IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01461-WJM

THE STATE OF COLORADO,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY;
ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency;
U.S. ARMY CORPS OF ENGINEERS; and
R.D. JAMES, in his official capacity as Assistant Secretary of the Army for Civil Works,

Defendants.

DECLARATION OF DON PARRISH IN SUPPORT OF BUSINESS-INTERVENORS' PROPOSED OPPOSITION TO PLAINTIFF'S AMENDED MOTION FOR A PRELIMINARY INJUNCTION

I, Don Parrish, declare based upon personal knowledge that:

1. I am over eighteen years of age and suffer from no disability that would preclude me from giving this declaration.

2. I am the Senior Director of Regulatory Affairs at the American Farm Bureau Federation ("AFBF"). In addition to my role at AFBF, I am the Chairman of the Waters Advocacy Coalition ("WAC" or "the Coalition"), a position in which I have served since its inception in 2010. I offer this Declaration based on my 30 years working primarily on Clean Water Act ("CWA") issues on behalf of farmers, ranchers, and industry groups in a wide variety of business areas.

3. My duties as Chairman of the Waters Advocacy Coalition include holding weekly meetings, responding to requests for information from the government and the general public, providing information on government regulations to the Coalition's members, assisting the members with participation in legislation and rulemaking processes, and ensuring the Coalition's members are able to express their interests to government entities.

4. WAC and its members advocated against the 2015 expansion of the definition of jurisdictional Waters of the United States ("WOTUS"), for the repeal of the 2015 Rule, and for a more certain and narrower definition of WOTUS like that adopted in the 2020 Navigable Waters Protection Rule. Their advocacy throughout has reflected the great harm to landowners and operators that results from broad and uncertain federal jurisdiction beyond what Congress intended in the CWA. Although the Plaintiff State of Colorado has asserted that it will be harmed by implementation of the 2020 Rule, Plaintiff completely ignores the great harm to the intervenor-defendants ("the Business Intervenors") and WAC's members that would result from enjoining

that Rule. I submit this affidavit to describe some of the harms that arose from prior, broader definitions of WOTUS that have been addressed by the 2020 Rule, which the Business Intervenors and WAC's members support.

5. Unlike the speculative harms asserted by Plaintiff, these are specific and concrete harms that arose under prior regulatory regimes which we believe were unlawful under the CWA and Supreme Court precedent and that have been corrected in the 2020 Rule. Enjoining that Rule would expose the Business Intervenors' and WAC's members to the same enormously burdensome and illegal regime imposed by the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") (collectively "the agencies") prior to promulgation of the 2020 Rule, in the 2015 Rule and before.[1]

WAC Members' Involvement in WOTUS Regulation

6. The Waters Advocacy Coalition represents a large cross-section of the Nation's construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much-needed jobs. The Coalition's members[2]—which include most

[1] A few months prior to finalization of the 2020 Rule the agencies repealed the 2015 Rule, reinstating the pre-2015 regulatory regime, including 2008 guidance that based jurisdiction on a vague "significant nexus" test. The Repeal Rule has been challenged in lawsuits pending in multiple courts. If both the 2020 Rule and Repeal Rule were found unlawful, the 2015 Rule would apply in some states, but the 2008 guidance would apply in most states as the result of injunctions issued by various district courts against the 2015 Rule. This mess is impossible for businesses to analyze to determine if their property contains jurisdictional WOTUS, the more so because both the 2015 Rule and the prior regulatory regime used (different) vague standards. Any uncertain test for WOTUS harms landowners and users, but my declaration focuses principally on harms flowing from the 2015 Rule for ease of comparison.

[2] Coalition members include: Agricultural Retailers Association, American Exploration & Mining Association, American Exploration & Production Council, American Farm Bureau Federation, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American

of the Business Intervenors in this case—are committed to a successful American economy as well as to the protection and preservation of America's wetlands and waters, and believe that clear regulation will help further these goals.

7. Since its inception, the Coalition has been involved in every permutation of CWA regulation. The definition of WOTUS under the CWA is of paramount interest to WAC members, because the ability of their members to plan projects and organize their affairs is highly sensitive to the scope of the agencies' regulatory jurisdiction. Members' operations are irreparably disrupted by an overly broad or ambiguous assertion of CWA jurisdiction.

8. The Coalition was formed in 2010, when I and other individuals familiar with the needs of the industries that would eventually make up the Coalition learned that some members of Congress introduced an amendment to the CWA that would result in the removal of the word "navigable" from the Act. This was deeply concerning to the members of the Coalition because

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Gas Association, American Iron and Steel Institute, American Petroleum Institute, American Public Power Association, American Road & Transportation Builders Association, American Society of Golf Course Architects, Associated Builders and Contractors, Inc., Associated General Contractors of America, Association of American Railroads, Association of Oil Pipe Lines, Chamber of Commerce of the United States, Club Management Association of America, Corn Refiners Association, CropLife America, Edison Electric Institute, Florida and Texas Sugar Cane Growers, Golf Course Builders Association of America, Golf Course Superintendents Association of America, Independent Petroleum Association of America, Industrial Minerals Association, N.A., International Council of Shopping Centers, International Liquid Terminals Association, Leading Builders of America, National Association of Home Builders, National Association of Manufacturers, National Association of Realtors, National Association of State Departments of Agriculture, National Cattlemen's Beef Association, National Club Association, National Corn Growers Association, National Cotton Council, National Council of Farmer Cooperatives, National Mining Association, National Multifamily Housing Council, National Oilseed Processors Association, National Pest Management Association, National Pork Producers Council, National Rural Electric Cooperative Association, National Stone, Sand and Gravel Association, Responsible Industry for a Sound Environment, Southeastern Lumber Manufacturers Association, Inc., Texas Wildlife Association, The Fertilizer Institute, Treated Wood Council, United Egg Producers, and USA Rice.

removal of the word "navigable" from the CWA could result in a significant expansion of federal jurisdiction under the CWA to virtually all water, along with the lands that water touches.

9. The Coalition was at the center of efforts to convince Congress not to undertake such a dramatic expansion in CWA jurisdiction, because it would result in a massive infringement on landowners' use of their land, and increase costs and regulatory burden on nearly every aspect of ordinary business operations across the American economy. The Coalition demonstrated to Congress that this expansion of federal jurisdiction under the CWA would unreasonably expand federal permitting requirements, increase exposure of the Coalition's members to civil penalties, potential criminal liability, and private lawsuits over alleged violations of the CWA, result in job losses and business closures, and cause delays and add costs for services, such as construction of roads, schools, and homes, and growing our nation's food, that ordinary people depend upon every day. Once Congress understood the burdens the amendment under consideration would impose on the Coalition's members and the American economy, Congress decided not to proceed with the removal of the word "navigable" from the CWA.

10. The Obama Administration apparently did not agree with Congress's decision not to remove the word "navigable" and sought to accomplish through regulatory action what it could not accomplish through legislation The agencies promulgated a sweeping regulatory definition of WOTUS in the so-called "Clean Water Rule" (the 2015 Rule), which effectively wrote the word "navigable" out of the Act.

11. The Coalition vigorously opposed the 2015 Rule, for much the same reasons it objected to amending the CWA. In negotiations regarding the proposal, officials in the Obama Administration argued that their proposed regulatory changes would add clarity and transparency

to regulation of "Waters of the United States" under the CWA by creating a presumption that businesses should *assume* their activities would impact a WOTUS and, therefore, should seek federal permits for ordinary business activities that would not previously have required a permit. These permits come at great cost: As the Supreme Court has noted, "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos v. United States*, 547 U.S. 715, 725 (2006) (plurality) (quoting Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Natural Resources J. 59, 74–76 (2002)).

12. While it is true that the scope of federal jurisdiction under the CWA had not been clear under the prior regime, the 2015 Rule required jurisdictional determinations and permits over a sweeping array of activities that had never previously been covered.

13. The agencies promulgated the final 2015 Rule in June 2015. From its inception, the 2015 Rule was vigorously contested in various district courts by States, industry interests, and NGO groups. The Coalitions' members remained at the center of these efforts. Some members filed an original suit challenging the 2015 Rule in the Southern District of Texas, and also participated in litigation contesting the jurisdiction of the Sixth Circuit Court of Appeals to hear challenges to the 2015 Rule. Another member filed an original suit challenging the 2015 Rule in the Northern District of Oklahoma. Many members also participated as intervenors in suits challenging various aspects of the 2015 Rule before the Southern District of Georgia and the Western District of Washington, and as *amicus curiae* before the District of North Dakota and the Tenth Circuit Court of Appeals.

14. Simultaneously with this ongoing litigation, the agencies recognized that the 2015 Rule was unlawful, and promulgated a so-called Applicability Date Rule to delay the effective date of the 2015 Rule while they engaged in a two-step rulemaking process to first repeal, and second replace, the 2015 Rule. WAC members participated extensively in discussions with the agencies during this ongoing rulemaking and submitted detailed comments, both individually and as a group.[3] Coalition members also participated in litigation challenging these later regulatory efforts as intervenor-defendants before the District of South Carolina, the Southern District of New York, and (currently as proposed intervenor-defendants), before this Court.

[3] *See*, *e.g.*, WAC, Comment Letter on 2015 Rule (Nov. 13, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14568; WAC, Comment Letter on Applicability Date Rule (Dec. 13, 2017), https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0644-0375; WAC, Comment Letter on Repeal Rule (Sept. 27, 2017), https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-11027; WAC, Comment Letter on 2020 Rule (Apr. 29, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-684; *see also* AFBF, Comment on the 2015 Rule, https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-18005 (Dec. 4, 2014); API., Comment Letter on 2015 Rule (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15115; Am. Road & Transp. Builders Ass'n, Comment Letter on 2015 Rule(Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-17359; Nat'l All. of Forest Owners, Comment Letter on 2015 Rule (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15247; Nat'l Ass'n of Home Builders, Comment Letter on 2015 Rule (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-19540; Nat'l Cattlemen's Beef Ass'n & Public Lands Council, Comment Letter on 2015 Rule (Oct. 28, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-10183; Nat'l Corn Growers Ass'n, Comment Letter on 2015 Rule (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14968; Nat'l Mining Ass'n, Comment Letter on 2015 Rule (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15169; Nat'l Stone, Sand, & Gravel Ass'n, Comment Letter on 2015 Rule (Nov. 13, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14412; U.S. Poultry & Egg Ass'n, et al., Comment Letter on 2015 Rule (Nov. 5, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14469.

15. As part of WAC's and AFBF's participation in the ongoing WOTUS Rule litigation described above, I personally submitted a declaration on September 20, 2016 in litigation before the U.S. Court of Appeals for the Sixth Circuit, explaining the serious harms that the 2015 Rule would impose on AFBF members. (Ex. A). I also submitted a declaration on February 6, 2018 in support of AFBF's challenge to the 2015 Rule in the Southern District of Texas (Ex. B), and another declaration in support of AFBF's challenge as an intervenor-plaintiff to the 2015 Rule in the Southern District of Georgia on September 10, 2018 (Ex. C). Both of these declarations explained the irreparable harms caused to industry members by the vague, overly broad 2015 Rule, and by an uncertain regulatory climate. Any statement made in those declarations remains true except insofar as it has been superseded by anything I have said here.

16. Numerous other members across a broad cross-section of industries submitted declarations describing the harms caused by an overly broad, uncertain WOTUS Rule. As just a sampling of these, *see* Excerpts of Addendum to the Opening Br. of Municipal Pet'rs, *In Re EPA*, No. 15-3751 (6th Cir. Nov. 1, 2016) (Dkt. 129-2) (Ex. D) (compiling excerpts of member declarations filed before the Sixth Circuit Court of Appeals); Exhibit D to Business Intervenor-Plaintiffs' Motion to Amend the Court's Preliminary Injunction, *Georgia v. Wheeler*, No. 2:15-cv-79 (S.D. Ga. Sept. 26, 2018) (Dkt. 208) (Ex. E) (compiling 7 member declarations).

17. Several courts agreed that the 2015 Rule was likely unlawful, and issued regional preliminary injunctions guarding against its enforcement. And in cases initiated by members of the proposed Business Intervenors here, the federal district courts in Texas and Georgia held the 2015 Rule to be unlawful and remanded it to the agencies to correct, while keeping their regional preliminary injunctions in place.

18. Also during the ongoing WOTUS rule litigation, the District of South Carolina issued a nationwide injunction vacating the Applicability Date Rule, which had prevented the 2015 Rule from going into effect in the states not covered by a preliminary injunction. As a result, the 2015 Rule entered into effect in those unprotected states in 2018.

The Serious Harms Caused by Unclear, Uncertain WOTUS Regulation

19. The entry into force of the 2015 Rule on a patchwork basis created a deeply troubling state of affairs for WAC members. Members who operated nationwide found themselves straddling two conflicting legal regimes and unable to plan for their multistate operations.

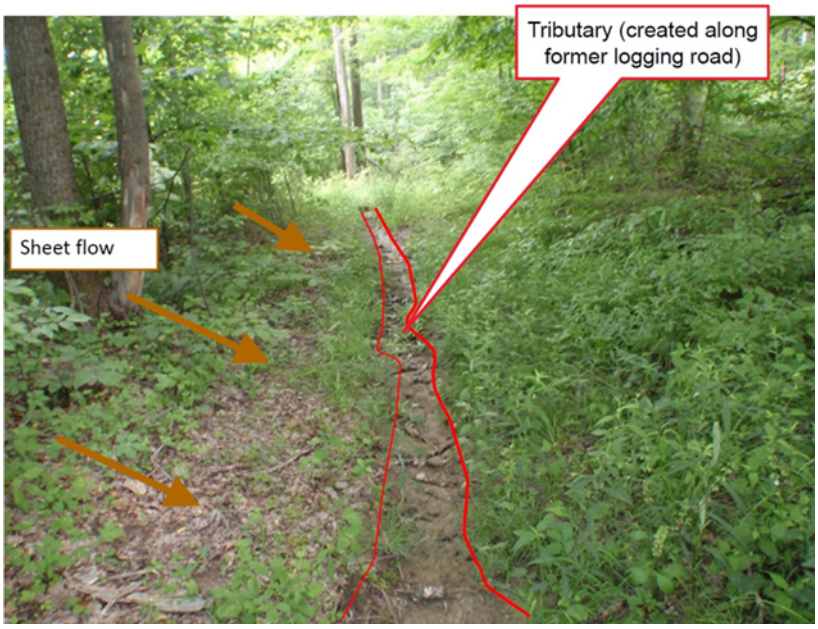
20. In the jurisdictions where it entered effect, the 2015 Rule dramatically expanded the scope of CWA jurisdiction as it applies to land in use for farming, ranching, mining, and construction—you name it. *See* Exs. B, C. But it did not, as promised, provide regulatory clarity and consistency. Rather, it continued to prove very difficult for individual farmers and business owners to determine whether a feature on their property would be considered a "water of the United States."

21. This is because, while the pre-2015 regime was often unclear, the 2015 Rule was even more unclear in that it swept in countless only sometimes-wet landscape features that are ubiquitous in and around farmland, on building sites, and in and around mining operations. *See* Ex. B, ¶ 6. These common features included drains carrying rainfall away from farm fields, ordinary farm ditches, drainage ditches along roadsides, retention ponds, and low areas in fields where water channels or temporarily pools after heavy rains.

22. As an example, Figure 1 below depicts the type of sometimes-wet low areas, otherwise known as "puddles," that the 2015 Rule may have covered as a depressional wetland

and for which coverage under the pre-2015 regime was unclear. *See* AFBF, Comment on the 2015 Rule, App. A at 38, https://www.regulations. gov/document?D=EPA-HQ-OW-2011-0880-18005 (Nov. 14, 2014).

23. The 2015 Rule also brought under its umbrella man-made features, like purpose-built ponds to water livestock. For example, under the 2015 Rule, the feature in Figure 2 below depicts a former logging road. Under the 2015 Rule, this type of feature was likely deemed to be a "tributary" to a "navigable water." Am. Petroleum Inst., Comment Letter on 2015 Rule at 129 (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15115. Under the pre-2015 regime, there is not a bright line rule that would have excluded this feature.



24. Although the 2015 Rule purported to exclude puddles, rills, swales, and some ditches from jurisdiction, those exclusions were meaningless because they were undefined, unclear, and many such features were swallowed up by the all-inclusive definitions of covered features such as wetlands and tributaries. Under a broad rule that does not clearly exempt such features, members had to either seek exorbitantly expensive permits or else internalize significant costs to avoid accidentally building or operating in features that had not previously been classified as a WOTUS, but were now potentially jurisdictional. Every time members plowed a field, sank a shovel in the ground, built a road through uplands, placed a pipe in the ground, or moved waste or soil—activities that occur on *land*, not on water—they were required to expend resources to obtain a permit or avoid features that could potentially be classified as "WOTUS."

25. The need to procure additional permits or avoid jurisdictional features increased the cost of conducting ordinary business operations sharply. For example, it is my understanding from

my experience with individuals in the homebuilding industry that the cost of building a home significantly spiked. As another example, the National Association of Manufacturers explained that energy exploration and production companies expected the number of permits required for projects to *double* under the 2015 Rule. Ex. D, at A-6.

26. Seeking additional permits is not an option for all businesses. Jurisdictional determinations come at great cost and delay. Indeed, a jurisdictional determination from the agencies can take around six months to a year to receive. During the intervening months, a business owner or farmer is trapped waiting in limbo. Further, a CWA permit comes with the cost of consultants, engineers, permit applications, mitigation costs, and compliance costs that make it an untenable option for many businesses. See Tr. of Oral Argument in *SWANCC v. U.S. Army Corps of Engineers*, No. 99-1178, at 40 (U.S. Sup. Ct. Oct. 31, 2000) (observing that the successive permit applications and regulatory decisions required for the isolated ponds at issue in *SWANCC* totaled 47,000 pages). And, in some cases, a permit will be denied or unavailable.

27. Thus, some members operating under the 2015 Rule significantly decreased their productivity to avoid potentially jurisdictional features. I am aware of farmers who had to avoid plowing certain parts of their fields or, in some cases, take areas entirely out of production for fear of accidentally plowing through a remote ditch that qualified as a WOTUS. Another farmer-member submitted a declaration in the WOTUS litigation explaining that, under the 2015 Rule, he would need to create a fifteen-foot buffer around drainage ditches on his farm to avoid the risk of any fertilizers or pesticides accidentally reaching those ditches. Ex. E, at A-16. And some farmers were even harder hit. I estimate that in certain regions of the country, the 2015 Rule stood to take

around 20% of farmland out of production on account of the need to create a buffer to avoid potentially jurisdictional features.

28. As a result of these costs, some projects were delayed, reduced, or even entirely prevented. These delays and reduced productivity could come at the loss of jobs and sometimes threaten the closure of businesses. For example, the National Association of Manufacturers explained that application of the 2015 Rule and its expanded permitting requirements "could impede the construction and operation of new facilities or expansions and could cost American jobs." Ex. E, at A-6. The National Association of Home Builders explained that many homebuilders would delay or abandon projects to avoid the costs imposed under the 2015 Rule. *Id.* at A-23.

29. Members of the National Stone, Sand and Gravel Association would experience similar harms. The coverage of dry stream beds and isolated wetlands in the definition of WOTUS renders the permitting process much more difficult, costly, and time consuming for its member companies, which are responsible for producing essential raw materials for construction projects. An overly expansive definition of WOTUS makes it difficult and expensive for these companies to supply customers with aggregate needed for essential public works projects, including new road construction, flood control, water and wastewater treatment, and repair of existing highways and bridges. The National Stone, Sand and Gravel Association anticipates that, if required to operate under the 2015 Rule, some property owners would have to abandon reserves because of these increased compliance costs. *See* Ex. E, at A-2-3.

30. These harms extend to businesses large and small. One landowner located in Delaware explained that the 2015 Rule would require him to abandon planned improvements to

his land, which would no longer be economically feasible. Because some portions of his land contained physical signs of occasional water flow, there was a significant risk that these land features were covered under the 2015 WOTUS Rule. The enormous burden and cost of obtaining a CWA permit rendered it too expensive for him to clear his land for cattle grazing and to harvest valuable timber. The location of a probable jurisdictional feature on his land, and the resulting inability to improve his land, significantly lowered the land's value. Ex. D, at 74a-78a.

31. Areas in the Southwest were particularly hard hit by the 2015 Rule's assertion of jurisdiction over certain forms of "ephemeral waters," such as those depicted below in Figure 3, that are dry most of the year and only contain water during periods of heavy rain, which may or may not occur in a given year. These features often reflect one-time extreme water events and are not reliable indicators of regular flow. In the desert, rainfall occurs infrequently; and sandy, lightly vegetated soils are highly erodible. Thus washes, arroyos, and other erosional features often reflect physical indicators that trigger the assertion of jurisdiction under the 2015 Rule, even if they were formed by a long-past and short-lived flood event, and the topography has persisted for years or even decades without again experiencing flow. *See* Ariz. Mining Ass'n, Comment on 2015 Rule at 7-11 (Nov. 18, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-13951. The NWPR, in contrast, clearly excludes these types of features.

32. While it is often difficult to determine what remote features are covered by the 2015 Rule, the price of any mistake under the CWA is steep. Violations expose farmers and business owners, including owners of small and medium-sized operations, to potentially millions of dollars in civil penalties as well as the risk of criminal liability.

33. The case of John Duarte is illustrative of the burdens the 2015 Rule imposed on small and medium-sized farms and businesses. John Duarte purchased 400 acres of agricultural land in California. At the time John purchased the land, its previous owner had placed the land into a local conservation program for two ten-year terms. Under the terms of this conservation program, the United States Department of Agriculture considered the land farmed, although it had not been used for the production of crops for twenty years. Prior to this twenty-year period, all 400 acres of the land had a history of wheat production – a history documented by the USDA. When the term of the conservation program ended, John decided not to re-enter his land into it. Instead, John began to use the land to grow wheat. When he plowed his land, the Army Corps of Engineers stepped in and determined, first, that the isolated vernal pools on John's land were now "waters of the United States" under the 2015 Rule and, second, that plowing the land was not "ordinary

activity" because the previous owner had voluntarily entered the land into a temporary conservation program and, therefore, had not plowed the land in twenty years. As a result of these findings, John faced millions of dollars in civil penalties for violating the CWA and was forced to reach a settlement with the U.S. Government to save his family farm and preserve his livelihood. *See also, e.g.*, *Borden Ranch v. U.S. Army Corps of Engineers*, 537 U.S. 99 (2002) (affirming by equally divided court a $1 million civil penalty against farmer who plowed an isolated vernal pool to switch crops).

Example of Problematically Overbroad Jurisdiction

34. The photograph below, Figure 4, is illustrative of the type of feature that was not considered a WOTUS prior to the 2015 Rule, but which was regulated by the federal government under the 2015 Rule. *See* AFBF, Comments on the 2015 Rule at App. A, 31, https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-18005 (Dec. 4, 2014). Figure 4 will be referenced repeatedly hereafter to demonstrate the harms caused by the 2015 Rule.

35. Figure 4 depicts a portion of a field on a Tennessee farm. The depression in the middle of that field is caused by occasional bursts of heavy rain. This type of feature is common on farms in the Southeastern United States in states such as Tennessee, Alabama, and Mississippi. This type of feature will certainly not be considered a "water" triggering federal jurisdiction under the 2020 Rule, and likely was not jurisdictional under the pre-2015 rules.

36. Treating this feature as jurisdictional would have a significant detrimental impact on this farmers' ability to utilize this land and on the commercial value of the land itself. Based on my knowledge and experience, I would estimate that the land shown in Figure 4 would be valued at approximately $3,000 per acre. The costs of avoiding this feature or the cost of obtaining and complying with an EPA permit could amount to an approximately $600 per acre decrease in the commercial value of the land shown in Figure 4. These costs are significant for farms consisting of hundreds or thousands of acres, which may have many such features.

37. The devaluation of commercial value of land on a farm—or for any other business—has collateral effects beyond simply the cost of applying for permits. It amounts to a reduction in the business's capital, which has significant effects on the terms and availability of loans and other forms of financing that businesses depend upon to operate. Land containing jurisdictional features under the 2015 Rule such as ephemeral drains, ditches, and other low areas had less value while the 2015 Rule was in effect because of the land-use restrictions imposed on jurisdictional waters and surrounding land, even when there was no water in the feature and it otherwise appeared to be dry land. The added cost of seeking a permit for agricultural or non-agricultural use made the land more difficult to sell and lowered its value.

38. The land depicted in Figure 4 was eventually sold and a manufacturing facility was constructed on the site. Based on my experience, if a feature like the one in Figure 4 is determined to be jurisdictional under the CWA, the costs associated with mitigating it to proceed with development could reach $3000 *per linear foot.*

39. Figure 4 also demonstrates how an overly broad definition of WOTUS is counterproductive to achieving the goals of the Clean Water Act. Figure 4 depicts an erosion feature that occurs during periods of heavy rain. When these rains occur, soil and other chemical inputs such as fertilizer and pesticides common to agriculture are washed away through the feature where they may contribute to pollution of downstream waters. Ordinarily, a farmer would attempt to mitigate the feature to prevent harm to the environment and prevent the loss of valuable topsoil. Under the 2015 Rule, however, a farmer could not take even environmentally friendly action without incurring the costs of applying for a federal permit. If a farmer could not obtain a permit, the farmer would be forced to retain a feature that harms the farmer's business *and* the environment— all as a result of the expansion of CWA jurisdiction under the 2015 Rule.

Inconsistent and Unjust Application of the "Significant Nexus" Standard

40. The circumstances under which the feature in Figure 4 was designated a "water of the United States" also demonstrate the harm to farmers and business operators caused by the "significant nexus" standard derived from Justice Kennedy's opinion in *Rapanos*, first applied by the agencies through a guidance document adopted in the pre-2015 regime, and later defined through a broad, vague multi-step test under the 2015 Rule advocated by Plaintiff in this case. The owner of the land depicted in Figure 4 sought and received a determination from the Army of Corps of Engineers that the CWA applied to the feature. Applying the case-specific "significant

nexus" standard, the Corps determined that it was a "water of the United States." The landowner had no way to tell that this remote, desiccated feature was under the jurisdiction of the CWA until the Corps determined that it was.

41. These types of features can, and often do, stretch onto neighbors' properties. Thus, the neighboring landowners with property onto which such a feature stretched would similarly experience the negative repercussions of a jurisdictional determination, including restrictions on the use of their land and lowered property value, based on a determination in which they did not participate and of which they likely had no notice. Any post-determination use of the land, whether it is continued farming or sale for mineral production or other development, must account for the feature's new status as a "water of the United States." As stated previously, this requires all of the landowners impacted by the feature to either avoid impacting the feature or incur the costs of applying for an EPA permit.

42. Moreover, the outcome of the case-specific, highly subjective significant nexus determination for a feature like the one in Figure 4 can depend on the Corps district in which the land is located. It is my understanding that different Corps districts would apply the standard differently, potentially reaching different results for identical features based on the happenstance of where they are located. That means that whether a landowner is forced to bear the costs and burdens as well as the potential liabilities of having a jurisdictional feature depends not on the nature of the feature but the arbitrary boundaries of the Corps district in which his or her land is located. This random, unjust, and inconsistent application of the "significant nexus" standard added to the already significant harms suffered by farmers and business owners prior to the most recent regulatory action.

The Importance of the NWPR

43. Following significant efforts on the part of the Business Intervenors and other WAC members to advocate for a clear, reasonable definition of WOTUS, and following the culmination of the agencies' efforts to repeal and replace the 2015 Rule, the agencies published the 2020 Navigable Waters Protection Rule ("the NWPR") in April 2020.

44. I believe the NWPR will achieve what the 2015 Rule failed to do and will address the lack of clarity also apparent, although to a somewhat lesser degree, under the regulatory regime in place prior to the 2015 Rule. That is, the NWPR will provide increased regulatory clarity and consistency for the business community and eliminate the unnecessary costs and burdens imposed upon businesses by prior unlawful expansion of the CWA and the uncertainty of jurisdictional criteria.

45. Among its most critical features, the NWPR clearly excludes ephemeral features that flow only in direct response to precipitation. The NWPR also provides clear definitions of what waters qualify as jurisdictional "adjacent" waters and as "tributaries." These features of the NWPR are essential to the ability of WAC members to determine what is and is not jurisdictional, to avoid exorbitant permitting costs, and to avoid the loss of productivity that results from a broad and unclear definition of WOTUS.

46. These brighter line definitions offered in the NWPR allow construction, building, mining, farming, and other business to go forward without the delays, costs, and uncertainties discussed above. For example, under the NWPR, it would be clear that the types of features depicted in Figures 1, 2, 3 and 4 would not be considered "waters of the United States." This means that the Business Intervenors and WAC Coalition's members would no longer need to incur the

costs of avoiding these features or applying for federal permits in order to conduct ordinary, but essential, business operations.

47. The NWPR also alleviates unreasonable burdens that an overly-broad definition of WOTUS places on states. For example, the State of Tennessee, prior to the 2015 Rule, did not have any state water quality standards for the type of remote, desiccated feature depicted in Figure 4. Were this feature to be covered under the CWA, the State would be forced to develop and enforce water quality standards for that feature under Section 301 of the CWA. The resources to develop and enforce these new standards would have to come at the expense of other services the state provides to the Coalition's members and to the citizens of Tennessee.

48. The NWPR Rule further provides a more appropriate federal-state balance in regulating our Nations waters. State and local officials are the more appropriate, and more efficient, parties to determine if and how to regulate ephemeral, remote features in any given State. It is local conservation districts that provide the true backbone of natural resource and water preservation. Both States and federal agencies depend on them in implementing conservation programs, and farmers, ranchers, and other local businesses are more used to dealing with these local officials who are more involved in their ordinary operations.

Harms Caused by Enjoining the NWPR

49. Enjoining the NWPR would cause significant harm to the Business Intervenors' and WAC's other members. Most obviously, businesses across the United States would lose the bright line jurisdictional standards that the NWPR Rule offers. They would also again be subject to the harmful and difficult to predict significant nexus standard.

50. Absent a clear standard, farmers with drainage ditches and ephemeral drains located in and around farm fields would need to again exercise caution and avoid placing seed, fertilizer and pesticides into those potentially regulated features to avoid Clean Water Act liability for an unauthorized discharge of pollutants into a "water of the United States." This would require many to put parts of their land out of use, or instead expend often cost-prohibitive amounts on a consultant. Similarly, tree farmers often rely on aerial application of pesticides for the health and safety of the trees. If the ditches running alongside a row of trees may be classified as "waters of the United States," tree farmers may forgo this step or scale back operations rather than seek a permit. In either case, this would result in significant harm to their businesses, which would have ripple effects on the local economy, as tree farmers in this situation would be less likely to hire the workers they rely on to prune and harvest the trees.

51. Ranchers, builders, mining operations, and other Coalition members would need to exercise caution—or even delay or avoid—constructing and maintaining important infrastructure, such as roads, fences, ditches, ponds and culverts, when those improvements are constructed in a landscape feature that may or may not be a regulated "water of the United States."

52. Return to a broader definition of WOTUS would also be detrimental to constructing homes, roads, schools, and infrastructure. Take homebuilding as an example. The National Association of Home Builders estimates that 25% of the value of a new home is caused by compliance with government regulations, a large portion of which is associated with CWA compliance. Any expansion of federal regulation would add to that cost.

53. A broader, less clear definition of WOTUS would impact all landowners and operators, coming at a loss of productivity and jobs, but would hit small and mid-sized operations

the hardest. That is because these are the businesses least able to weather a reduction in productivity or afford a costly jurisdictional determination.

54. Without the NWPR in place, businesses must either scale back important and otherwise lawful activities, roll the dice and assume the risk of potentially crippling liability, or incur tens of thousands of dollars plus months or years of delay in performing services essential to the economy while they seek precautionary permits.

55. Even worse, enjoining the NWPR Rule would require members to confront the serious risk that even the wholly unlawful 2015 Rule could be reinstated, as parallel actions challenging the Repeal Rule are pending throughout district courts nationwide. If there is a possibility that the 2015 Rule will be reinstated, Coalition members must plan and prepare their activities to guard against inadvertent "discharges" of "pollutants" to "waters" that could once-again be categorized as "waters of the United States."

56. Putting the risk of the 2015 Rule coming back into place aside, should the scope of Clean Water Act jurisdiction continue to flip-flop or remain uncertain, many members of the Business Intervenors and WAC be irreparably harmed by their inability to plan their farming and business activities, such as planning the purchase of seed, fertilizer, and crop protection tools.

57. It is my firm belief that keeping the NWPR in effect will not result in any harm to the States or any environmental groups by causing a "race to the bottom" for environmental regulation at the state level. The permitting programs under the CWA are only one part of a robust regulatory framework at the state and federal level, including under other provisions of the CWA, designed to protect and preserve our Nation's waters. Indeed, other CWA programs provide federal grants to states to assist with maintaining water quality. Additional federal laws, including the

Solid Waste Disposal Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act, protect natural resources and waters. And states can, and often do, enact greater regulation.

58. Perhaps most importantly, protecting our Nation's water quality and ensuring access to clean water is as important to the Coalition's members as it is to the states challenging the NWPR. This belief stems from my personal background in agriculture. I was raised in a farming family and can attest that the health and integrity of this Nation's land and water is, and always has been, of great importance to me and my family, and to the farm families I meet. But we believe that there is an important distinction between using a statute as Congress intended to coordinate a permitting program in "navigable" waters, versus extending federal power beyond the CWA's limits to regulate land-based activities far removed from such features.

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

Dated: June 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2020 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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