

[12] EPA Technical Support Document ("TSD") [EPA-HQ-OW-2011-0880-20869], at 129, 132, 148, 344.
[13] TSD, at 361.

Act, Congress gave EPA authority to influence the flow of water *only* by making recommendations to Congress on whether storage for water quality control should be added as a project purpose when reservoirs are authorized or constructed by other federal agencies. 33 U.S.C. § 1252(b)(3).[14]

The legislative history of the Act confirms that Section 101(g) precludes any claim of federal jurisdiction over water flows. Congress added Section 101(g) in 1977 in response to an attempt by federal agencies to use the Act to regulate surface flows and groundwater. *See* 42 Fed. Reg. 36,787, 36,793 (July 15, 1977) (option paper discussing potential use of federal water quality statutes to regulate both surface water diversions and groundwater pumping). According to its sponsor, this amendment reaffirms Congressional intent to use the Federal Water Pollution Control Act to address water pollution only: "This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. … This 'State's jurisdiction' amendment reaffirms that it is the policy of Congress that this act is to be used for *water quality purposes only.*" 123 Cong. Rec. 39, 211-12 (1977) (floor statement of Senator Wallop) (emphasis added). By enacting Section

---

[14]The authority of the Corps to regulate water flows is found in flood control acts and water resources development acts, not the Federal Water Pollution Control Act. The authority of the Bureau of Reclamation over water is found in reclamation law, not the Federal Water Pollution Control Act.

101(g), Congress rejected use of the Act to regulate surface and groundwater flows– which the Agencies are attempting to resurrect in the WOTUS rule – as inappropriate intrusion into states' rights to allocate water.

Finally, the Agencies themselves offer conflicting views on whether they can regulate the flow of water through a groundwater aquifer. In 2015, the Corps' Assistant Secretary of the Army (Civil Works), Jo-Ellen Darcy, responded to written congressional questions stating that: "The Corps has never interpreted groundwater to be jurisdictional water *or a hydrologic connection* because *the* [Federal Water Pollution Control Act] *does not provide such authority*."[15] Despite this admission, the Agencies' WOTUS Rule purports to establish federal jurisdiction based on groundwater connections.[16] Following *Riverside Bayview*, the Agencies may have the authority to determine where water ends and land begins, but that does not include the authority to regulate based on subsurface flows.

Because the text of the Act and its legislative history do not support (indeed they contradict) the Agencies' new jurisdictional claim, the Agencies rely on

---

[15] *See* Response to Follow-Up Questions for Written Submission to Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) (June 2, 2015) (emphasis added), available at http://www.epw.senate.gov/public/_cache/files/bd664535-f1a2-4a60-a0ab-7c6112e91f50/darcy-senate-qfr-responses-on-wotus-hearing-02.04.2015.pdf (last visited November 7, 2016).

[16] *See supra* note 12.

various scientific studies of water connections via overland or groundwater flows. *See* EPA report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" [EPA-HQ-OW-2011-0880-20858], at 4-21 to 4-26, B-14 to B-22, and B-37 to B-66 (Connectivity Report). The Agencies do not (and cannot) cite to any statutory authority that supports their notion that Congress intended federal jurisdiction to be based on such diffuse and indirect "connections." Quite the contrary is true. The statute focuses on preventing pollution from entering navigable waters from point sources.

This Court should therefore reject the Agencies' claim to jurisdiction over water storage and water flows and vacate the Rule.

C. The WOTUS Rule Would Unlawfully Regulate Wildlife Habitat.

If this Court accepts the Agencies' new theory of jurisdiction, the federal government will be free to regulate isolated ponds or wetlands or ephemeral flows of rainwater based on the mere possibility that: (1) a species that lives in water that is navigable may also use the isolated or ephemeral water as habitat; or (2) a species may disperse plant seeds or invertebrate eggs between the isolated or ephemeral water and water that is navigable. *See* 80 Fed. Reg. at 37,068 ("Streams, wetlands, and open waters provide life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area) for species located in traditional navigable waters"). *See also* 80 Fed. Reg. at

37,072 ("Non-glaciated vernal pools in western states are reservoirs of biodiversity and can be connected genetically to other locations and aquatic habitats through wind- and animal-mediated dispersal."). There simply is no support for such a theory.

The Act's Section 102 provides that the storage of water for *fish and wildlife habitat* at a federal reservoir is to be determined by "the Corps of Engineers, Bureau of Reclamation, or other Federal agencies" planning that reservoir project, *not EPA*. 33 U.S.C. § 1252(b)(2). Congress can and does pass laws to regulate and protect habitat, but the Federal Water Pollution Control Act is not one of them. The Endangered Species Act protects endangered and threatened species and related critical habitat. 16 U.S.C. §§ 1531 *et seq*. The Migratory Bird Treaty Act makes it illegal for anyone to take any migratory bird, or the parts, nests, or eggs of such a bird except under the terms of a valid permit. 16 U.S.C. §§ 703 *et seq*. The North American Wetlands Conservation Act authorizes a grant program to carry out projects to protect and manage wetland habitats for migratory birds and other wetland wildlife in the United States. 16 U.S.C. §§ 4401 *et seq*. These statutes, which are administered by the U.S. Fish and Wildlife Service, have a specific scope and purpose and do not encompass the habitat of all species that move between navigable and other waters. Yet, for habitat used by many species, the new WOTUS rule would moot these specific, focused statutes.

The Agencies do not provide any support for their novel theory that the Act regulates habitat; instead they claim that "science" (found in the Connectivity Report) supports expanding their jurisdiction. This Report includes nearly 50 studies that document biological connections used by the Agencies to justify the scope of jurisdiction claimed in the WOTUS rule. The studies include: Figuerola, J., A. J. Green, and T. C. Michot, "Invertebrate eggs can fly: Evidence of waterfowl mediated gene flow in aquatic invertebrates," The American Naturalist 165:274-280 (2005); Frisch, D., A. J. Green, and J. Figuerola, "High dispersal capacity of a broad spectrum of aquatic invertebrates via waterbirds," Aquatic Sciences 69:568-574 (2007); and Roscher, J. P., "Alga dispersal by muskrat intestinal contents," Transactions of the American Microscopical Society 86:497-498 (1967). Connectivity Report at 1-9, 4-31, 4-32, 4-34, B-64.

It surpasses belief that the content of a muskrat's intestines was on Congress' mind when it enacted the 1972 Amendments to the Federal Water Pollution Control Act. The Agencies' efforts to radically expand the Act should be rejected.

D. The Statement of Goals Does Not Prescribe the Act's Jurisdictional Reach.

Section 101(a) sets forth the objective of the Act, but, as noted above, the goals and policies identified are all related to protecting water from pollution. The authority Congress granted to the Agencies in the subsequent sections of the Act is even more limited than the objectives, goals, and policies in Section 101(a).

As the Supreme Court has stated, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). The *Rapanos* plurality made this point as well, expressly rejecting the claim of jurisdiction that the Agencies now assert in the WOTUS rule:

> This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose. … It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that "significantly affect the chemical, physical, and biological integrity of" waters of the United States. It did not do that, but instead explicitly limited jurisdiction to "waters of the United States."

Rapanos v. United States, 547 U.S. 715, 755-56 (2006) (Scalia, J., plurality).

This Court too, should reject the Agencies' novel attempt to transform and elevate the goals statement of the Federal Water Pollution Control Act into a grant of expansive regulatory jurisdiction.

III. THE AGENCIES' NEW, EXPANSIVE INTERPRETATION OF FEDERAL WATER POLLUTION CONTROL ACT JURISDICTION IS NOT ENTITLED TO DEFERENCE

The Agencies' interpretation of the Federal Water Pollution Control Act is not entitled to deference under *Chevron v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842–43 (1984).

No deference applies when an "administrative interpretation of a statute invokes the outer limits of Congress' power," in the absence of a clear indication from Congress that it intended that result. *SWANCC*, 531 U.S. at 172 (citations omitted). "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. *Id.* at 173. The WOTUS Rule falls squarely within the scope of that prohibition.

In *SWANCC*, the Supreme Court held that efforts of the Corps to regulate isolated bodies of water based on their use by migratory birds or endangered species (the "Migratory Bird Rule") pushed the limits of congressional authority and encroached on traditional state authorities. Given the absence any clear congressional intent to authorize such actions, the Court interpreted the Act to avoid these problems. *Id*. at 173. The Agencies attempt to go even further with their WOTUS Rule, seeking to extend federal control over isolated water that is used as habitat by a species that also lives in navigable water (not just migratory or

endangered species) and creating federal control over water flows, a traditional state authority. The WOTUS Rule, like the "Migratory Bird Rule," raises serious constitutional problems that should be avoided by courts.

As in *SWANCC*, the Agencies fail to cite to text or legislative history that provides any clear indication of congressional intent to regulate water based on either overland or groundwater flows, or on the use water as habitat. Accordingly, no deference can be accorded the Agencies' WOTUS Rule.

This Court should greet the Agencies' novel theory (that "connections" to navigable water such as "contribution of flow" or "provision of life cycle dependent aquatic habitat" are bases for federal jurisdiction) with skepticism. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000))("[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate … we typically greet its announcement with a measure of skepticism."). For this reason too, this Court should reject the Agencies' novel jurisdictional theories.

IV. THE THEORY OF JURISDICTION ESPOUSED IN THE WOTUS RULE IS NOT SUPPORTED BY THE ADMINISTRATIVE RECORD

As noted by this Court when staying the effective date of the WOTUS Rule pending review, there is no record support for the definitions adopted by the Agencies in this rulemaking. *State of Ohio, et al. v. U.S. Army Corps of Eng'rs, et al.*, Case No. 15-3751, Document 49-2, Order of Stay, at 5.

The Agencies claim that science supports the new definition of waters of the United States. 80 Fed. Reg. at 73,057. However, from a scientific standpoint, all water is connected. Under the Federal Water Pollution Control Act, however, Congress did not grant the Agencies with limitless authority to regulate all water.[17]

The Act regulates pollution of navigable water. Yet the Agencies have filled the administrative record with studies that have no relevance to water quality, such as the habitat studies cited above. Similarly, the studies cited by EPA in the Connectivity Report to justify jurisdiction over ephemeral flows over land examine the role such flows play in recharging groundwater, not in conveying pollutants to navigable waters. *See* Connectivity Report, at Appendix B, section B.5. The vast majority of the studies in the Connectivity Report do not even identify impacts to navigable waters.

The disparity between the definitions in the Rule and evidence of impacts to navigable waters is identified in an April 24, 2015 memorandum in which the head of the Corps' regulatory program notes that hydrologic connections are more important than distance to navigable water when making jurisdictional determinations.[18] In a letter to the Senate Environment and Public Works

---

[17] The theory of jurisdiction put forth in the Rule could theoretically support jurisdiction over any water, not just water covered by the Rule.
[18] Moyer April 24, 2015 Technical Analysis, at paragraph 8.

Committee, Assistant Secretary Darcy admitted that the definitions in the Rule were not based on field observations.[19] Finally, a recently completed investigation by the House Committee on Oversight and Government Reform reveals that, according to Corps officials, the definitions in the Rule were politically, not empirically, driven.[20]

The Agencies must separately justify both the legal and factual bases for their regulatory decisions and the scope of their rulemaking. They have failed on all counts.

As this Court has already found, the Agencies' general references to the Connectivity Report and to their own experience do not justify the expansive jurisdiction claimed in the WOTUS rule. The failure to provide adequate record support for the Rule violates the Administrative Procedure Act's "arbitrary and capricious" standard and, therefore, the Rule must be vacated.

---

[19] Correspondence between Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) to James Inhofe, Chairman, Senate Environment and Public Works Committee (Aug. 28, 2015) , available at http://www.epw.senate.gov/public/_cache/files/75d3b352-44fd-4e64-9d9a-be8d06193342/08.28.15-army-response-to-07.06.-15-and-07.27.15-letters.pdf (last visited on November 7, 2016).

[20] House Report on "Politicization of the Waters of the United States Rulemaking," Oct. 27, 2016, at 32-33, available 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).

V. CONCLUSION

For the foregoing reasons, this Court should vacate the WOTUS rule.

Respectfully Submitted,

/s/ L. Rachel Lerman

L. Rachel Lerman
Barnes & Thornburg LLP
2029 Century Park East
Suite 300
Los Angeles, CA 90067-2904
Tel: (310) 284-3871
Rachel.lerman@btlaw.com

Jeffrey S. Longsworth
Barnes & Thornburg LLP
1717 Pennsylvania Avenue, NW
Suite 500
Washington, DC 20006
Tel: (202) 408-6918
Jeffrey.longsworth@btlaw.com

Tammy Helminski
Barnes & Thornburg LLP
171 Monroe Avenue N.W. Suite 1000
Grand Rapids, Michigan 49503
Tel: (616) 742-3926
Tammy.helminski@btlaw.com

Counsel for Amici

COMBINED CERTIFICATIONS

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 6,932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font type.

Dated: November 8, 2016

/s/ L. Rachel Lerman
L. Rachel Lerman
Barnes & Thornburg LLP
2029 Century Park East
Suite 300
Los Angeles, CA 90067-2904
Tel: (310) 284-3871
Rachel.lerman@btlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2016, a true and correct copy of the Brief of Members of Congress as Amici Curiae was filed electronically with the Clerk of the Court for the United States of Appeals for the Sixth Circuit using the CM/ECF system. Parties in the case that are registered CM/ECF uses will be served by that system.

Date: November 8, 2016

/s/ L. Rachel Lerman
L. Rachel Lerman

ADDENDUM

List of *Amici Curiae*

1. Senator James M. Inhofe of Oklahoma
2. Senator Mitch McConnell of Kentucky
3. Representative Bob Gibbs of Ohio, 7th Congressional District
4. Representative Bill Shuster of Pennsylvania, 9th Congressional District
5. Senator Pat Roberts of Kansas
6. Representative Michael K. Conaway of Texas, 11th Congressional District
7. Representative Collin Peterson of Minnesota, 7th Congressional District
8. Senator Lisa Murkowski of Alaska
9. Senator Lamar Alexander of Tennessee
10. Representative Harold Rogers of Kentucky, 5th Congressional District
11. Senator Chuck Grassley of Iowa
12. Representative Bob Goodlatte of Virginia, 6th Congressional District
13. Senator John Thune of South Dakota
14. Senator David Vitter of Louisiana
15. Senator John Barrasso of Wyoming
16. Senator John Boozman of Arkansas
17. Senator Shelley Moore Capito of West Virginia
18. Senator Michael D. Crapo of Idaho
19. Senator Joni K. Ernst of Iowa
20. Senator Deb Fischer of Nebraska
21. Senator John Hoeven of North Dakota
22. Senator James Lankford of Oklahoma
23. Senator Joe Manchin III of West Virginia
24. Senator Mike Rounds of South Dakota
25. Senator Dan Sullivan of Alaska
26. Senator Thom Tillis of North Carolina
27. Senator Roger F. Wicker of Mississippi
28. Representative Brian Babin of Texas, 36th Congressional District
29. Representative Lou Barletta of Pennsylvania, 11th Congressional District
30. Representative Rod Blum of Iowa, 1st Congressional District

31. Representative Charles W. Boustany, Jr. of Louisiana, 3rd Congressional District
32. Representative Jim Bridenstine of Oklahoma, 1st Congressional District
33. Representative Larry Bucshon of Indiana, 8th Congressional District
34. Representative Kevin Cramer of North Dakota, At-Large Congressional District
35. Representative John Culberson of Texas, 7th Congressional District
36. Representative Warren Davidson of Ohio, 8th Congressional District
37. Representative Rodney Davis of Illinois, 13th Congressional District
38. Representative Jeff Denham of California, 10th Congressional District
39. Representative Sean P. Duffy of Wisconsin, 7th Congressional District
40. Representative John J. Duncan, Jr. of Tennessee, 2nd Congressional District
41. Representative Stephen Fincher of Tennessee, 8th Congressional District
42. Representative Chuck Fleischmann of New York, 3rd Congressional District
43. Representative John C. Fleming of Louisiana, 4th Congressional District
44. Representative Louie Gohmert of Texas, 1st Congressional District
45. Representative Paul A. Gosar of Arizona, 4th Congressional District
46. Representative Sam Graves of Missouri, 6th Congressional District
47. Representative H. Morgan Griffith of Virginia, 9th Congressional District
48. Representative Glenn Grothman of Wisconsin, 6th Congressional District
49. Representative Gregg Harper of Mississippi, 3rd Congressional District
50. Representative Vicky Hartzler of Missouri, 4th Congressional District
51. Representative Jody Hice of Georgia, 10th Congressional District
52. Representative Richard Hudson of North Carolina, 8th Congressional District

53. Representative Tim Huelskamp of Kansas, 1st Congressional District
54. Representative Evan Jenkins of West Virginia, 3rd Congressional District
55. Representative Bill Johnson of Ohio, 6th Congressional District
56. Representative Sam Johnson of Texas, 3rd Congressional District
57. Representative Walter B. Jones of North Carolina, 3rd Congressional District
58. Representative David P. Joyce of Ohio, 14th Congressional District
59. Representative Mike Kelly of Pennsylvania, 3rd Congressional District
60. Representative Trent Kelly of Mississippi, 1st Congressional District
61. Representative Raúl R. Labrador of Idaho, 1st Congressional District
62. Representative Darin LaHood of Illinois, 18th Congressional District
63. Representative Robert E. Latta of Ohio, 5th Congressional District
64. Representative Doug Lamborn of Colorado, 5th Congressional District
65. Representative Billy Long of Missouri, 7th Congressional District
66. Representative Barry Loudermilk of Georgia, 11th Congressional District
67. Representative Cynthia Lummis of Wyoming, At-Large Congressional District
68. Representative David McKinley of West Virginia, 1st Congressional District
69. Representative Luke Messer of Indiana, 6th Congressional District
70. Representative Markwayne Mullin of Oklahoma, 2nd Congressional District
71. Representative Randy Neugebauer of Texas, 19th Congressional District
72. Representative Kristi Noem of South Dakota, At-Large Congressional District
73. Representative Pete Olson of Texas, 22nd Congressional District
74. Representative Steven Palazzo of Mississippi, 4th Congressional District

75. Representative Mike Pompeo of Kansas, 4th Congressional District
76. Representative John Ratcliffe of Texas, 4th Congressional District
77. Representative Jim Renacci of Ohio, 16th Congressional District
78. Representative David P. Roe of Tennessee, 1st Congressional District
79. Representative Jason Smith of Missouri, 8th Congressional District
80. Representative Chris Stewart of Utah, 2nd Congressional District
81. Representative Glenn Thompson of Pennsylvania, 5th Congressional District
82. Representative Ann Wagner of Missouri, 2nd Congressional District
83. Representative Greg Walden of Oregon, 2nd Congressional District
84. Representative Mimi Walters of California, 45th Congressional District
85. Representative Bruce Westerman of Arkansas, 4th Congressional District
86. Representative Lynn Westmoreland of Georgia, 3rd Congressional District
87. Representative David Young of Iowa, 3rd Congressional District
88. Representative Ryan Zinke of Montana, At-Large Congressional District