IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

(2) NATIONAL FEDERATION OF INDEPENDENT BUSINESS,

(3) STATE CHAMBER OF OKLAHOMA,

(4) TULSA REGIONAL CHAMBER, and

(5) PORTLAND CEMENT ASSOCIATION,

Plaintiffs,

v.

(1) UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

(2) GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

(3) UNITED STATES ARMY CORPS OF ENGINEERS, and

(4) JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works),

Defendants.

No. 15-CV-386-CVE-PJC
(Related: No. 15-CV-381-CVE-FHM)

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The Chamber of Commerce of the United States of America, National Federation of Independent Business, State Chamber of Oklahoma, Tulsa Regional Chamber, and Portland Cement Association ("Plaintiffs") hereby move for a preliminary injunction enjoining the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps") ("Agencies") from giving effect to the *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015) ("Final Rule"), in order to maintain the status quo while the legality of the Final Rule is determined.

On June 29, 2015, the Agencies published the Final Rule, which purports to expand dramatically the Agencies' power over waters within Oklahoma. Although the Agencies waited to issue the Rule for nearly a decade after the Supreme Court rejected their last attempt to expand the reach of the Clean Water Act, they set an effective date only 60 days later, on August 28, 2015. As a result, absent preliminary relief to preserve the status quo, Oklahoma will be deprived of authority over a significant percentage of the waters over which it had previously exercised sovereign regulatory authority. In addition, absent preliminary relief, Plaintiffs' members will be deprived of the ability to improve their property without undergoing costly and time-consuming federal permitting requirements. These deprivations are unlawful because the newly broadened definition of "waters of the United States" clearly exceeds the Agencies' authority under the Clean Water Act, the Administrative Procedure Act, the U.S. Constitution, and the Regulatory Flexibility Act. For these reasons, the Court should enter an order preventing the Agencies from implementing the Final Rule to maintain the status quo until the legality of the Final Rule is determined and the Agencies comply with the Regulatory Flexibility Act.[1]

[1] In *Georgia v. McCarthy*, No. 15-79 (S.D. Ga.), eleven States filed a lawsuit against the same Defendants seeking the same declaratory and injunctive relief on the same matter before this Court. On

BACKGROUND

I. The Agencies' Prior Attempts to Aggrandize Their Power

The Clean Water Act ("CWA") grants the Agencies regulatory authority over only "navigable waters," which are defined as "the waters of the United States including the territorial seas." 33 U.S.C. § 1362. The CWA reserves regulatory authority over all other waters to the States. The Final Rule broadens this definition to include wholly intrastate, non-navigable, and traditionally state-regulated waters.

This is not the first time the Agencies have attempted to accomplish this end. In both prior instances, the United States Supreme Court found that the Agencies had acted unlawfully. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), the Supreme Court examined the validity of the so-called "Migratory Bird Rule," which allowed the federal government to assert CWA jurisdiction over virtually anything that constituted a habitat for migratory birds, including the abandoned sand and gravel pit that was at issue in the case. 531 U.S. 159, 162 (2001). In rejecting this assertion of CWA jurisdiction, the Court explained that it was the intent of Congress to regulate wetlands that were "inseparably bound up with the 'waters' of the United States." *Id*. at 167 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985)). The Court found that Section 404(a)'s scope clearly did not apply "to non-navigable, isolated, intrastate waters" (or sand pits, for that matter). *Id*. at 172. And even if it were not clear, the Agencies' conclusion to the contrary was not entitled to deference because the Agencies' assertion of jurisdiction potentially exceeded their power under the Commerce Clause. Because of the "prudential desire not to needlessly reach

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July 21, 2015, the plaintiff States filed a motion for a preliminary injunction, and on the same day, the district court ordered Defendants to respond within ten days and set the hearing for August 12, 2015. *Id.* (Doc. 33). Plaintiffs respectfully request that this Court establish the same schedule here, ordering Defendants to respond promptly to Plaintiffs' motion and scheduling a hearing to resolve the motion.

constitutional issues and [its] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," the Court held that there was "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit." *Id*. at 172-74.

Undeterred, the Agencies attempted another overreach in 2006 and were again rebuffed by the Supreme Court. In *Rapanos v. United States*, the Supreme Court examined the legality of the federal government's attempt to bring a CWA enforcement action against private individuals for discharging fill material into allegedly protected wetlands. 547 U.S. 715, 729 (2006). A plurality of the Court concluded that the attempted exercise of CWA jurisdiction was unlawful because the only natural reading of the statute "confirm[s] that 'the waters of the United States' … cannot bear the expansive meaning" asserted by the federal government. *Id*. at 731-32. The plurality found that "'waters' refers more narrowly to water 'as found in streams and bodies forming geographical features such as oceans, rivers, and lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'" *Id*. at 732.

The plurality also relied on the Act's use of the phrase "*navigable* waters" which could confer jurisdiction only "over relatively *permanent* bodies of water." *Id*. at 734 (emphasis in original). This conclusion was likewise supported by the CWA's stated policy to "recognize, preserve, and protect" state primacy with regard to land and water use. *Id*. at 737. The plurality ultimately held that "the phrase 'the waters of the United States'" "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes,'" and *not* "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*. at 739 (internal citations omitted).

In a concurring opinion, Justice Kennedy explained that the federal government's jurisdiction extends only to primary "waters that are navigable in fact or that could reasonably be so made" and to secondary waters with a "'significant nexus'" to primary waters. *Id.* at 780 (quoting *SWANCC*, 531 U.S. at 167, 172). To satisfy that nexus, secondary waters must "significantly affect the chemical, physical, *and* biological integrity of" primary waters. *Id.* at 780 (emphasis added). Justice Kennedy noted that "in many cases wetlands adjacent to [covered] tributaries … might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*" and thus emphasized that in order to avoid "unreasonable applications of the statute," the federal government "must establish a significant nexus on a case-by-case basis when it seeks to regulate *wetlands* based on adjacency to nonnavigable tributaries." *Id.* at 781-82 (emphasis added). Justice Kennedy added that if any deference were owed to the Agencies it would not extend so far as to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778.

II. The Agencies' Current Attempt to Aggrandize Their Power with the Final Rule

The Agencies demonstrated no apparent urgency in responding to the decision in *Rapanos*. More than nine years later, on June 29, 2015, the Agencies issued a new, broadened definition of "waters of the United States." 80 Fed. Reg. 37,054. This definition includes: (1) "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide"; (2) all "interstate waters" and "interstate wetlands"; (3) "the territorial seas"; and (4) "all

impoundments." *Id.* at 37,116-17 (to be codified at 40 C.F.R. § 230.3(o)(1)(i)-(iv)).[2] For the first time, the Final Rule also includes "all tributaries" and provides a new and expansive definition of that term. *Id.* (to be codified at 40 C.F.R. § 230.3(o)(1)(v)).

The Final Rule drastically expands the traditional meaning of "tributary" to include many new waters. Now, any water "that contributes flow, either directly or through another water" to a water used in interstate commerce, an interstate water, or the territorial sea, that is "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark," is considered a tributary. 40 C.F.R. § 230.3(o)(3)(iii).

Tributaries can be "natural, man-altered, or man-made" and include "waters such as rivers, streams, canals, and ditches not excluded." *Id.* If a water meets this definition, it would still be considered a tributary even if—for any length of time—there are "one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground)." *Id.* Similarly, a tributary will not lose its tributary status even if it contributes flow through a *non-regulable water* to an interstate commerce water, interstate water, or territorial sea. *Id.*

In addition, and notably different from its past definitions of "waters of the United States," the Final Rule includes two new categories of waters. First, instead of including only adjacent *wetlands* as in past definitions, the rule regulates "all waters adjacent" to waters that have been or could be used in interstate commerce, all interstate waters, the territorial seas, impoundments, tributaries, and all adjacent "wetlands, ponds, lakes, oxbows, impoundments, and similar waters." *Id.* § 230.3(o)(1)(vi). Second, the Final Rule includes new categories of water

[2] The Final Rule codifies changes to the definition of "waters of the United States" in multiple locations throughout the Code of Federal Regulations. For ease of reference, this brief refers only to the changes made in 40 C.F.R. Part 230.

features that require "case-by-case" analyses to determine whether they are regulated. *Id.* § 230.3(o)(1)(vii-viii). "Adjacent" is defined broadly to mean "bordering, contiguous, or neighboring" an interstate commerce water, interstate water, territorial sea, impoundment, or tributary, and even includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." *Id.* § 230.3(o)(3)(i). Adjacent waters also include waters that connect segments of interstate commerce waters, interstate waters, territorial seas, impoundments, and tributaries. *Id.* With few exceptions, all waters that are "adjacent" are *per se* regulated and require federal permits.

For purposes of adjacency, "neighboring" is defined as "all waters located within 100 feet of the ordinary high water mark" and "all waters located within the 100 year floodplain but not more than 1,500 feet from the ordinary high water mark" of an interstate commerce water, interstate water, territorial sea, impoundment, or tributary. *Id.* § 230.3(o)(3)(ii)(A)-(B). Finally, all waters located within 1,500 feet of the high tide line of an interstate commerce water, interstate water, or territorial sea are also "neighboring." *Id.* With few exceptions, all "neighboring" waters are *per se* regulated and require federal permits. *Id.* § 230.3(o)(3)(ii)(C).

The Final Rule also introduces a "case-by-case analysis" category that encompasses all waters within the 100-year floodplain of traditionally covered waters, and waters located within 4,000 feet (three-quarters of a mile) of an ordinary high water mark of a covered water. When these waters are determined on a case-by-case basis to have a "significant nexus" to an interstate commerce water, interstate water, or territorial sea, they too are regulated and require federal permits. *Id.* § 230.3(o)(1)(viii).

As defined by the Agencies, a significant nexus exists when "a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly

affects the chemical, physical, *or* biological integrity of [an interstate commerce water, interstate water, or territorial sea]." *Id.* § 230.3(o)(3)(v) (notably different from Justice Kennedy's requirement of effects on the "chemical, physical, *and* biological integrity" of the water). As defined by the Agencies, waters "in the region" means the water in the watershed that drains to the nearest interstate commerce water, interstate water, and territorial sea. *Id.* In determining whether a water has a significant nexus to a primary water, the water's effect on the downstream primary water will be assessed by evaluating certain aquatic functions listed in the Final Rule. *Id.* Some of these include sediment trapping, pollutant trapping, retention of floodwaters, and runoff storage. *Id.* Importantly, a significant nexus will be found if any single function "contributes significantly to the chemical, physical *or* biological integrity" of the nearest affected water. *Id.* (emphasis added).

III. Procedural Background

Plaintiffs filed their complaint on July 10, 2015. On July 15, 2015, Plaintiffs requested that this Court consolidate this action with an earlier filed, related action pending before this Court: *Oklahoma v. EPA*, No. 15-CV-381-CVE-FHM. Before the Court ruled on that Motion, the Agencies filed Motions to Stay Proceedings in both cases pending a ruling on an unfiled Section 1407 Motion to Transfer and Consolidate. Although the Agencies seek to delay Plaintiffs' attempt to avoid being injured by the Final Rule, they did not exercise their authority voluntarily to "postpone the effective date of [the Rule], pending judicial review." 5 U.S.C. § 705. Plaintiffs' have separately opposed the Agencies' Stay Motion, though they note that they would withdraw their opposition to the Agencies' request for delay if the Agencies would agree to postpone the effective date of the Rule until the conclusion of this litigation. And of course, if the Agencies were to postpone the effective date of the Rule until that point, Plaintiffs' preliminary injunction motion would also be unnecessary. Absent such a postponement,

however, Plaintiffs will face immediate and irreparable harm as a result of the Final Rule, and accordingly Plaintiffs seek a preliminary injunction.

ARGUMENT

Federal courts have broad "inherent equitable powers … to prevent plaintiffs from suffering irreparable injury." *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 834 (D.C. Cir. 1984). Likewise, the Administrative Procedure Act separately provides in relevant part:

> On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705.

The purpose of such preliminary relief is to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Parties requesting a preliminary injunction must establish that: (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Importantly, "[i]f the plaintiffs can establish that the latter three requirements tip strongly in their favor, the test is modified, and the plaintiffs may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Tulsa Fire Fighters Ass'n v. City of Tulsa, Okla.*, 834 F. Supp. 2d 1277, 1286 (N.D. Okla. 2011) (citing *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255-56 (10th Cir. 2003)). Parties requesting a preliminary injunction are not required, however, to "prove [their] case in full at a preliminary-injunction hearing."

Camenisch, 451 U.S. at 395. Thus, preliminary injunctions are "customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.*

I. Plaintiffs Are Likely to Succeed on the Merits

A. The Final Rule Exceeds the Agencies' Authority under the Clean Water Act.

The Final Rule exceeds the Agencies' authority under the CWA because there is no fair reading of the statutory term "navigable waters" that would include waters that are ephemeral or lack any discernable flow and are not "inseparably bound up with" the "waters of the United States." *SWANCC*, 531 U.S. at 167. The Final Rule exceeds the Agencies' authority in at least four separate ways.

First, the Final Rule improperly asserts *per se* coverage of "adjacent" waters. The Final Rule violates the test set forth by the *Rapanos* plurality because it includes *per se* coverage over all "adjacent" waters, thus sweeping in *any* water "adjacent to" or "neighboring" tributaries or impoundments, even when there is no "continuous surface connection" to a traditional "water of the United States." *Rapanos*, 547 U.S. at 742. It also sweeps in any water and land within the 100-year flood plain, even when there is no "continuous surface connection" to traditional "waters of the United States." *Id.*

The Final Rule also contravenes the limits set forth in Justice Kennedy's concurring opinion by sweeping in "adjacent," "neighboring," and "bordering" waters even when there is no "significant nexus" to traditional "waters of the United States." 40 C.F.R. § 230.3(o)(3)(i); *see Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). The definition also sweeps in waters within 100 feet of traditional waters, impoundments, and tributaries and 100-year floodplain waters, even when they have no "significant nexus" to a traditional water. *See id.* § 230.3(o)(3)(ii).

Finally, waters within 1,500 feet of the high tide line are included, again with no requirement to demonstrate a "significant nexus" to a traditional water. *See id*.

Second, the Final Rule improperly asserts *per se* coverage of "tributaries." The Final Rule exceeds the EPA's statutory and constitutional authority due to its broad definition of "tributary," which encompasses wholly intrastate and isolated ponds, ephemeral streams, and even channels that are dry for most of the year as long as there is a discernable ordinary high water mark. Under the EPA's new approach, a water falls within the definition of tributary even if it has man-made or natural breaks of any length. 80 Fed. Reg. 37,117 (to be codified at 40 C.F.R. § 230.3(o)(3)(iii)). This characterization of a "tributary" violates the plurality's test in *Rapanos* because it includes any feature with *any flow* into traditional waters, even when there is no "continuous surface connection." *See Rapanos*, 547 U.S. at 742 (plurality opinion) (requiring that adjacent wetlands covered by the CWA have "a continuous surface connection" with a "water of the United States," "making it difficult to determine where the 'water' ends and the 'wetland' begins"). The EPA's *per se* inclusion also exceeds the limits in Justice Kennedy's separate opinion because it purports to regulate *all* tributaries even when there is no impact on the "chemical, physical, and biological integrity of" a traditionally-regulated water. *Id*. at 780 (Kennedy, J., concurring).

Third, the Final Rule improperly creates a category of waters covered on a case-by-case basis. The inclusion of a case-by-case analysis for *all* waters within the 100-year floodplain and within 4,000 feet of an ordinary high water mark or high tide line of a primary water also exceeds the EPA's legal authority. To begin with, the sheer number of waters the Final Rule now considers *per se* regulated ("adjacent," "neighboring" and "tributary") means there will be vast areas of land located within the 100-year floodplains or within 4,000 feet of these primary

waters. Indeed, "the agencies have determined that the *vast majority* of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea." *See* Economic Analysis of the EPA-Army Clean Water Rule, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 11 (May 2015) (emphasis added). Moreover, if even a small portion of a water feature falls within these geographic areas, and is determined to have a significant nexus, the entire feature is regulated and any activity along that feature will require federal permitting. 80 Fed. Reg. 37,117 (to be codified at 40 C.F.R. § 230.3(o)(1)(viii)). Under this case-by-case analysis, an intrastate water can be subject to a significant nexus test (and ultimately be regulated by the Agencies) merely because it has a geographic proximity (either by falling within the 100-year floodplain or 4,000 feet of an ordinary high water mark) to a non-navigable interstate water. This approach is clearly contrary to the *Rapanos* plurality's statement that a "water of the United States" must have some connection to "a relatively permanent body of water connected to traditional interstate *navigable* waters." *Rapanos*, 547 U.S. at 742 (plurality opinion) (emphasis added). It is also contrary to Justice Kennedy's concurrence because the CWA covers only those waters having a "significant nexus" with "waters that are or were *navigable* in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring) (emphasis added). Because the Final Rule includes these case-by-case waters as "waters of the United States," it should be set aside as not in accordance with the law.

Fourth, the Final Rule exceeds the Agencies' authority under the CWA by flatly ignoring Congress's command that the States retain regulatory primacy over the vast majority of waters. *See Rapanos*, 547 U.S. 736-37 (plurality opinion) ("[T]he expansive theory advanced by [the federal government], rather than 'preserving the primary rights and responsibilities of the

States,' would have brought virtually all 'planning of the development and use of land and water resources' by the States under federal control."); *SWANCC*, 531 U.S. at 174 (noting that the federal government's expansive "waters of the United States" interpretation would "result in a significant impingement of the States' traditional and primary power over land and water use").

Defendants may seek to avoid defending these deficiencies by invoking *Chevron* deference. But such an argument would fail. As an initial matter, the Agencies' construction of the CWA should receive no deference from this Court. In reviewing an agency's construction of a statute, a Court must first ask whether "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). And in a case like this one, the Agencies have to do more than point to an ambiguity in the CWA that entitles their Final Rule to deference. This is so because "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)); *SWANCC*, 531 U.S. at 174. The Final Rule is entitled to no deference at all because the CWA contains no express statement of Congress's intent to allow the expansion of federal power over waters traditionally regulated by the States. Instead, the CWA expressly states the opposite by mandating that the Agencies "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

Even if the Agencies were entitled to deference (and they are not), the Final Rule would still fail. "Even under *Chevron's* deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442,

(2014) (quoting *Arlington v. FCC*, 133 S.Ct. 1863, 1868 (2013)). "And reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole." *Id.* (citation and alteration omitted). A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* (quoting *United Sav. Assn. of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). Here, the Agencies' interpretation of the CWA through the Final Rule is flatly "inconsisten[t] with the design and structure of the statute as a whole." *Univ. of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2529 (2013). As such, the Final Rule is invalid and merits no deference from this Court.

B. The Final Rule Exceeds the Agencies' Authority under Article I of the U.S. Constitution and Violates State Sovereignty Reserved under the Tenth Amendment.

The federal government has no general police power and may exercise only those powers that are expressly granted to it by the Constitution or implied as reasonably "necessary and proper" to carry out the granted powers. *See* U.S. Const. art. I, § 8, cl. 18; *id*. amend. X; *United States v. Lopez*, 514 U.S. 549, 566 (1995). The Clean Water Act was enacted pursuant to Congress's authority under the Commerce Clause "to regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8. "'The power to regulate commerce, though broad indeed, has limits that the Court has ample power' to enforce." *Lopez*, 514 U.S. at 557 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)). If the commerce power had no limits, "the distinction between what is national and what is local" would be "effectually obliterate[d]" and would "create a completely centralized government." *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37, 57 (1937). Thus, "the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as

to embrace effects upon interstate commerce [that are] indirect and remote.'" *Lopez*, 514 U.S. at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37)

And where "an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. This requirement stems from the prudential desire to avoid constitutional issues and the assumption that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id*. at 172-73. "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 172-73; *see also United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."). "Thus, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *SWANCC*, 531 U.S. at 173 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

The Final Rule raises serious doubt as to the validity of the CWA as an exercise of the commerce power because it attempts to regulate as *per se* "waters of the United States" wholly intrastate and isolated intermittent streams and culverts, ditches with ephemeral flow, and other "waters" that may have no continuous or even discernable flow. Dredging and filling into a water or ditch that flows perhaps once in 100 years, or in a water separated by natural or man-made breaks, or waters that are within 1,500 feet of the high tide line or ordinary high water mark will not *per se* have a *substantial* effect on interstate commerce. Because the Final Rule

declares that each of these waters are *per se* "waters of the United States" without showing that the effect of such attenuated activities are in fact *substantial*, it is invalid.

As the Court found in *SWANCC* and the plurality found in *Rapanos*, there is "nothing approaching a clear statement from Congress that it intended ['waters of the United States'] to reach" wholly intrastate, non-navigable and intermittent waters. *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 738 ("The phrase 'the waters of the United States' hardly qualifies [as a clear statement from Congress]."). The federal government's interpretation of "waters of the United States" therefore "stretches the outer limits of Congress's commerce power," raising "difficult questions about the ultimate scope of that power." *Id*. Such a "'Land Is Waters' approach to federal jurisdiction" must be avoided. *Id*. at 734.

The Final Rule also is not in accordance with the law because it violates the Tenth Amendment to the Constitution of the United States. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people." U.S. Const. amend. X. The federal system "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). "If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may ... challenge [the] law as enacted in contravention of constitutional principles of federalism." *Id*.

Among the powers reserved to the States under the Tenth Amendment is the authority to regulate intrastate land use and water resources. *See Hess v. Port Auth. TransHudson Corp.*, 513

U.S. 30, 44 (1994); *see also SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"). The CWA itself recognizes that the States have "the primary responsibilities and rights ... to plan the development and use ... of land and water resources." 33 U.S.C. § 1251(b). The Supreme Court requires a "clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional state authority." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). A Tenth Amendment violation occurs where a challenged regulation "regulates states as states," when it "addresses matters that are indisputably attributes of state sovereignty," and when "compliance with [the regulation] would directly impair the State's ability to structure integral operations in areas of traditional state functions." *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996) (citation omitted).

Such is the case here. The Final Rule requires the States to abdicate to the federal government state authority over waters falling within the States' traditional regulatory authority. The expansion of federal jurisdiction over these waters necessarily takes something away from the State "as a State." Once waters fall under the CWA's coverage, the States are subjected to many affirmative requirements under the Act. *See* 33 U.S.C. §§ 1311, 1315(b)(1)(B), 1341; 40 C.F.R. § 130.7. For the new waters now covered under the "waters of the United States" definition, the federal government requires States to issue a slew of additional certifications and permits in their capacity as a "State." For example, the Final Rule will require States to issue additional state certifications under the Section 404 program to parties seeking to discharge dredge and fill into "waters of the United States." 33 U.S.C. § 1341(a)(1). Similarly, the Final Rule will require States to create, process, and issue additional National Pollutant Discharge Elimination System permits to parties seeking to discharge pollutants into newly classified "waters of the United States." 33 U.S.C. § 1342.

The Final Rule also addresses matters that are "indisputably attributes of state sovereignty." *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996) (citing *New York v. United States*, 505 U.S. 144, 156, (1992)). The CWA itself recognizes that the States retained sovereignty over land and water use. 33 U.S.C. § 1251(b) (specifically instructing the Agencies to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources."). The Supreme Court has further acknowledged this principle. *See SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 737. The federal government's usurpation of state authority over wholly intrastate, traditionally state-regulated waters clearly impacts "attributes of state sovereignty." *South Carolina v. Regan*, 465 U.S. 367, 419 n.18 (1984). Compliance with the Final Rule would "impair the State's ability to structure integral operations in areas of traditional state functions." *Hampshire*, 95 F.3d at 1004. The Agencies assert regulatory authority over wholly intrastate, traditionally state-regulated waters. This displacement of state authority in favor of federal authority impairs the State's ability to set its own policy for its land and water use. Instead of regulating its land and water in the interest of the State, Oklahoma must defer to the federal government's framework established under the CWA. Because the federal government has displaced Oklahoma's sovereign authority over wholly intrastate, traditionally state-regulated waters, the Final Rule violates the Tenth Amendment. By doing so, the Final Rule would also place additional regulatory burdens on private entities. *See infra* at 19-23.

C. The Final Rule Violates the Regulatory Flexibility Act.

Lastly, the Agencies issued the Final Rule in clear violation of the Regulatory Flexibility Act ("RFA").[3] Small entities are entitled to judicial review of an agency's Regulatory Flexibility

[3] Plaintiff NFIB, the nation's leading small business advocacy associate, has nearly 4,000 members in Oklahoma, including the members whose declarations are attached as exhibits to this motion.

Analysis or the agency's certification that no such analysis is required. *See* 5 U.S.C. § 611. Compliance with the RFA is mandatory where a proposed rule would have a significant economic impact on a substantial number of small entities. *Id.* § 605(b). When an agency fails to comply with its obligations, the RFA authorizes a court to defer enforcement of the rule. *Id.* § 611(a)(4). Congress also singled-out the EPA for special treatment in the 1996 amendments to the RFA. *Id.* § 609(d)(1). For example, the EPA is required to create and participate in special small business "review panels" for all rules expected to have a significant impact. *Id.* § 609(b)(3).

Here, rather than comply with their obligations, the Agencies blithely asserted that "[b]ecause fewer waters will be subject to the CWA under the rule than are subject to regulation under the existing regulations" the RFA did not apply. 80 Fed. Reg. at 37,102. As described above, that assertion is patently false—the Rule on its face expands the scope of the Clean Water Act relative to the portion of prior regulations that were constitutionally enforceable after *Rapanos*. Even if this assertion were accurate, however, it would still be a non-sequitur, as the number of waters subject to the CWA is a different question than whether the Rule will burden small businesses. The record is replete with details about the significant costs that the Final Rule imposes on small entities; indeed Plaintiff NFIB's comments demonstrating that the proposed rule "shifts the burden of proof from the agency asserting jurisdiction to the property owner" alone was sufficient to alert the Agencies of their obligations under the Regulatory Flexibility Act. *See* Comments of the National Federation of Independent Business at 5, Docket No. EPA-HQ-OW-2011-0880 (Oct. 15, 2014). The Agencies simply failed to address these clear burdens—a patent violation of their obligations under the RFA, which justifies the grant of a preliminary injunction.. *See Am. Fed'n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1013 (N.D.

Cal. 2007) (granting preliminary injunction where plaintiffs "raised serious doubts" about agency's claim that rule would not have significant effect on small businesses).

II. Without a Preliminary Injunction, Plaintiffs and Their Members Will Suffer Irreparable Injury.

Absent a voluntary stay from the Agencies or an order from this Court preventing its effectiveness, the Final Rule will imminently harm landowners with waters on their property, including Plaintiff NFIB's members, by forcing them to submit to expensive and time-consuming federal permitting requirements in order to conduct routine activities on their property. The costs and delays associated with these permitting requirements constitute irreparable injury. Moreover, given the burdens of complying with federal regulations, many individuals and small business owners will be forced to forego their plans for improving their property, as the benefits they hoped to achieve will not outweigh the substantial costs.

For example, Michael Jacobs, an NFIB member from Delaware County, Oklahoma, owns a 50-acre plot of land adjacent to his home that is largely undeveloped. *See* Jacobs Declaration ¶ 5 (Ex. A). Before the Final Rule, Mr. Jacobs had planned to clear his property for cattle grazing and other farming purposes—improvements that would "greatly increase the value of the property" and allow him to one day "sell the property or give it to one of [his] children so that they [could] build a home on the property." *Id*. ¶¶ 7-8. Mr. Jacobs had anticipated beginning this work in September or October of this year. *Id*. ¶ 8. After his property was cleared, he "intended to raise about 30 cattle on the property[,] … take these cattle to market in the summer or fall of 2016 and, hopefully, realize a sizable return on [his] investment." *Id*.

But because Mr. Jacobs's property contains a small creek bed—which is usually about 5-6 inches deep but "will often go dry"—this parcel of land will likely be classified as a "tributary" under the Final Rule. *Id*. ¶¶ 14, 20. As a result, Mr. Jacobs "will be forced to halt all plans for

improving [his] property because the rule would require [him] to obtain a costly permit from the federal government" before making critical improvements to his property, such as impounding water for his cattle or excavating for structural improvements. *Id.* ¶ 22. The profits that Mr. Jacobs "hoped to realize in the summer or fall of 2016 from cattle sales will be forever lost." *Id.* ¶ 26. Due to the Final Rule, Mr. Jacobs "will have to forego this investment opportunity and will be unable to use the land for these and other business purposes." *Id.*

In addition, the Final Rule is already devaluing lands that represent the bulk of many families' assets. For example, Leo Stevens, an NFIB member and life-long resident of Rogers County, Oklahoma, owns a home with a small creek at the back of his property. Stevens Declaration ¶¶ 3-4 (Ex. B). Even though this creek is dry about a third of the year, because water runs through it at other times of the year Mr. Stevens believes this parcel of property is now subject to regulation under the Final Rule. *Id.* ¶¶ 5-6, 8. Much of Mr. Stevens' land's value "comes from its potential. For example, one day [he] would like to build a home on it for one of [his] children or grandchildren. Others might use it for farming or for recreation." *Id.* ¶ 9. But Mr. Stevens cannot avail himself of these potential uses of his land because he believes he now has "to ask permission from the federal government to do routine activities, such as drilling a posthole, filling a gully, or maintaining a septic system." *Id.* ¶ 10. Obtaining a federal permit is "an enormous burden and expense" for Mr. Stevens. *Id.* His property, which is the "culmination of [his and his wife's] life's work and represents a substantial part of [their] savings," has been immediately devalued by the Final Rule. *Id.* ¶ 14.

If this rule takes effect, numerous businesses will be forced to undergo the expense of applying for a CWA permit, and countless land owners and small businesses will be forced to delay or cancel plans to improve their properties, resulting in permanent lost value and foregone

profits. *See, e.g.*, *id*. ¶ 10; Jacobs Dec. ¶¶ 7, 8, 25. This economic harm is "irreparable per se" because Plaintiffs cannot recover damages from Defendants due to sovereign immunity. *See, e.g.*, *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010); *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849, 852 (9th Cir. 2009); *Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991); *Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010), *aff'd sub nom.*, *Sottera, Inc. v. FDA*, 627 F.3d 891 (D.C. Cir. 2010). ("[E]ven if the claimed economic injury did not threaten plaintiffs' viability, it is still irreparable because plaintiffs cannot recover money damages against FDA.").

III. The Balance of the Equities and Public Interest Both Favor a Preliminary Injunction.

A preliminary injunction will maintain the status quo while the case is litigated. Thus, if the preliminary injunction is granted, the Agencies will not be forced to take any affirmative action or make any changes to the way they operate. Indeed, the Agencies can hardly be heard to complain about enduring the status quo for several more months while this case is adjudicated after they waited nearly a *decade* to enact the Rule following *Rapanos*. Moreover, the Agencies have further attempted to delay this case by filing a stay motion even before moving to file a motion to transfer to the Judicial Panel on Multidistrict Litigation. The Agencies need to implement the Rule now hardly outweighs the injury to Plaintiffs absent a preliminary injunction.

Further, the public interest will be served if the Court enters a preliminary injunction. Even putting aside the Agencies' extensive delay, the public interest is not advanced by "enforcing a [rule] that is likely constitutionally infirm." *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). Granting a preliminary injunction would ensure that agency actions taken "in excess of delegated governmental power cannot direct or control [Plaintiffs']

actions." *Bond*, 131 S. Ct. at 2364. On the other hand, if an injunction is not entered, Plaintiffs will suffer immediate and irreparable injury because, among other things, they will be forced to delay or cancel plans to improve their properties, resulting in permanent lost value and foregone profits. *See supra*.

It is not just Plaintiffs and their members whose rights are at stake—the Final Rule will impact countless individuals in Oklahoma and across the country. EPA itself has developed maps indicating that more than 8.1 million miles of rivers and streams across the country could be identified as new "waters of the United States" under the Final Rule. *See Press Release, House Committee on Science, Space & Technology*, Smith: Maps Show EPA Land Grab (Aug. 27, 2014). Likewise, analyses by the States of their own waters reveal that the Final Rule would greatly expand the stream miles classified as "waters of the United States." For example, the State of Kansas has estimated that the inclusion of "ephemeral" streams as "waters of the United States" would increase the amount of jurisdictional stream miles to 134,000 miles from 32,000, an increase of over 400 percent. *See* Letter to Nancy Stoner, Acting Assistant Administrator for Water, EPA, from Sam Brownback, Governor of Kansas (July 14, 2011).

The impact of the Final Rule is already being felt. Farmers, landowners, and developers across the State have expressed concern over whether the ponds, lakes, and streams within their property are now subject to the permitting processes—and accompanying fines—under the Clean Water Act. Dozens of industries in which Plaintiffs' members operate are having similar problems, including manufacturing, mining, asphalt production, food production, pulp and paper production, paint manufacturing, electricity production, energy development, water utilities, sand, stone, and gravel operations, road construction and maintenance, landfills, real estate development, railroads, industrial development, and agriculture. *See* Comments of 375 Business

Groups at 5-26, Docket ID No. EPA-HQ-OW-2011-0880 (Nov. 12, 2014). Indeed, Plaintiffs, along with more than 375 businesses and associations from all 50 States, warned the Agencies during the notice and comment proceeding about the grave effects the rule would have on industry:

> [T]he Agencies' proposal would subject countless ordinary commercial, industrial, and even recreational and residential activities to new layers of federal requirements under the Clean Water Act. This would happen solely because low-lying or wet areas on or near their properties would, for the first time, be defined as being jurisdictional. In addition, the unusually vague and confusing definitions the Agencies use in the proposal make it virtually impossible for businesses to even comprehend that they would have to meet federal—rather than State and local—requirements when they perform routine operations…. All of the undersigned groups want clean water—and in many cases depend on it for their businesses to survive…. [But] in light of the overwhelming evidence that the proposed rule would have a devastating impact on businesses, States, and local governments without any real benefit to water quality, the Agencies should immediately withdraw the waters of the U.S. proposal and begin again.

Id. at 2-3.

Absent an injunction, this "devastating" impact will accrue once the Rule becomes effective. Plaintiffs' members and other citizens of the State will be effectively prohibited from engaging in lawful activity regarding the use of their land, despite their highly meritorious claims. A preliminary injunction should be issued in order to shield countless individuals from such harms until a final judicial determination is made.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction preventing the Agencies from enforcing the Final Rule.

Dated: July 24, 2015

Respectfully submitted,

By: */s/ Mary E. Kindelt*

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2015, I electronically served the foregoing pleading with the Clerk of Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants that was sent to the following CM/ECF registrants:

Cathryn McClanahan

/s/ Mary E. Kindelt

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERNDISTRICT OF OKLAHOMA

(1) CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

(2) NATIONAL FEDERATION OF INDEPENDENT BUSINESS,

(3) STATE CHAMBER OF OKLAHOMA,

(4) TULSA REGIONAL CHAMBER, and

(5) PORTLAND CEMENT ASSOCIATION,

Plaintiffs,

v.

(1) UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

(2) GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

(3) UNITED STATES ARMY CORPS OF ENGINEERS, and

(4) JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works),

Defendants.

No. 4:15-cv-386-CVE-PJC
(Related: No. 4:15-cv-381-CVE-FHM)

DECLARATION OF MICHAEL JACOBS

1. My name is Michael Jacobs and I am a long-time resident of Delaware County, Oklahoma.

2. I am the President of Jacobs Manufacturing Corporation in Delaware County, Oklahoma. My company makes fiberglass products for water and wastewater treatment.

3. I am an active member of the National Federation of Independent Business.

4. My family and I live on a 20-acre plot of land in Delaware County, Oklahoma. This land contains my home as well as about eight acres of hay, which we harvest throughout the year.

5. Adjacent to this plot is a 50-acre plot of land, which I also own. Because this land is undeveloped, it has great potential to be used for economic activity and personal enjoyment.

6. Before the Environmental Protection Agency recently enacted its rule regarding "navigable waters" under the Clean Water Act ("WOTUS Rule"), I had planned to develop this 50-acre property for agricultural and other purposes.

7. Specifically, I planned to clear the area for cattle grazing and other farming purposes. This process would yield valuable timber, which I would sell for profit. I also planned to improve the land so that cattle could graze on the property, including putting fences up for the cattle, planting grass, removing excess trees, and impounding waters that flow from small underground springs.

8. I had anticipated beginning this work in September or October of this year. After my property was cleared, I intended to raise about 30 cattle on the property. I planned to take these cattle to market in the summer or fall of 2016 and, hopefully, realize a sizable return on my investment.

9. These improvements, I believe, would greatly increase the value of the property. After the improvements are finished, I hope to either sell the property or give it to one of my children so that they can build a home on the property.

10. Because of the WOTUS Rule, however, I no longer believe it is economically feasible for me to make these improvements.

11. A ravine runs across the entire portion of my 50-acre property. The ravine is about 75-85 feet deep and 200-250 feet wide.

12. At the bottom of the ravine is a creek bed. The water at the bottom of the creek bed varies depending on the time of the year and the amount of rainfall.

13. For about seven to eight months of the year, there is a very small stream of water running through the creek bed. This stream is about 2-3 feet wide and 5-6 inches deep.

14. During the summer, the creek bed will often go dry and no water will run through it. Only a few small puddles of water will remain at the bottom of the ravine.

15. At other times (usually when there has been heavy rainfall), the water in the ravine will rise and the stream will grow. At its peak, the stream is about 6-8 feet deep and 20-30 feet wide.

16. When flowing, the water in the ravine feeds into the Spavinaw Creek, which flows into Lake Eucha and Lake Spavinaw. These waters eventually feed into the Arkansas River and the Mississippi River.

17. My property also contains small natural springs, many of which are in the ravine. They are often about 25-30 feet above the creek bed on the shelves of the ravine. These springs are formed when water comes up from the ground and collects in pools. When active, they trickle across the property and into the creek bed below.

18. My property also contains indentations in the ground where there are visible signs that water occasionally flows during storms.

19. Before the WOTUS Rule, my property was not subject to federal regulation under the Clean Water Act. I thus was free to use my land for the agricultural and enjoyment purposes for which I had planned.

20. After the WOTUS Rule becomes final, however, I believe these portions of my land will become subject to federal regulation under the Clean Water Act. I fear the federal government will classify these waters as "tributaries" because the land contains physical signs of occasional water flow and the water (when running through my property) eventually feeds into navigable waters downstream.

21. Since I currently do not use this property for agricultural purposes, I do not believe it qualifies for any agricultural exemption.

22. If my property is subject to the WOTUS Rule, I will be forced to halt all plans for improving my property because the rule would require me to obtain a costly permit from the federal government. For example, to raise cattle I will need to impound water on my property from the small natural springs on my property. This impoundment would now require a federal permit.

23. Complying with these regulations is an enormous burden and expense. Given the huge undertaking I was already facing (clearing the land, financing the improvement, etc.), it would no longer be worthwhile to bear the additional costs and burdens imposed by the WOTUS Rule.

24. The WOTUS Rule thus harms me in several ways. I will not be able to obtain the highest economic value from my property, as the property will remain unimproved and unused. And without such improvements, the land is less attractive to others. One goal of mine was to improve the land so that one of my children could build a home on the property. The WOTUS Rule makes that impossible.

25. This land has already been greatly devalued—both because I cannot improve it and because potential buyers know that they must obtain a costly permit if they wanted to do so.

26. In addition, the profits that I hoped to realize in the summer or fall of 2016 from cattle sales will be forever lost. Due to the WOTUS Rule, I will have to forego this investment opportunity and will be unable to use the land for these and other business purposes.

27. The WOTUS Rule will stifle the valuable and productive use of my property. This Court should enjoin the implementation of the rule.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 21, 2015

Michael Jacobs

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

(2) NATIONAL FEDERATION OF INDEPENDENT BUSINESS,

(3) STATE CHAMBER OF OKLAHOMA,

(4) TULSA REGIONAL CHAMBER, and

(5) PORTLAND CEMENT ASSOCIATION,

Plaintiffs,

v.

(1) UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

(2) GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

(3) UNITED STATES ARMY CORPS OF ENGINEERS, and

(4) JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works),

Defendants.

No. 4:15-cv-386-CVE-PJC
(Related: No. 4:15-cv-381-CVE-FHM)

DECLARATION OF LEO STEVENS

1. My name is Leo Stevens and I am a life-long resident of Rogers County, Oklahoma.

2. I am currently a part owner of the Tri-State Electric Supply Company in Bartlesville, Oklahoma. Before that, I served my country as a member of the United States Air

Force. I have two children and three grandchildren. I graduated from Kansas State University with a degree in Biology.

3. I am an active member of the National Federation of Independent Business.

4. My wife and I own a home in Rogers County, Oklahoma. We have lived here since 1984.

5. A small creek runs through the back of our property. This creek is dry about a third of the year, usually from August through November.

6. When active, the creek is about four feet deep. The water from this creek flows into Bird Creek, which then flows into Verdigris River, which eventually flows into the Arkansas River.

7. Before the Environmental Protection Agency recently enacted its rule regarding "navigable waters" under the Clean Water Act ("WOTUS Rule"), our land was not subject to federal regulation and so I was free to develop our property without federal interference.

8. After the WOTUS Rule becomes final, however, I believe this part of our land will become subject to federal regulation under the Clean Water Act. I fear the federal government will classify this creek as a "tributary" because the land contains physical signs of occasional water flow and the water (when running through our property) eventually feeds into navigable waters downstream.

9. This classification will immediately devalue our property. Much of our land's value comes from its potential. For example, one day I would like to build a home on it for one of my children or grandchildren. Others might use it for farming or for recreation.

10. But these potential uses are greatly curtailed when the owner has to ask permission from the federal government to do routine activities, such as drilling a posthole,

filling a gully, or maintaining a septic system. Obtaining a federal permit is an enormous burden and expense. There is no question that the WOTUS Rule will decrease the value of our property.

11. From my experience owning farmland, I can attest that this County's lands are already heavily regulated by the State and by the local government. As a result, I would face severe liability if I were to misuse my lands.

12. The fact that our land is regulated by the State and by the local government is not surprising. What is surprising is that the *federal* government now claims authority to regulate my property because a small amount of water sometimes flows through a creek on my property.

13. When we purchased this land, I never could have imagined that I would be subject to federal regulation for making basic improvements to the property.

14. Like many Americans, my wife and I have invested our time, money, and labor into our land. We have never polluted a navigable or non-navigable water—either on our property or elsewhere. We are stewards of the land and we protect it. This real estate is the culmination of our life's work and represents a substantial part of our savings. This Court should stop this rule from taking effect.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 17, 2015

Léo Stevens