No. 20-1238

In the

United States Court of Appeals

for the

Tenth Circuit

STATE OF COLORADO,
Plaintiff-Appellee,

– v. –

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellants,

&

AMERICAN FARM BUREAU FEDERATION, et al.,
Intervenor-Defendant-Appellants.

Appeal from the U.S. District Court for the District of Colorado,
Judge William J. Martinez
No. 1:20-cv-01461-WJM-NRN

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF INTERVENOR-DEFENDANT-APPELLANTS BUSINESS INTERVENORS

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Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule 27.6, the American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Chamber of Commerce of the United States of America; Leading Builders of America; National Alliance of Forest Owners; National Association of Home Builders; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; and U.S. Poultry & Egg Association (collectively, the "Business Intervenors") respectfully request leave to file the attached Brief of Intervenor-Defendant-Appellants.

The district court yesterday, July 15, 2020, granted the Business Intervenors' unopposed motion to intervene as of right, which had been filed on June 8, 2020. Intervenors immediately filed a notice of appeal, and also refiled their previously "proposed" opposition to Colorado's preliminary injunction/stay motion, which had been filed with their intervention papers on June 8. In these circumstances, Business Intervenors had no opportunity to file a brief when the defendant agencies filed their opening brief on appeal. The Business Intervenors request the

opportunity to file that brief now. No prejudice will result from that filing, because the parties had already consented to the Business Intervenors filing a timely *amicus* brief on July 16, and the parties do not oppose this motion to now participate as intervenors.

Relevant Background

1. The Business Intervenors filed an unopposed motion to intervene as defendants before the district court on June 8, 2020. *Colorado v. EPA*, No. 1:20-cv-01461-WJM-NRN (D. Colo. June 8, 2020) (Dkt. 49).[1] The motion came less than three weeks after Plaintiff filed its complaint challenging the Navigable Waters Protection Rule ("2020 Rule"), and the Business Intervenors attached a proposed opposition to Plaintiff's amended motion for a preliminary injunction then pending before that court. *See* DCD 49-2.

2. The district court did not grant the Business Intervenors' motion to intervene until yesterday, July 15, 2020. DCD 69.

3. In the meantime, on June 19, 2020, the district court construed Plaintiff's motion as seeking a stay of agency action pursuant to 5 U.S.C. § 705, granted the motion, and enjoined operation of the 2020 Rule in

[1] Docket entries filed on the district court docket are henceforth referred to as "DCD."

Colorado. DCD 61. Defendant agencies filed the present appeal of that order on June 23, 2020. *See* DCD 62.

4. On appeal, this Court granted Defendants' Motion to Expedite the Briefing, directing that their opening brief be filed and served on July 9, 2020.

5. Because the Business Intervenors' motion to intervene before the district court had not yet been ruled upon or granted, the Business Intervenors' prepared to file a brief *amicus curiae* in support of Appellants and reversal, due July 16, 2020. *See* Declaration of T. Bishop ("Bishop Decl."), ¶ 3; *see also* Fed. R. App. P. 29(a)(6) (brief of *amicus curiae* due seven days after the principal brief of the party supported). Both counsel for Plaintiff and counsel for Defendants consented to that filing. *See* Bishop Decl., ¶ 4.

6. The district court granted the Business Intervenors' motion to intervene on July 15, 2020, one day prior to the deadline for filing a brief of an *amicus curiae* in support of Appellants and reversal, and six days after the deadline for filing an Appellant brief.

7. The same day, the Business Intervenors filed a notice of appeal of the district court's order granting Plaintiff a preliminary injunction. Dkt. 71. That appeal has been docketed in this Court at No. 20-1263.

8. The Business Intervenors simultaneously file a motion to consolidate their appeal with the Defendants' appeal, because both proceedings arise from the same lower court proceedings and appeal the same order.

Reasons for Requested Relief

Because the Business Intervenors now have filed their own appeal of the same order challenged here and move to consolidate the appeals, and because of the accelerated schedule in Defendants' appeal, the Business Intervenors respectfully request leave to file the attached Appellants' brief seeking reversal of the district court's grant of the preliminary injunction. Although Appellants' briefs were due on July 9, 2020, it was not possible for the Business Intervenors to meet that deadline because their motion to intervene in the district court had not yet been ruled upon and, as such, they could not yet appeal the district court's order or be a party to this appeal. Now they are a party to the district court action, have filed an appeal from the district court's injunction order, and seek to consolidate

their appeal with this one. In these circumstances, granting the requested relief is in the interests of fairness to all parties and judicial efficiency and economy. In particular, it will facilitate the timely decision of the appeal on the accelerated schedule that has been established, without prejudice to any party.

The Business Intervenors have a significant interest in this proceeding. Fed. R. App. P. 29(a)(3)(A). The Business Intervenors are 14 national trade associations that represent a broad cross-section of the Nation's infrastructure, commercial and residential construction industries, and mining, manufacturing, forestry, agriculture, livestock, and energy industries, all of which are vital to a thriving national economy, including providing much needed jobs. As the parties directly regulated by the governing definition of "waters of the United States," they have a strong interest in ensuring that federal CWA jurisdiction is exercised lawfully and in promoting national uniformity in the definition of what features are "waters of the United States." As the district court recognized, their serious interest in the outcome of the proceeding is sufficient to support intervention as of right. *See* DCD 69.

The Business Intervenors further respectfully submit that their singular ability to brief harms that an injunction of the 2020 Rule imposes on private industries, their active involvement in the WOTUS rulemaking and litigation, and their members' daily engagement with the application of the various rules and guidance that have defined WOTUS, will make their views helpful and relevant to this Court in resolving this appeal. *See* Fed. R. App. P. 29(a)(3)(B).

Disclosure of Other Parties' Positions

Counsel for the Business Intervenors have conferred with counsel for Plaintiff and Defendants regarding this requested relief. Plaintiff consents to this motion as well as to the Business Intervenors' simultaneously filed motion to consolidate, provided the Business Intervenors do not seek to participate in oral argument and consent to Plaintiff filing a consolidated response of up to 18,500 words. The Business Intervenors agree to those conditions. Plaintiff also agrees that the Business Intervenors may file a reply brief.

Defendants do not oppose the Business Intervenors' motion to file a Brief of Intervenor-Defendant-Appellants if it does not change the briefing schedule or cause any delay. The Business Intervenors do not seek any

schedule change that would delay these proceedings or prejudice the existing parties. Indeed, Plaintiff and Defendants both previously consented to the filing of an *amicus* brief on behalf of the Business Intervenors by July 16, 2020, before yesterday's grant of intervention by the district court. Bishop Decl., ¶ 4. Accordingly, the parties will not be prejudiced by the filing of Business Intervenors' Appellants' brief on the same day that the *amicus* brief would have been filed.

CONCLUSION

The Business Intervenors respectfully request that the Court grant them leave to file their Brief of Intervenor-Defendant-Appellants.

July 16, 2020

Respectfully submitted,

/s/ *Timothy S. Bishop*

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Counsel for Intervenor-Defendant-Appellants

CERTIFICATE OF COMPLIANCE

I, Timothy S. Bishop, counsel for the Business Intervenors, certify that I am a member in good standing of the Bar of this Court. I certify that all required privacy redactions have been made per 10th Cir. R. 25.5. I further certify that the attached motion complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 1,219 words, excluding the parts of the brief exempted by Rule 32(a)(7)(f).

I further certify that this motion complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirement of Rule 32(a)(6) because it has been prepared using Microsoft Word and is set in Century Schoolbook in a typeface size equivalent to 14 points or larger.

/s/ *Timothy Bishop*
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Counsel for Intervenor-Defendant-Appellants

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redaction have been made per 10th Cir. R. 25.5;

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender Version 1.319.1543.0, last updated July 15, 2020, and according to the program are free of viruses.

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Counsel for Intervenor-Defendant-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on July 16, 2020. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via the appellate CM/ECF system.

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DECLARATION OF TIMOTHY S. BISHOP IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF INTERVENOR-DEFENDANT-APPELLANTS BUSINESS INTERVENORS

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Counsel for the Intervenor-Defendant-Appellants

1. I am a member in good standing of the Bar of the Tenth Circuit Court of Appeals. I serve as counsel for the American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Chamber of Commerce of the United States of America; Leading Builders of America; National Alliance of Forest Owners; National Association of Home Builders; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; and U.S. Poultry & Egg Association (collectively, the "Business Intervenors") in the above-captioned proceedings.

2. I also represent these parties before the district court in *Colorado v. EPA*, No. 1:20-cv-01461-WJM-NRN (D. Colo.), where the Business Intervenors filed a Motion to Intervene as Defendants.

3. Because the Motion to Intervene had not been granted before the district court as of July 9, 2020, the date that an Appellant Brief in these proceedings was due, I prepared to file an *amicus curiae* brief to oppose the District of Colorado's June 19, 2020 Order that enjoined operation of the 2020 Rule in the State of Colorado. DCD 61.

4. I conferred with counsel for both Plaintiff and Defendants, and obtained their consent to file an *amicus curiae* brief.

5. Because the District Court of Colorado granted the Business Intervenors' Motion to Intervene on July 15, 2020, I immediately prepared a notice of appeal, and began work on a motion to consolidate that appeal with the present matter.

6. I also re-styled and expanded the Business Intervenors' proposed *amicus* brief as a brief of Intervenor-Defendant-Appellants.

7. I seek consolidation of that appeal with the above-captioned action.

8. In my absence at a medical appointment today, my colleague Colleen Campbell exchanged e-mails with counsel for the parties regarding their position on this motion and the motion to consolidate. By e-mail, which I have reviewed, counsel for Plaintiff Colorado consented to those motions provided the Business Intervenors do not seek to participate in oral argument and also consent to Plaintiff filing a consolidated response of up to 18,500 words. The Business Intervenors have agreed to those conditions. Plaintiff also agrees that the Business Intervenors may file a reply brief. Counsel for the Defendants consent to these motions provided that they do not alter

the briefing schedule or delay the case. The Business Intervenors do not seek any extension or delay of the briefing schedule or this Court's consideration of the appeal.

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

Executed this 16th day of July, 2020 */s/Timothy S. Bishop*
Timothy S. Bishop

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No. 1:20-cv-01461-WJM-NRN

BRIEF OF 14 CONSTRUCTION, MINING, MANUFACTURING, FORESTRY, AGRICULTURE, LIVESTOCK, AND ENERGY TRADE ASSOCIATIONS AS INTERVENOR-DEFENDANT-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Intervenor-defendant-appellants are the following national trade associations:

American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Chamber of Commerce of the United States of America; Leading Builders of America; National Alliance of Forest Owners; National Association of Home Builders; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; and U.S. Poultry & Egg Association.

Intervenors certify that none of them issues stock and none is owned, either in whole or in part, by any publicly held corporation.

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ATTACHMENT

District court order under review (June 19, 2020)

STATEMENT OF RELATED CASES

The following appeals are related as appeals from the same order:

Colorado v. EPA, 20-1238 (10th Cir.)

Colorado v. EPA, 20-1262 (10th Cir.)

Colorado v. EPA, 20-1263 (10th Cir.)

GLOSSARY

Agencies:	Together, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers
APA:	Administrative Procedure Act
Business Intervenors:	Together Intervenor-Defendant-Appellants American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Chamber of Commerce of the United States of America; Leading Builders of America; National Alliance of Forest Owners; National Association of Home Builders; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; and U.S. Poultry & Egg Association
CWA:	Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566 (as amended)
Repeal Rule:	Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).
WOTUS:	Waters of the United States
2015 Rule:	Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)

2020 Rule:	The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020)

INTRODUCTION

The intervenor-defendant-appellants ("Business Intervenors") are a coalition of 14 national trade associations. They represent a broad cross-section of the Nation's infrastructure, commercial and residential construction industries, and mining, manufacturing, forestry, agriculture, livestock, and energy industries, all of which are vital to a thriving national economy, including providing much needed jobs. The Business Intervenors filed an unopposed motion to intervene in the district court proceedings, as of right or permissively, on June 8, 2020 (Dkt. 49), along with a proposed brief in opposition to Colorado's preliminary injunction motion (Dkt. 49-2) and a detailed declaration of Don Parrish in support (Dkt. 49-3). The district court granted intervention as of right on July 15, 2020. Dkt. 69.

Many of the Business Intervenors' members construct residential developments, multi-family housing units, commercial buildings, shopping centers, factories, warehouses, waterworks, roads and other infra-structure. During 2019, total public and private investment in the construction of residential structures alone totaled over $550 billion. U.S. Census Bureau, *Annual Value of Construction Put in Place 2008-2019*,

https://www.census.gov/construction/c30/historical_data.html. Every $1 billion of residential construction generates around 16,000 jobs. Spending on commercial and institutional facilities such as shopping centers, schools, office buildings, factories, libraries, and fire stations has an even larger job creation effect, at around 18,000 jobs per $1 billion of spending.

Many of the Business Intervenors' members construct and maintain critical infrastructure: highways, bridges, railroads, tunnels, airports, electric generation, transmission, and distribution facilities, and pipeline facilities. Research has shown that infrastructure investments increase economic growth, productivity, and land values. Not only are investments in infrastructure critical to quality of life throughout the nation, but their effect on job creation is substantial. Every $1 billion in transportation and water infrastructure construction creates approximately 18,000 jobs.

The Business Intervenors' agricultural members grow virtually every agricultural commodity produced commercially in the United States, including significant portions of the U.S. wheat, soybean, cotton, milk, corn, poultry, egg, pork, and beef supply. Agriculture and livestock-related industries contributed over $1.050 trillion to the U.S. gross domestic product in 2017 and employed 22 million people in 2018. *See* U.S. Dep't of

Agric., Economic Research Serv., *Ag and Food Sectors and the Economy* (May 4, 2020), https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy; *see also* U.S. Dep't of Agric., Economic Research Serv., *Ag and Food Statistics: Charting the Essentials, February 2020* (Feb. 2020), https://www.ers.usda.gov/webdocs/publications/96957/ap-083.pdf. Forestry-related businesses support 2.9 million total jobs and are associated with $128.1 billion in total payroll. And forest products—paper, wood, and furniture manufacturing—contribute nearly 6% of GDP. Forest2Market, *New Report Details the Economic Impact of US Forest Products Industry* (May 9, 2019), https://blog.forest2market. com/new-report-details-the-economic-impact-of-us-forest-products-industry; Nat'l Alliance of Forest Owners, *The Economic Impact of Privately-Owned Forests in the 32 Major Forested States* (Apr. 4, 2019), https://nafoalliance.org/wp-content/uploads/2018/11/Forest2Market_ Economic_Impact_of_Privately-Owned_Forests_April2019.pdf; *see also* American Forest & Paper Ass'n, *State Industry Economic Impact – United States* (Aug. 2018), https://www.afandpa.org/docs/default-source/factsheet/2018-update/united-states-august-2018.pdf?sfvrsn=2.

Additionally, the Business Intervenors represent producers of most of America's coal, metals, and industrial minerals. In 2017, U.S. mining activities directly and indirectly generated over 1.5 million U.S. jobs and $95 billion in U.S. labor income, and contributed $217.5 billion to the U.S. GDP. *See* Nat'l Mining Association, *The Economic Contributions of U.S. Mining*, at E-1 (Sept. 2018), https://nma.org/wp-content/uploads/2016/09/Economic_Contributions_of_Mining_2017_Update.pdf. They also represent the energy industry that generates, transmits, transports, and distributes the nation's energy to residential, commercial, industrial, and institutional customers. Together, oil and natural gas supply more than 60 percent of our nation's energy. U.S. Energy Information Ass'n, *Annual Energy Outlook 2019*, https://www.eia.gov/outlooks/aeo/data/browser/#/?id=1-AEO2019&cases=ref2019&sourcekey=0.pdf (last visited July 15, 2020). Overall, as of 2017, the oil and natural gas industry supported 10.3 million U.S. jobs and contributed 8% of U.S. GDP. American Petroleum Inst., *Oil & Natural Gas: Supporting the Economy, Creating Jobs, Driving America Forward* (2018), https://www.api.org/~/media/Files/Policy/Taxes/DM2018-086_API_Fair_Share_OnePager_FIN3.pdf.

Individually and collectively, the Business Intervenors' members are thus of critical importance to the Nation's economy. Their experience, planning, and operations make them experts in the Clean Water Act (CWA) and the practical consequences of the 2020 Rule's definition of "waters of the United States" (WOTUS).

In particular, the Business Intervenors have a strong interest in ensuring that federal CWA jurisdiction is exercised lawfully and in promoting national uniformity in the definition of what features are "waters of the United States." Their members must comply with the CWA's prohibition against unauthorized "discharges" into any areas that are ultimately deemed jurisdictional. The 2020 Rule provides their members much-needed certainty in describing features that are or are not "waters of the United States." The prior regulatory regime often required unpredictable case-by-case determinations by the Agencies, and under that system businesses did not know which features on their lands were jurisdictional and which were not. That uncertainty was compounded by court rulings that meant different regulatory regimes applied in different states. Uncertainty as to which features were jurisdictional deprived the Business Intervenors' members of notice of what the law requires and

made it impossible for them to make informed decisions concerning the operation, logistics, and finances of their businesses. Moreover, under the CWA, their members may be subjected to severe criminal and civil penalties and citizen suits for failure to properly comply with the provisions of the Rule.

The 2020 Rule culminates more than five years of multiple administrative rulemakings and litigation, in which the members of the intervenor coalition have participated at every step. They have submitted comments on every proposed rule and litigated for a lawful, reasonable standard since the U.S. EPA and Army Corps of Engineers (the "Agencies") proposed what became the 2015 rule defining WOTUS. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29 2015) ("2015 Rule"). They were among the most active litigants in challenging the 2015 Rule's unlawful expansion of federal jurisdiction. They challenged the 2015 Rule as plaintiffs in the Southern District of Texas and Southern District of Georgia—where the district courts held the 2015 invalid—and as *amici* in the District of North Dakota and elsewhere. Among other things, they persuaded the U.S. Supreme Court that these challenges belong in district court, resolving a

long-time split among the circuits as to where jurisdiction lay. *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617 (2018).

For all these reasons, the Business Intervenors believe that their experience with the development of and litigation over the regulatory definition of WOTUS—including their members' experience operating under prior regulatory regimes—should inform this Court's decision.

The Business Intervenors are as follows:

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. Through its state and county Farm Bureau organizations, AFBF represents about six million member families in all 50 States and Puerto Rico.

The American Petroleum Institute (API) is the only national trade association representing all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, marine businesses, and service and supply firms. These companies provide most of the nation's

energy. API was formed in 1919 as a standards-setting organization. In its first 100 years, API has developed more than 700 standards to enhance operational and environmental safety, efficiency and sustainability.

The American Road and Transportation Builders Association (ARTBA) is a non-partisan federation established in 1902 whose primary goal is to aggressively grow and protect transportation infrastructure investment to meet the public and business demand for safe and efficient travel. ARTBA's members designed, built and continue to manage the Nation's Interstates and intermodal surface transportation network. Its core mission is market development and protection on behalf of the U.S. transportation design and construction industry.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing the interests of approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and organizations of every size, in every industry sector, and from every geographical region of the country. A central function of the Chamber is to represent the interests of its members in important matters before Congress, the Executive Branch, and the courts.

The Leading Builders of America (LBA) is a national trade association representing 20 of the largest homebuilding companies in North America. Collectively, LBA members build approximately 35% of all new homes in America. Its purpose is to preserve home affordability for American families. LBA member companies build across the residential spectrum from first-time and move-up to luxury and active-adult housing. In each of these segments, its members are leaders in construction quality, energy efficiency, design, and the efficient use of land. Many of its members are also active in urban multi-family markets and also develop traditional and neo-traditional suburban communities.

The National Alliance of Forest Owners (NAFO) is a national advocacy organization committed to advancing federal policies that support the long-term economic, social, and environmental benefits of sustainably managed, privately owned forests. NAFO member companies own and manage more than 46 million acres of private working forests—forests that are managed to provide a steady supply of timber. NAFO's membership also includes state and national associations representing tens of millions of additional acres. NAFO works aggressively to sustain the ecological, economic, and social values of forests and to assure an

abundance of healthy and productive forest resources for present and future generations.

The National Association of Home Builders (NAHB) is a national trade association incorporated in Nevada. NAHB's membership includes more than 140,000 builder and associate members organized into approximately 700 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. Its members include individuals and firms that construct single-family homes, apartment buildings, condominiums, and commercial and industrial projects, as well as land developers and remodelers.

The National Cattlemen's Beef Association (NCBA) is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

The National Corn Growers Association (NCGA) was founded in 1957. NCGA represents nearly 40,000 dues-paying corn farmers

nationwide and the interests of more than 300,000 growers who contribute through corn checkoff programs in their States. NCGA and its 50 affiliated state organizations work together to create and increase opportunities for corn growers to help them sustainably feed a growing world.

The National Mining Association (NMA) is the national trade association of the mining industry. NMA's members include the producers of most of the Nation's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry.

The National Pork Producers Council (NPPC) is an association of 43 state pork producer organizations and the global voice in Washington, DC for the Nation's approximately 60,000 pork producers. NPPC conducts public policy outreach at both the state and federal level with a goal of meeting growing worldwide consumer demand for pork while simultaneously protecting the water, air, and other environmental resources that are in the care of or potentially affected by pork producers and their farms. NPPC and its members have engaged directly with EPA over the last two decades regarding the development of water quality

standards and have made significant capital investments in the design and operation of farms to comply with these environmental regulations.

The National Stone, Sand, and Gravel Association (NSSGA) member companies are responsible for the essential raw materials found in every home, building, road, bridge and public works project in the U.S. and produce more than 90% of the crushed stone and 70% of the sand and gravel consumed annually in the United States. The industry employs about 100,000 men and women nationally. NSSGA and its predecessor organizations have represented the industry for over 100 years.

The Public Lands Council (PLC) has actively represented cattle and sheep producers who hold public lands grazing permits since 1968. Public land grazing is the economic backbone of countless rural communities within 11 western states. The PLC advocates for these western ranchers, who preserve the Nation's natural resources while providing vital food and fiber to the Nation and the world. Approximately 22,000 ranchers own nearly 120 million acres of private land and hold grazing permits on more than 250 million acres managed by the U.S. Forest Service and Bureau of Land Management. Nearly 40% of western cattle herd and 50% of the nation's sheep herd spend time on public lands.

The U.S. Poultry & Egg Association (U.S. Poultry) is the world's largest and most active poultry organization. The Association represents the entire industry as an "All Feather" association. Membership includes producers and processors of broilers, turkeys, ducks, eggs, and breeding stock, as well as allied companies. Formed in 1947, the association has affiliations in 27 states and member companies worldwide.

JURISDICTIONAL STATEMENT

Plaintiff-Appellee State of Colorado filed this action against Defendants-Appellants U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (together, the Agencies) alleging that the 2020 Rule violates the Administrative Procedure Act and that the Corps violated the National Environmental Policy Act. Agencies App. 8-53.[1] The district court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because Colorado's complaint raises questions under federal law.

On June 19, 2020, the district court granted Colorado's motion for preliminary injunction. Agencies App. 94-120. On June 23, 2020, the

[1] Pursuant to 10th Cir. R. 30.1(C), rather than duplicate the Appendix the Agencies filed with their brief, Business Intervenors adopt that Appendix and will cite to it in the form: Agencies App. __.

Agencies filed a notice of appeal of that order. Agencies App. 121-23. Additionally, Business Intervenors filed their own notice of appeal on July 15, 2020, which was the day their motion to intervene was granted. Supp. App. 14-17.[2] The notices of appeal are timely because they were filed within 60 days of the order appealed from. 28 U.S.C. § 2107(b)(2); Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over this appeal from an order granting an injunction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred in determining that Colorado was likely to succeed on the merits of its challenge to the 2020 Rule.

2. Whether the district court abused its discretion by granting a preliminary injunction absent evidence that Colorado would suffer certain and great irreparable harm before the district court renders a final decision on Colorado's claim.

3. Whether the district court abused its discretion in ruling that the balance of harms and public interest favors an injunction based solely on the conclusion that an injunction would preserve the status quo.

[2] Citation to the Supplemental Appendix attached to this brief is in the form: Supp. App. __.

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the Addendum following the Agencies' brief.

STATEMENT OF THE CASE

Business Intervenors adopt the Statement of the Case provided by the Agencies in their opening brief.

SUMMARY OF ARGUMENT

The district court's order staying enforcement of the 2020 Rule in Colorado pending judicial resolution of Colorado's challenges to that Rule should be vacated. The 2020 Rule is a permissible interpretation of the CWA by the Agencies that provides needed bright line rules to determine what constitute jurisdictional waters and wetlands within the scope of federal regulation. The 2020 Rule also appropriately restores the federal-state balance Congress contemplated when it enacted the CWA.

In staying the 2020 Rule in Colorado, the district court misconstrued the legal effect of the Supreme Court's fragmented decision in *Rapanos v. United States*, 547 U.S. 715 (2006), and ignored the Agencies' authority under *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to reasonably construe ambiguous provisions of the CWA. The district court's decision also ignores the significant harm to the

regulated community imposed by the stay: the stay removes the jurisdictional clarity provided by the 2020 Rule and once again subjects farmers, ranchers, mining companies, construction companies, and many other businesses to uncertainty and expense that will hamstring their operations and likely cause them to forego projects and let land lay unused. This will stifle job creation and have a negative impact on Colorado's economy.

ARGUMENT

I. THIS COURT REVIEWS THE STAY ORDER FOR AN ABUSE OF DISCRETION.

The district court construed Colorado's preliminary injunction motion as a motion seeking stay of administrative action under 5 U.S.C. § 705. Agencies App. 94. The standard for a stay under section 705 of the Administrative Procedure Act is the same as the standard for a preliminary injunction. *Cook Cty., Ill. v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020). To obtain a preliminary injunction, the movant must show that it is likely to succeed on the merits of its claim; it will suffer irreparable harm if the injunction is denied; the threatened injury outweighs the harm that the injunction will cause the opposing party; and the injunction is not against the public interest. *McDonnell v. City & Cty. of Denver*, 878 F.3d

1247, 1252 (10th Cir. 2018); *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The court reviews a preliminary injunction (and thus a stay under the APA) for an abuse of discretion. *See McDonnell*, 878 F.3d at 1252. "A district court abuses its discretion when it commits an error of law or relies upon a clearly erroneous factual finding." *Id*.

II. COLORADO IS NOT LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

A. *Rapanos* Does Not Foreclose The Agencies From Incorporating The Plurality's Reasoning Into Their Rulemaking.

The district court concluded that the 2020 Rule "is self-consciously intended to take the [*Rapanos*] plurality opinion (including its categorical exclusion of ephemeral watercourses), flesh out the details, and make it the new law of the land." Agencies App. 116-17. According to the court, however, "*Rapanos* forecloses this interpretation of the CWA." *Id*. at 117. That is both an incorrect characterization of what the Agencies did and erroneous as a matter of law.

As an initial point, the Agencies did not wholly adopt the *Rapanos* plurality opinion nor wholly reject Justice Kennedy's *Rapanos* concurrence. Instead, they explained that "there are sufficient

commonalities between these opinions to help instruct the agencies on where to draw the line between Federal and State waters." 85 Fed. Reg. at 22,291. For instance, the 2020 Rule "incorporates important aspects of Justice Kennedy's opinion, together with those of the plurality, to craft a clear and implementable definition [of "tributary"] that stays within their statutory and constitutional authorities." *Id.* The agencies further acknowledged that each opinion "excludes some waters and wetlands that the other standard does not," but were guided by the fact that both opinions "agreed in principle that the determination must be made using a basic two-step approach that considers (1) the connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters." *Id.* at 22,267. Additionally, both opinions "also agreed that the connection between the wetland and the tributary must be close" *Id.* The Agencies sought to implement guidance from "the [opinions'] common analytical framework." *Id.* Therefore, the district court's view that the 2020 Rule is simply an adoption of the *Rapanos* plurality is incorrect. Instead, the Rule uses both that opinion and Justice Kennedy's concurrence as guideposts for the Agencies' rulemaking.

As the district court recognized, "[i]t is notoriously difficult to understand what *Rapanos* is *for*." Agencies App. 116. But the Court got it wrong when it opined that it is "much simpler to understand what *Rapanos* is *against*." *Id.* The district court concluded that the *Rapanos* decision rejected the plurality's approach because five justices—Justice Kennedy in his concurrence *and the four dissenters*—disagreed with the plurality. *Id.* at 116-17. The fundamental error in that analysis is that the dissenters' views cannot be considered in determining what, if anything, is the precedential effect of *Rapanos*.

In *Marks v. United States*, the Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments* on the narrowest grounds." 430 U.S 188, 193 (1977) (emphasis added). For an opinion to constitute the narrowest grounds under *Marks*, it "must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices *who support the judgment*." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (emphasis added). Thus, in determining the precedential effect of

its fragmented decisions, the Court looks to the opinions of "the Justices whose votes were necessary to the judgment." *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997). The first step in the analysis is to ascertain which opinions are "necessary to our judgment." *United States v. Santos*, 553 U.S. 507, 523 (2008). Dissenting opinions do not support the judgment and therefore are necessarily excluded from the *Marks* analysis. *See King*, 950 F.2d at 783 ("we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority"); *see also United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (examining opinions "supporting the Court's decision" under *Marks* analysis); *Homeward Bound, Inc. v. Hissom Mem'l Ctr.*, 963 F.2d 1352, 1359 (10th Cir. 1992) (considering only plurality and concurrence to ascertain whether fragmented decision resulted in a determinative holding).

Justice Stevens's dissent in *Rapanos* cannot be necessary to the Court's judgment for the simple reason that the dissenters did not join the judgment. Because the dissent does not matter when determining the precedential effect of a fragmented decision, the district court incorrectly accorded legal significance to the fact that the *Rapanos* dissenters disagreed with the plurality.

The district court relied on *Vasquez v. Hillery*, 474 U.S. 254 (1988), to conclude that it was proper to consider the dissent to derive a holding from *Rapanos*. Agencies App. 117. In *Vasquez*, the Court considered its line of precedent holding that discrimination in the composition of a grand jury taints a subsequent conviction and that the harmless-error rule did not apply in that circumstance. The *Vasquez* dissent suggested that one of the Court's recent cases, *Rose v. Mitchell*, 443 U.S. 545 (1979), did not support the rule because it was an advisory opinion. *Vasquez*, 474 U.S. at 270 n.4 (Powell, J., dissenting). The majority disagreed, explaining that Part II of *Mitchell* reaffirmed the no-harmless-error principle, and that Part was joined by Justice Blackmun, who authored the opinion, along with Justices Brennan and Marshall who joined it, and two additional Justices who "explicitly joined Part II, but dissented from the judgment." *Id.* at 261 n.4. Although Justice White, joined by Justice Stevens, "dissent[ed] in part," they explicitly "agree[d] with Parts I and II of the Court's opinion." *Rose*, 443 U.S. at 588 (White, J., dissenting in part).

Thus, the Court in *Vasquez* recognized that five Justices in *Rose* expressly joined Part II of that decision even though two of them dissented from the ultimate judgment. The D.C. Circuit has explained that *Vasquez*

"is quite a different situation than the one that the *Marks* methodology addresses, where there is no explicit majority agreement on all the analytically necessary portions of a Supreme Court opinion." *King*, 950 F.2d at 784. And *Vasquez* has no application to *Rapanos* because the four dissenters did not dissent only in part or join any part of the plurality's or Justice Kennedy's opinions.

Vasquez, then, offers no support at all for the district court's conclusion that it is permissible to include a dissent in the *Marks* analysis. Therefore, the district court's use of the dissent to contrive a holding from *Rapanos* that reliance on the plurality opinion is foreclosed does not withstand scrutiny. That is reason enough alone to reverse its ruling.

B. Justice Kennedy's Concurrence Is Not The Controlling Opinion From *Rapanos*.

In its complaint and motion, Colorado argued something different: that Justice Kennedy's concurrence was the controlling opinion from *Rapanos*. Agencies App. 45; Amended Mot. for Preliminary Injunction at 13-14, Dkt. 24. But the concurrence was not a logical subset of the plurality and thus, under *Marks*, did not establish controlling precedent. *Marks* does not apply where there is no lowest common denominator that

represents the Court's holding. *Nichols v. United States*, 511 U.S. 738, 745 (1994).

This Court has recognized that "the *Marks* rule produces a determinative holding only when one opinion is a logical subset of other, broader opinions." *Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1141 (10th Cir. 2012). A *Marks* analysis does not yield a determinative holding when fragmented opinions are simply different from each other, such as "when the various opinions supporting the Court's decision are mutually exclusive." *Carrizales-Toledo*, 454 F.3d at 1151. In that instance, "there is then no law of the land because no one standard commands the support of the majority of the Supreme Court." *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *see also United States v. Orosco*, 575 F. Supp. 2d 1214, 1217 (D. Colo. 2008) ("In such a situation [where the plurality and concurring opinions take distinct approaches], circuit courts generally hold that no national standard derives from the plurality decision, and the only binding aspect of the decision is its specific result").

Neither the plurality nor Justice Kennedy's concurrence are controlling because neither is a logical subset of the other. The plurality devised a two-part test to determine whether a wetland was within the

jurisdictional reach of the CWA. First, there must be "waters" that contain a "relatively permanent flow," and second, there must be a "continuous surface connection" between the water and the wetland. *Rapanos,* 547 U.S. at 757 (plurality). By contrast, Justice Kennedy's significant nexus test provided that wetlands "possess the requisite nexus . . . if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J. concurring).

The plurality did not accept Justice Kennedy's significant nexus test, explaining that the test "leaves the [CWA]'s 'text' and 'structure' virtually unaddressed." *Id.* at 753 (plurality). The plurality continued that the "case-by-case determination of ecological effect" of a wetland on a navigable water under the significant nexus test "*was not the test*" and had been "*specifically rejected*" by the Court's prior cases. *Id.* at 754 (emphasis in original).

Likewise, Justice Kennedy did not accept the plurality's test, finding it to be "inconsistent with the Act's text, structure, and purpose." *Id.* at 776 (Kennedy, J.). He concluded that the plurality's reliance on the

permanence of water flow "makes little practical sense" and was precluded by the common understanding of "waters." *Id.* at 769. He also determined that the requirement of a continuous surface connection found no support in precedent. *Id.* at 774. The plurality's test, but not the significant nexus test, would exclude wetlands that abut navigable-in-fact waters but lack a continuous surface connection, and it would include remote wetlands with a surface-water connection with a small but continuously flowing stream that may be excluded by the significant nexus test. *Id.* at 776-77.

Understanding this, the Sixth Circuit held that neither the plurality nor the concurrence is a logical subset of the other. *United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009). The court observed that "there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's view." *Id.* at 210. Thus, "*Rapanos* is not easily reconciled with *Marks*." *Id.*

And the Court itself looks to the plurality opinion, not Justice Kennedy's concurrence, when it seeks guidance from *Rapanos*. For instance, in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Court issued a fragmented decision addressing the meaning of

language in the CWA regarding discharge of pollutants "from any point source." Four Justices wrote opinions and all of them cited the *Rapanos* plurality's discussion of point sources under the CWA. *Id*. at 1468-78; *id*. at 1478-79 (Kavanaugh, J., concurring); *id*. at 1479-82 (Thomas, J., dissenting); *id*. at 1482-92 (Alito, J., dissenting). While each opinion applied the plurality's reasoning differently, there can be no question that the Court believes the plurality—even though not a holding under *Marks*—is the source from which to draw guidance about the meaning of the statute.

C. The 2020 Rule Is Consistent With The Common Denominator Between The Plurality And Concurrence.

The Agencies recognized, 85 Fed. Reg. at 22,291, that there is some agreement between the plurality and Justice Kennedy on important issues. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) (court may look for common ground in plurality and concurring opinions). The plurality and Justice Kennedy agreed that "the word 'navigable' in 'navigable waters' [must] be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring); *see id*. at 731 (plurality). They also agreed that the CWA reaches some waters and

wetlands that are not navigable-in-fact but have a substantial connection to navigable waters. *Id.* at 739, 742 (plurality); *id.* at 784-85 (Kennedy, J.). And they agreed that "environmental concerns provide no reason to disregard limits in the statutory text." *Id.* at 778 (Kennedy, J.).

Justice Kennedy and the plurality agreed that, applying their tests, "waters of the United States" do *not* include "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," 547 U.S. at 781, much less waters or "wetlands [that] lie alongside [such] a ditch or drain." 547 U.S. at 778 (Kennedy, J.); *see id.* at 778-91 (identifying "volume of flow" and "proximity" as relevant factors and ruling out jurisdiction over features with a "remote," "insubstantial," or "speculative" effect on navigable waters) (Kennedy, J.); *id.* at 733-34 (jurisdiction reaches "continuously present, fixed bodies of water"; "intermittent or ephemeral flow" of the sort found in "drainage ditches," "storm sewers and culverts," and "dry arroyos" is insufficient) (plurality); *id.* at 742 (wetlands with "an intermittent, physically remote hydrologic connection" to jurisdictional waters lack a "significant nexus") (plurality).

The 2020 Rule heeds this guidance. *E.g.*, 85 Fed. Reg. at 22,251-52.

D. The Agencies Have The Authority To Interpret Ambiguities In The CWA Differently Than A Court Has Construed Them.

Even if *Rapanos* offered a precedential interpretation of ambiguities in the CWA, the Agencies may consider new information, reconsider past information, reinterpret statutory provisions, review prior assumptions, and set new policies based on their current understanding of the facts and the law. "[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). "[A] court's choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation." *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009). In fact, permitting a judicial interpretation "to foreclose an agency from interpreting an ambiguous statute" improperly "allow[s] a court's interpretation to override an agency's." *Brand X*, 545 U.S. at 982.

Thus, even if a court has interpreted the relevant statutory language, the question of whether an agency's contrary interpretation is permissible requires a two-step inquiry: first, the court must determine "whether the

statute is silent or ambiguous" with regard to the meaning of the relevant terms and, second, whether the agency reading is "a permissible construction of the statute." *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10th Cir. 2008).

There can be no meaningful disagreement that the phrase "waters of the United States" in the CWA—although it has a core of clear meaning (*see Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985))—is in other respects ambiguous. *See* Agencies Opening Br. 28-29. Thus, in examining a prior agency interpretation of its jurisdiction under the CWA over tributaries, this Court found that "the statutory terms 'waters of the United States' is sufficiently ambiguous to constitute an implied delegation of authority to the Corps." *United States v. Hubenka*,438 F.3d 1026, 1031 (10th Cir. 2006).

The question, then, becomes whether the Agencies' interpretation is permissible. The district court did not analyze that question, finding the 2020 Rule to be "foreclosed" by *Rapanos*. In its motion, Colorado argued that the Agencies' interpretation was impermissible because "nothing in the [CWA suggests] that Congress intended to balance water quality

against state sovereignty by limiting [WOTUS] to the narrow definition in the 2020 Rule." Dkt. 24 at 12. But one main purpose of the CWA is to protect states' authority over water and land use. 33 U.S.C. § 1251(b); 85 Fed. Reg. at 22,254, 22,262. That authority is a core aspect of state sovereignty, *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982), and agency intrusion into it violates the Tenth Amendment. *Hodel v. Va. Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 286-87 (1981). The risk of intrusion on that core state power was a key reason the Supreme Court rejected the Agencies "migratory bird rule" in *SWANCC*, 531 U.S at 172-173. Congress also enacted a system of federal support and assistance to states for programs to curb pollution in the "nation's waters" while authorizing direct federal regulation of a *subset* of the "nation's waters" it identified as "navigable waters." 85 Fed. Reg. at 22,253. The 2020 Rule is consistent with the congressional plan.

Colorado also argued that the Agencies were required to interpret WOTUS "as far as was permissible under the Commerce Clause." Dkt. 24 at 12. But the Supreme Court has rejected exactly that contention. It held in *SWANCC* that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication

that Congress intended that result." 531 U.S. at 172. "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173. Rather than point to any "clear indication" in the CWA's text, Colorado cited isolated snippets of legislative history. Dkt. 24 at 12. In the absence of a contrary textual mandate, it cannot be impermissible for the agencies to stop short of the far limit of their constitutional power. *See* 85 Fed. Reg. at 22,256 ("The CWA contains no such clear statement" authorizing the Agencies to interpret their jurisdiction under the statute to "press[] against the outer limits of Congress's constitutional authority").

E. Colorado's Other Challenges Are Meritless.

Although the district court did not reach the merits of Colorado's other claims, the Business Intervenors recognize that the State may raise those claims on this appeal as alternative grounds for affirmance. We will respond to such arguments in reply, but observe here some reasons why Colorado's additional arguments should leave this Court unpersuaded.

First, the Agencies did not disregard Colorado's reliance interest on their prior interpretation of WOTUS. *See* Dkt. 24 at 15-16. An

administrative agency is free to change its policy, but it must provide a reasoned explanation for its change and it must "be cognizant" that "long-standing policies" may have led to "reliance interests." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). The Agencies recognized that the 2020 Rule would affect states and discussed how states may adapt to the change in federal jurisdiction. 85 Fed. Reg. at 22,270, 22,333-34. The Agencies also met with states during the rulemaking process to examine the implications for state and local governments. *Id.* at 22,336. The Agencies also explained that the 2020 Rule "does not impose any new costs or other requirements, preempt state law, or limit states' policy discretion," but gives states "more discretion" over "how best to manage waters under their sole jurisdiction." *Id.* The Agencies thus did not ignore states' reliance interests.

Second, contrary to Colorado's assertion (Dkt. 24 at 16-17), the Agencies applied scientific principles in fashioning the Rule. *E.g.*, 85 Fed. Reg. at 22,274-75, 22,288. Colorado really complains that the Agencies did not wholly adopt the Connectivity Report underlying the 2015 Rule. But there is no requirement that the Agencies defer to that scientific analysis; they receive "considerable discretion and deference" for "matters that

require a high level of technical expertise" and "'it is not [the court's] role to weigh competing scientific analyses." *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 442 (10th Cir. 2011). Further, the Agencies explained why the Science Advisory Board's critique of the 2020 Rule was unfounded. 85 Fed. Reg. at 22,261, 22,288. In short, the Agencies "looked to scientific principles to inform" the Rule. *Id.* at 22,271; *see id.* at 22,288. They were required to do no more.

Third, Colorado's claim (Dkt. 24 at 18) that it was improper for the Agencies to believe "that states would be able to fill in the gaps in clean water protection" makes no sense. As discussed, the CWA is designed to preserve states' primary responsibility over waters within their borders. 33 U.S.C. § 1251(b). It was logical for the Agencies to reason that states may choose to fill any regulatory gaps created by the Rule and that states may be more efficient at allocating resources in doing so. 85 Fed. Reg. at 22,334. A rule based on logical reasoning is not arbitrary or capricious. *Personal Web Techs. v. Apple, Inc.*, 848 F.3d 987, 992 (Fed. Cir. 2017). And insofar as Colorado contends (Dkt. 24 at 19) that the Agencies underestimated the costs of the Rule to the state, they provided no authority or explanation as to why the alleged flaws are so serious as to

render the Rule arbitrary and capricious. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012).

III. THE STAY HARMS THE REGULATED COMMUNITY, WHICH IT RETURNS TO THE PRIOR STATE OF DEBILITATING UNCERTAINTY.

A. The Agencies Reasonably Promulgated A Rule That Addresses The Uncertainty Over WOTUS Jurisdiction Of Which Business Intervenors Have Long Complained.

As the Agencies explain (Opening Br. at 35-44), Colorado did not establish that it would face irreparable harm in the absence of the stay and (*id.* at 44-48) the balance of equities and the public interest weigh against the stay. Added to that equation, and further compelling vacatur of the stay, is the harm it causes to the regulated business community because it eliminates the greater certainty that the Agencies reasonably sought to achieve when they promulgated the new Rule.

The Agencies explained that the 2020 Rule "is intended to establish categorical bright lines that provide clarity and predictability for regulators and the regulated community." 85 Fed. Reg. at 22,325. The declaration of Don Parrish, Senior Director of Regulatory Affairs at the American Farm Bureau Federation and Chairman of the Waters Advocacy Commission (included in the Supplemental Appendix filed with this brief),

documents why that increased clarity is essential.[3] Mr. Parrish explains that the Agencies published the 2020 Rule after significant efforts by the regulated business community to advocate for a "clear, reasonable definition of WOTUS." Parrish Decl. ¶43. The 2020 Rule "will provide increased regulatory clarity and consistency for the business community and eliminate unnecessary costs and burdens imposed by prior unlawful expansion of the CWA and the uncertainty of jurisdictional criteria." *Id.* ¶44. The bright line definitions of the 2020 Rule allow construction, building, mining, farming, and other businesses to operate without the delays, costs, and uncertainties that result from prior agency rules. *Id.* ¶¶21, 46. The 2020 Rule also creates a more appropriate federal-state balance by placing greater emphasis on regulatory action by state and local officials. *Id.* ¶48. Those state and local officials are more likely to know the features of local water resources and provide more efficient regulation. *Id.* Farmers, ranchers, and local businesses also benefit from

[3] This declaration was originally attached in support of the Business Intervenors' "proposed" opposition to Colorado's motion for a preliminary injunction that they submitted as putative intervenors in the district court. Dkt. 49-3. Following the grant of intervention on July 15, 2020, intervenors immediately refiled their formerly "proposed" opposition brief and supporting Parrish declaration, also on July 15. *See* Dkt. 72. The Parrish declaration is also included in the Supplemental Appendix submitted with this brief.

the balance struck by the 2020 Rule because they are more commonly used to working with the local conservation officials. *Id.*

Staying the operation of the 2020 Rule and returning to the pre-2020 regulatory system subjects business owners (and regulators) to a less clear and more expansive federal jurisdiction that is extremely costly. The costs of obtaining a CWA permit "are significant" and the process "arduous." *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1812, 1815 (2016). "Over $1.7 billion is spent each year" for wetland permits. *Rapanos*, 547 U.S. at 721 (plurality). For many businesses, these costs force them to abandon projects or take land out of use. Parrish Decl. ¶¶26-30, 33.

Further, the uncertainty entrenched in the pre-2020 regulatory environment compromised businesses' ability to use their land. For instance, if farmers cannot tell what land can be put to use, they may have to take the land entirely out of production. *Id.* ¶50. As one illustration, because of the stay farmers and ranchers in Colorado must again worry that sometimes-wet areas of land, also known as puddles, similar to what is depicted in Figure 1 of the Parrish declaration, are jurisdictional "waters" under the CWA. *Id.* ¶22, fig. 1.

This uncertainty may also cause manufacturers and builders to delay or abandon projects. *Id.* ¶¶28-29. These concerns are present for nearly every industry, including ranching, mining, and homebuilding, and this uncertainty costs jobs and impair production of essential goods. *Id.* ¶¶51-52. Family or other smaller operations are often the hardest hit because they lack the resources for costly jurisdictional determinations, and the uncertainty of the prior rules elevates the risk that their expense will be for naught. *Id.* ¶53. Uncertainty over what standard applies hamstrings business operations and planning. *Id.* ¶56.

The experience of the Business Intervenors and their members, documented in the Parrish Declaration and the thousands of pages of comments on numerous WOTUS-related rules cited in the Declaration, amply justify the Agencies' conclusion that prior regimes had provided inadequate certainty to the regulated community and needed to be replaced with brighter lines of jurisdiction. That was a proper and adequate explanation of the Agencies' departure from the prior regulatory regime, and a reasonable response to the failures of those prior regimes.

B. The Agencies Reasonably Took Into Account The Considerable Uncertainty Generated By The Litigation History Of The 2015 Rule.

All this uncertainty under the 2015 Rule and the prior regulatory regimes it replaced was compounded by the litigation history of the 2015 Rule, which left it in place in 23 states, but led to it being enjoined in 27 other states and held unlawful by two courts. This litigation history is important, because the Agencies were entitled to take it into account—and did take it into account—when they determined to promulgate a new rule without the same litigation vulnerabilities.

The 2015 Rule was stayed nationwide at first by the Sixth Circuit, because it was "far from clear" that it could be squared with even the most generous reading of Supreme Court precedent. *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015), *vacated*, 713 Fed. App'x 489 (6th Cir. 2018). After the Sixth Circuit lost jurisdiction (*see Nat'l Ass'n of Mfrs.*, 138 S. Ct. 617), district courts issued preliminary injunctions covering more than half of the country.

The District Court in North Dakota enjoined the rule in 13 States because plaintiffs were "likely to succeed on the merits of their claim that the EPA has violated its grant of authority." *North Dakota v. EPA*, 127 F.

Supp. 3d 1047, 1051 n.1, 1055 (D.N.D. 2015). It concluded that the 2015 Rule was inconsistent with any plausible reading of Supreme Court precedent and arbitrary and capricious. Enjoining the 2015 Rule in another 11 States, the Southern District of Georgia agreed that it was "plague[d]" by the "fatal defect" that it reached drains, ditches, and streams "remote from any navigable-in-fact" water. *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364-65 (S.D. Ga. 2018) (quoting *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring)). The Southern District of Texas enjoined the Rule in another three States. *American Farm Bureau Fed'n* v. *U.S. EPA*, 3:15-cv-165 (S.D. Tex. Sept. 12, 2018), Dkt. 87. Accordingly, the rule was enjoined in 27 States.

Ultimately, district courts in Texas and Georgia held the 2015 Rule unlawful. The Texas court concluded that it "is not sustainable on the basis of the administrative record'" and remanded it to the Agencies. *Texas v. EPA*, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019). The Georgia court addressed the substance of the 2015 Rule. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019). It held that asserting jurisdiction over all "interstate waters" impermissibly reads the term "navigable" out of the statute; defining "tributary" extends federal jurisdiction beyond that

allowed under the CWA; and asserting jurisdiction over all waters "adjacent" to all tributaries was an impermissible construction. *Id.* at 1363-68. And it held that "the WOTUS Rule's vast expansion of jurisdiction over waters and land traditionally within the states' regulatory authority" constituted a "substantial encroachment" into state power that "cannot stand absent a clear statement from Congress." *Id.* at 1370, 1372. The court remanded the Rule to the Agencies because, recognizing its serious shortcomings, the Agencies had by then begun to reconsider it in new rulemakings.

That series of failures in court is part of the backdrop of the Agencies' decision to promulgate a narrower and more certain rule, and it is certainly permissible for the Agencies to take those litigation failures into account—as it did—in determining that the 2015 Rule must be replaced.

In turn, the Rule that the Agencies promulgated in 2019 to repeal the 2015 Rule has been challenged in numerous suits. *See* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) ("Repeal Rule").[4] As a result, it is unclear

[4] Challenges to the Repeal Rule include: Compl., *Chesapeake Bay Found., Inc. v. Wheeler*, 1:20-cv-1064 (D. Md. Apr. 27, 2020) (Dkt. 1); Compl., *New York v. Wheeler*, No. 1:19-cv-11673 (S.D.N.Y. Dec. 20, 2019) (Dkt. 1); Supp.

whether the 2015 Rule or prior regulatory regime would ultimately be in effect in Colorado. That uncertainty too justifies the Agencies' fresh start. Either prior regime would harm the Business Intervenors' members compared to the 2020 Rule, because each creates broader and far more uncertain federal jurisdiction.

* * *

The stay entered by the district court returns businesses operating in Colorado to the expense and uncertainty endemic to the pre-2020 regulatory regimes that the 2020 Rule replaces. The serious harms—documented by the Business Intervenors over years of litigation (Parrish Decl. ¶¶13-15) and rule comments (*id.* ¶14, n.2)—far outweigh Colorado's preference not to regulate its own water features. This evidence weighs strongly in favor of vacating the district court's stay order.

Am. Compl., *Washington Cattlemen's Ass'n v. EPA*, No. 2:19-cv-00569 (W.D. Wash. Dec. 20, 2019) (Dkt. 60); Compl., *Murray v. Wheeler*, No. 1:19-cv-01498 (N.D.N.Y. Dec. 4, 2019) (Dkt. 1)*;* Compl., *S.C. Coastal Conservation League v. Wheeler*, No. 2:19-cv-3006 (D.S.C. Oct. 23, 2019) (Dkt. 1); Compl.*, New Mexico Cattle Growers' Ass'n v. EPA*, No. 1:19-cv-988 (D.N.M. Oct. 22, 2019) (Dkt. 1); Supp. Compl., *Pierce v. EPA*, No. 0:19-cv-2193 (D. Minn. Oct. 22, 2019) (Dkt. 12).

CONCLUSION

The decision of the district court should be reversed and the stay of the 2020 Rule should be vacated.

July 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Timothy Bishop, counsel for the Business Intervenors certify that I am a member in good standing of the Bar of this Court. I certify that all required privacy redactions have been made. I further certify that the attached brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 8,053 words, excluding the parts of the brief exempted by Rule 32(a)(7)(f).

I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) because it has been prepared using Microsoft Word and is set in Century Schoolbook in a typeface size equivalent to 14 points or larger.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redaction have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender Version 1.319.1543.0, last updated July 15, 2020, and according to the program are free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on July 16, 2020. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via the appellate CM/ECF system.

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Attachment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 20-cv-1461-WJM-NRN

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.

ORDER GRANTING AS-CONSTRUED MOTION FOR STAY OF AGENCY ACTION

Plaintiff State of Colorado ("Colorado") sues the U.S. Environmental Protection Agency ("EPA") and its administrator, along with the U.S. Army Corps of Engineers ("Corps of Engineers") and its administrator, to invalidate a new regulation regarding the scope of federal jurisdiction under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq*. The Court will refer to Defendants collectively as "the Agencies."

Currently before the Court is Colorado's Amended Motion for Preliminary Injunction. (ECF No. 24.) The Court construes this as a motion seeking a stay of agency action under 5 U.S.C. § 705. For the reasons explained below, the Court finds that Colorado advances an unusual and partly self-contradictory theory of harm, but Colorado has nonetheless satisfied the elements required to obtain preliminary relief. The Court will therefore enjoin the Agencies from implementing their new regulation in

Colorado.[1]

I. LEGAL STANDARD

Colorado explicitly moves for a preliminary injunction under Federal Rule of Civil Procedure 65. (*See* ECF No. 24 at 2.)[2] Because this case seeks review of agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500 *et seq*., the proper authority for preliminary relief is 5 U.S.C. § 705:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. 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.

But the distinction between Rule 65 and § 705 is mostly technical because a § 705 stay is a provisional remedy in the nature of a preliminary injunction, *see Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980), and its availability turns on the same four factors considered under a traditional Rule 65 analysis, *see, e.g.*, *Hill Dermaceuticals, Inc. v. U.S. Food & Drug Admin.*, 524 F. Supp. 2d 5, 8 (D.D.C. 2007).[3]

---

[1] Through the Agencies' notice of supplemental authority filed a little over an hour ago (ECF No. 60), the Court has been made aware of a decision earlier today from the United States District Court for the Northern District of California denying a preliminary injunction against the new regulation at issue here. *See State of California et al. v. Wheeler*, No. 20-cv-3005 (N.D. Cal.), ECF No. 171 (filed June 19, 2020) (on this docket as ECF No. 60-1) (hereinafter, "*State of California*"). The Court explains its disagreements with *State of California* below.

[2] All citations to ECF page numbers are to the page number in the CM/ECF header, which does not always match the document's internal pagination due to unnumbered caption pages and separately numbered prefatory material (such as tables of contents).

[3] The major practical difference, it appears, between a Rule 65 proceeding and a § 705 proceeding is that Rule 65(c) requires a court granting an injunction to consider a bond amount, whereas § 705 contains no such requirement.

The Supreme Court has described the four preliminary injunction factors as follows: "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

II. STATUTORY BACKGROUND & PROCEDURAL HISTORY

Absent a permit, the CWA prohibits "discharge of any pollutant," 33 U.S.C. § 1311, into "navigable waters," *id*. § 1362(12). "Navigable waters" means "the waters of the United States." *Id*. § 1362(7). The CWA does not further define "waters of the United States," so the Agencies have defined it by regulation. *See* 33 C.F.R. § 328.3. The current definition reaches more than literally "navigable" waters, but the precise details are unimportant for present purposes. What matters is that, on June 22, 2020, the Agencies will put into effect a new rule that narrows the current definition of that term. *See* 85 Fed. Reg. 22250 (Apr. 21, 2020). In other words, the new rule puts some waters outside the reach of the CWA that the Agencies previously considered to be within the reach of the CWA. The Court will refer to the rule in effect today as the "Current Rule," the rule to take effect this coming Monday as the "New Rule," and the waters that are encompassed by the Current Rule but not by the New Rule as "Disputed Waters."

Of particular importance in this regard is the "Section 404 permit" process, which refers to the Corps of Engineers' authority under CWA § 404 (33 U.S.C. § 1344) to "issue permits . . . for the discharge of dredged or fill material into the navigable waters." *Id*. § 1344(a). Thus, for instance, if a developer wants to fill in a marshy area so it may

build on it, and if that marshy area is deemed "navigable waters"—*i.e.*, "waters of the United States" as defined in 33 C.F.R. § 328.3—then the developer must first obtain a Section 404 permit from the Corps of Engineers. On the flipside, if the marshy area is not "waters of the United States" as defined in 33 C.F.R. § 328.3, then the developer does not need a Section 404 permit—meaning, from the perspective of federal law, the developer may fill in the marshy area with impunity. If the New Rule goes into effect, such a developer would no longer need a Section 404 permit to fill Disputed Waters.

But whether federal law requires a permit or not, a state may enforce its own standards that are stricter than Section 404. *See* 33 U.S.C. § 1344(t) ("Nothing in this section shall preclude or deny the right of any State . . . to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State . . . ."). Colorado asserts jurisdiction over "state waters," defined to mean (with exceptions not relevant here) "any and all surface and subsurface waters which are contained in or flow in or through this state." Colo. Rev. Stat. § 25-8-103(19). And "[n]o person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the division [*i.e.*, the Water Quality Control Division of the Colorado Department of Public Health and Environment]." Colo. Rev. Stat. § 25-8-501(1).

The parties do not dispute that Colorado's definition of "state waters" embraces the Disputed Waters. Thus, anyone seeking to fill Disputed Waters will still need a permit from the state when the New Rule goes into effect. However, under Colorado law, "[n]o permit shall be issued which allows a discharge that by itself or in combination with other pollution will result in pollution of the receiving waters in excess of the

pollution permitted by an applicable water quality standard unless the permit contains effluent limitations and a schedule of compliance specifying treatment requirements." Colo. Rev. Stat. § 25-8-503(4). This presents a problem for Colorado: "Because discharges of large quantities of fill, by their nature, are likely to result in exceedances of state water quality standards and compromise the classified uses of these waters, the [state] could not allow almost any of them under a state discharge permit." (ECF No. 24 at 8.) In other words, there is no state water quality standard that contemplates dumping dirt and rock into water until it becomes dry land. Thus, filling state waters is flatly prohibited under Colorado law.

Since roughly January of this year, in anticipation of the New Rule, state administrators have been working with the Colorado Legislature to amend the relevant statute to provide state authority equivalent to Section 404. (ECF No. 56 ¶ 2.) These efforts, like many other things, were disrupted by the COVID-19 pandemic. (*Id*. ¶ 3.) The legislature adjourned on June 15, 2020, without passing legislation that would provide Section 404-like authority to state administrators.

The Court will provide additional background as it becomes relevant to the legal issues addressed below.

III. ANALYSIS

A. Irreparable Harm

Among the preliminary injunction factors, "a showing of probable irreparable harm is the single most important prerequisite." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (internal quotation marks omitted). "Without showing irreparable harm, [a party] cannot obtain a preliminary injunction." *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1143 (10th Cir.

2017). "[T]he party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (emphasis in original; internal quotation marks omitted). "Irreparable harm, as the name suggests, is harm that cannot be undone, such as by an award of compensatory damages or otherwise." *Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1105 (10th Cir. 2003). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Schrier v. University of Colorado*, 427 F.3d 1253, 1267 (10th Cir. 2005). Harm that is "merely serious or substantial" is not irreparable. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001).

In this case, the irreparable harm inquiry overlaps with whether Colorado asserts *any* cognizable harm flowing from the New Rule. If it does not, this Court does not have jurisdiction under Article III of the U.S. Constitution to adjudicate the dispute. In other words, every plaintiff in federal court must have "Article III standing," which entails the following:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citations omitted; certain alterations incorporated). "Article III standing is jurisdictional . . . ." *In re Peeples*, 880 F.3d 1207, 1212 (10th Cir. 2018).

Given the significance of irreparable harm in light of Article III standing, the Court

will address it before reaching the other preliminary injunction elements.

1. The "Permitting Gap" and Foregone Development

Colorado first asserts harm from what it calls the "permitting gap." (ECF No. 24 at 7.) The basic problem, Colorado says, is that Disputed Waters are still protected under state law (because they are "state waters") but Colorado's flat prohibition on filling state waters means that "project sponsors [*e.g.*, developers] will be left without any legal mechanism to authorize projects that require discharges of fill in these waters." (*Id*. at 8.)

It would seem that project sponsors were without such a legal mechanism—at least from the perspective of state law—even under the Current Rule, because Colorado simply prohibits fill. In other words, a developer discharging fill per a Section 404 permit would still appear to be violating state law, whether or not Colorado chose to enforce that law. However, Colorado's clean water statute further provides that "each permit issued pursuant to the federal act shall be deemed to be a temporary permit issued under this article which shall expire upon expiration of the federal permit." Colo. Rev. Stat. § 25-8-501(1). Thus, federal permits are essential to Colorado's ability to overcome its own ban on dredging and filling.

In light of the permitting gap, Colorado asserts that developers will not develop projects because Colorado cannot authorize their dredge and fill operations. From a preliminary injunction perspective, Colorado has provided no evidence of any such project, much less a project poised to start—in other words, one that needs a permit to fill Disputed Waters "before a decision on the merits [of this lawsuit] can be rendered,"

Winter, 555 U.S. at 22 (internal quotation marks omitted).[4] "Issuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. (emphasis added).

But the problem is deeper than simple failure to provide the evidence needed to support a preliminary injunction. Colorado's inability to authorize these projects is the result of nothing other than Colorado's choice in the matter. If such projects never get built, leading to economic harm, it is because the Colorado Legislature made the questionable decision to enact a clean water statute that provides no exception for filling. Colorado has thus categorically prioritized environmental preservation over economic gain—a prioritization in which the Agencies had no role in effecting. Projects not built under these circumstances would therefore be consistent with state policy, a policy wholly independent of the federal environmental policies codified in the CWA. The Court simply cannot see how adherence to state policy is an injury to the state, much less one caused by the New Rule. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) ("The injuries [complained of by the state-plaintiffs] were self-inflicted, resulting from decisions by their respective state legislatures. . . . No State can be heard to complain about damage inflicted by its own hand.").

Even if Colorado could assert the economic harm to developers as an injury to itself, Colorado may not sue the federal government to vindicate the federal rights (in this case, rights created by the APA and CWA) of its citizens (here, most notably,

[4] Obviously, if a developer plans to fill waters that remain "waters of the United States" under the New Rule, the developer can go to the Corps of Engineers for a Section 404 permit.

private developers). *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923); *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992). The Agencies point out as much in their response brief (*see* ECF No. 51 at 26), and Colorado's reply brief does not directly address the argument. It appears, rather, to address the argument indirectly by emphasizing "a project to improve safety on a state highway in Clear Creek County" (ECF No. 55 at 4)—in other words, something that Colorado itself (not any private developer) will forgo, and therefore outside the rule that a state may not assert its citizens' federal rights against the federal government.

The Clear Creek County project to which Colorado alludes is a plan to repair part of the famous—and famously rough—State Highway 5, which leads nearly to the summit of Mt. Evans. (*See* ECF No. 31 ¶¶ 20–28.) A 0.7-mile segment of the highway near Summit Lake is "heavily-damaged" due to frost heave. (*Id*. ¶¶ 21–22.) In part, this is because the road is surfaced with an impermeable material, which buckles when underlying groundwater freezes and thaws. (*Id*.) Colorado proposes to replace the road base with crushed rock, allowing the groundwater to freeze and thaw without displacing the road. (*Id*. ¶ 24.) According to Colorado, this will require some amount of filling in wetlands, including an approximately 1/3-acre that will become Disputed Waters under the New Rule, and therefore outside of the Section 404 permitting process. (*Id*. ¶ 26.) And, Colorado says, there is "[n]o alternative to reconstruction on the existing alignment," due to "steep conditions, land ownership, and lack of right-of-way . . . . Without a federal permitting mechanism to authorize discharge of fill into wetlands, the project could not move forward." (*Id*. ¶ 27.)

Assuming the truth of these assertions, and further assuming that inability to repair a routinely damaged but operational road segment is irreparable harm, Colorado's allegations are insufficient to show "imminent" irreparable harm. *See Heideman*, 348 F.3d at 1190. Colorado submits no evidence that it is prepared to begin reconstruction but for a permit, or that it will be prepared "before a decision on the merits [of this lawsuit] can be rendered." *Winter*, 555 U.S. at 22 (internal quotation marks omitted). To the contrary, Colorado says that "[a]n impact assessment has not been completed yet" on "the proposed project." (ECF No. 31 ¶ 25.) This strongly suggests that this particular highway repair project remains very much in the planning stages.[5]

But again, more fundamentally, the real problem is that Colorado has prohibited itself from filling "state waters," and it is apparently poised to enforce that prohibition against itself. That self-inflicted injury is manifestly not an injury caused by the New Rule.

2. Direct Environmental Harm

Colorado further claims that the New Rule will cause direct environmental harm because developers may begin filling Disputed Waters, in violation of state law. (ECF No. 24 at 9.) Notably, Colorado does not express any fear about rogue developers generally (at least not in its opening brief—but see below), probably because Colorado appreciates that a developer willing to take its chances without a state permit is

[5] It is also "generally known within [this] court's territorial jurisdiction," Fed. R. Evid. 201(b)(1), that State Highway 5 is open to the public usually only from Memorial Day to Labor Day, due to the highly inclement weather at such high elevation. Even if the construction-access season is longer than the public-access season, it cannot be much longer, and Colorado has submitted no evidence that it is prepared to begin construction before it must completely close the road for the winter season.

probably equally willing to take its chances without a Section 404 permit, whatever the scope of "waters of the United States." In other words, rogue developers operate unlawfully today under the Current Rule, and will continue to operate unlawfully under the New Rule, so the harm they cause cannot be attributed to or caused by the New Rule.

Colorado instead posits a very specific problem relating to developers "who previously sought federal permits." (ECF No. 24 at 9.) "[I]t is likely," Colorado says, "that some [of these] developers . . . may believe they are no longer subject to any regulatory oversight and will move forward with dredge and fill activities in [Disputed Waters] without taking the needed steps to protect downstream waters and mitigate any remaining environmental harm." (*Id*. at 9–10.)

Colorado certainly has an interest in protecting state waters, and that interest is cognizable for purposes of standing and irreparable harm when "the harm is sufficiently concrete." *See New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 697 n.13 (10th Cir. 2009) (summarizing *Massachusetts v. EPA*, 549 U.S. 497, 522–23 (2007)). However, Colorado's alleged chain of causation between the New Rule and the damage to state waters is pure speculation. Colorado offers no evidence in support of its contention that it is "likely" that a previously-permitted developer (one who has so far sought to obey the law) would conclude that the narrowing of one law means there must be no more laws to comply with. This is nothing more than attorney argument.

Even as attorney argument, the theory runs into a doubly strong headwind because it relies on (1) the actions of third parties and (2) the prediction that someone will disobey the law. *See, e.g.*, *Chamber of Commerce v. EPA*, 642 F.3d 192, 200–01

(D.C. Cir. 2011) (if injury will be caused by a third party, claimant has "the burden of adducing facts showing that those third-party choices have been or will be made in such manner as to produce causation and permit redressability of injury" (internal quotation marks omitted; alterations incorporated)); *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 810 F.3d 827, 831 (D.C. Cir. 2016) ("We have rejected assertions of imminent injury where the prospective injury depends on future illegal activity, finding, for example, that a sheriff lacked standing to challenge President Obama's immigration policy partly because the plaintiff's theory depended on immigrants' committing crimes in the future. More generally, we are relatively hesitant to find standing when the asserted injury depends on the unfettered choices made by independent actors not before the courts." (internal quotation marks and citation omitted)); *cf*. *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1216 (10th Cir. 2015) (finding a challenge to prison regulations moot because, in part, "we decline to assume [the plaintiff] will repeat the misconduct that previously got him sent to administrative segregation").

A declaration from one of Colorado's water quality administrators asserts that the "EPA has historically completed between three and five enforcement cases in Colorado per year for 404 permit violations." (ECF No. 32 ¶ 15.) A declaration from a retired EPA employee describes an unpermitted fill that took place in Telluride "[i]n the late 1980s." (ECF No. 28 ¶ 21.) Colorado cites these declarations in its reply brief as "evidence that illegal fill activity occurs in the state." (ECF No. 55 at 4.) Indeed, it shows that illegal fill has happened *under the Current Rule*. Or, as the Court observed above, rogue developers will operate outside the law, whatever rule the Agencies adopt. The New Rule therefore does not cause illegal fill, nor has Colorado presented any evidence that

the New Rule will make illegal fill more likely. Nonetheless, this record of violation remains important below as part of a different standing theory.

3. Injury Through Costs of Creating and Running a Replacement Permitting Regime

Colorado claims that if the New Rule is not enjoined, it will eventually spend money to set up and administer its own 404-like permitting and enforcement regime, and the resources it expends in those efforts will ultimately be unrecoverable, even if it prevails in this lawsuit. (ECF No. 24 at 7, 9.) Colorado is correct that it cannot obtain damages from the Agencies, even if it eventually succeeds in invalidating the New Rule. *See* 5 U.S.C. § 702 (APA waives sovereign immunity only for actions "seeking relief other than money damages"). And courts have recognized that a plaintiff suffers irreparable harm if the defendant's action causes the plaintiff to spend, or deprives the plaintiff from earning, money that the plaintiff can never recover due to sovereign immunity, even if the plaintiff succeeds in proving the defendant's conduct unlawful. *See Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Cloud Peak Energy Inc. v. U.S. Dep't of Interior*, 415 F. Supp. 3d 1034, 1042–43 (D. Wyo. 2019).

One might argue that nothing about the New Rule forces Colorado to establish a state-law analogue to Section 404, so this alleged injury is not caused by the New Rule. The Court will pick up this argument again shortly in a context where it actually matters. In the current context, the problem for Colorado is more practical. Colorado admits that it will not spend any money to set up a Section 404-like permitting and enforcement regime until the Colorado Legislature amends Colorado's water quality statute to permit dredging and filling. (ECF No. 24 at 9 ("Colorado cannot simply start issuing dredge

and fill permits on June 22. Establishing its own permitting program for dredge and fill activities *will require legislative action* and a lengthy implementation process." (emphasis added)). And, as noted above (Part II), the Colorado Legislature adjourned for the year on June 15, 2020, without creating a Section 404 analogue. Colorado therefore will not be spending money anytime soon on a new permitting and enforcement regime.

4. Enforcement of the Current Statute

Colorado says that it "will need to and will take enforcement action against illegal fill activity in state waters"—meaning *all* fill activity in state waters—when the New Rule comes into effect. (ECF No. 32 ¶ 15.) Colorado admits that "nothing compels [it] to begin enforcing against non-permitted discharges after the [New] Rule goes into effect," but it asserts that it "cannot exercise its enforcement discretion in response to the sudden narrowing of the federal Section 404 permitting process without creating significant harm to Colorado's environment." (ECF No. 58 at 6.) Moreover, Colorado's water quality enforcers "do[] not currently have dedicated funding or staffing resources to undertake this enforcement effort, so [they] will need to pull enforcement resources currently dedicated to other clean water activities." (ECF No. 32 ¶ 15.) The question for present purposes is whether this is a cognizable Article III injury.[6]

[6] In fairness to the Agencies, none of the analysis that follows was squarely presented to the Court by Colorado. Colorado's diversion-of-resources argument comprises: (i) one ambiguous sentence in its opening brief (ECF No. 24 at 10 ("[The New Rule] imposes an immediate compliance and enforcement burden on Colorado, which does not currently have dedicated funding or staffing resources to undertake enforcement against illegal fill activities and instead has relied on EPA and Corps oversight.")); (ii) one sentence in a declaration supporting the opening brief (ECF No. 32 ¶ 15 ("The [Water Quality Control] Division does not currently have dedicated funding or staffing resources to undertake this enforcement effort, so will need to pull enforcement resources currently dedicated to other clean water activities.")); and (iii) one sentence in the reply brief (ECF No. 55 at 3 ("Enforcing against illegal fill activity in state waters will require the State to divert resources currently dedicated to other water pollution activities,

The New Rule does not require the states to pick up where the federal government left off. Strictly speaking, then, nothing about the New Rule compels Colorado to enforce its water quality laws in Disputed Waters. However, causation is not quite so strict. Article III requires that "there be a causal connection between the injury and the conduct complained of," meaning that "the injury must be *fairly traceable* to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (emphasis added). "Fairly traceable" cannot be stretched too far, particularly through actions a plaintiff chooses (but is not legally compelled) to take due to government action: "[Plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). The Court nonetheless finds that Colorado's claimed injury is fairly traceable to the New Rule.

First, Colorado's choice to begin enforcing its no-fill law in the event the New Rule takes effect is not arbitrary or disproportionate to the problem. The Agencies are no longer asserting jurisdiction over Disputed Waters. As between an environmental free-for-all and a total ban on filling, Colorado's choice to enforce a total ban is reasonable in light of the potential significant environmental damage that might flow from a choice *not* to enforce its own applicable statute. (*See* ECF No. 24 at 10–11.)

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threatening compliance and enforcement across clean water programs.")). Colorado does not support these assertions with case law, and seems unaware of the various issues that a diversion-of-resources argument entails. But because the argument revolves around legal principles rather than factual development, it appears to be one of those arguments that the Tenth Circuit would deem to be "preserve[d] (although barely)," *Stender v. Archstone-Smith Operating Tr.*, 958 F.3d 938, 948 (10th Cir. 2020), meaning it would be error for this Court to disregard it as inadequately developed.

Second, Colorado's fear of environmental damage is not "fear[] of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416. Although the New Rule will not *cause* anyone to violate water quality laws and therefore does not create injury on that account (*see* Part III.A.2, above), Colorado has nonetheless made a sufficient record—uncontested by the Agencies—that "EPA has historically completed between three and five enforcement cases in Colorado per year for 404 permit violations." (ECF No. 32 ¶ 15.) In other words, regardless of cause, the record shows that violations of Section 404 consistently happen, requiring enforcement action. At least some of that enforcement burden (*i.e.*, filling in Disputed Waters) will now fall in Colorado's lap. That share of the enforcement burden is not at all minimal or speculative. Colorado asserts, and the Agencies do not dispute, that about half of state waters protected by the Current Rule will be unprotected by the New Rule. (ECF No. 29 ¶ 13.)

Third, for several decades it has been established that diversion of resources is a cognizable harm in the context of Article III standing analysis. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Although cases upholding diversion of resources as a cognizable harm are almost always about nonprofit organizations seeking to advance a social goal (mostly fair housing, voting rights, and immigrant rights),[7] the Court is not aware of any case couching the diversion-of-resources injury

[7] *See, e.g.*, *id*. (fair housing organization "devote[d] significant resources to identify and counteract [the defendants'] racially discriminatory steering practices" (internal quotation marks omitted)); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) ("enforcement [of day-laborer solicitation ordinance] will require [the plaintiff] to divert resources from other of its [pro-immigrant] activities to combat the effects of the Ordinance"); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) (challenged law forced voting rights organization to "spend extra time and money educating its members about these Texas provisions and how to avoid their negative effects"); *see also* 13A Charles

as something unique to nonprofit organizations, or that is otherwise a "special relaxation" of standing. *Zeppelin v. Fed. Highway Admin.*, 305 F. Supp. 3d 1189, 1198 (D. Colo. 2018).

Fourth, diversion of resources creates economic harm that—in a case against a private litigant—could be recovered through compensatory damages. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002). However, as discussed in Part III.A.3, above, Colorado cannot recover its economic losses against the Agencies, even if it succeeds on the merits of this lawsuit, because the APA does not waive sovereign immunity to money damages.

For these reasons, the Court finds that Colorado is poised to suffer an injury in fact that is fairly traceable to the New Rule, and would be redressed by a favorable ruling in this case. Moreover, that injury is certainly impending and would be irreparable. Accordingly, Article III standing and the irreparable harm requirement of the preliminary injunction test are both satisfied.

B. Likelihood of Success on the Merits

The Court now turns to whether Colorado is likely to succeed in proving at least one of its theories that the Agencies unlawfully promulgated the New Rule.

1. Legal Standards

Although this case centers around interpretation of the CWA, Colorado's right to sue arises under the APA. The APA empowers a reviewing court to "set aside" agency action if it is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Generally, an agency

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Alan Wright et al., *Federal Practice & Procedure* § 3531.9.5 nn.15–18 (3d ed., Apr. 2020 update).

decision will be considered arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

A reviewing court should engage in a "thorough, probing, in-depth review," *Wyoming v. United States*, 279 F.3d 1214, 1238 (10th Cir. 2002) (citation omitted), with its review of the merits "generally limited to . . . the administrative record," *Custer Cnty. Action Assoc. v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001). However, "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

2. The Supreme Court's *Rapanos* Decision

The history of litigation over "waters of the United States" is long and complicated. For present purposes, the overridingly relevant decision is *Rapanos v. United States*, 547 U.S. 715 (2006). The Court finds the Third Circuit's summary of *Rapanos*—and the problems it has created—to be helpful for present purposes:

> In *Rapanos*, a consolidation of two cases, the Court considered "whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States' within the meaning of the Act." *Id*. at 729 (plurality opinion). The Court of Appeals for the Sixth Circuit had upheld the Corps' claim of jurisdiction. The Supreme Court, in a fractured 4-1-4 decision, vacated those judgments and remanded for further proceedings to determine whether the wetlands were subject to the restrictions of the CWA.
>
> Four dissenting Justices took an expansive view of the

CWA's reach. Justice Stevens, writing for the dissenting Justices, stated that the Court should have deferred to what he and his fellow dissenting Justices viewed as the Corps' reasonable interpretation of its jurisdiction. *Id*. at 796 (Stevens, J., dissenting). However, five Justices believed that the Corps' jurisdiction is more limited, although they did not all agree on the proper test to determine the scope of that jurisdiction.

Justice Scalia, writing for a four-Justice plurality, stated that the term "waters of the United States" as used in the CWA "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.'" *Id*. at 739 (alterations in original) (citing Webster's New International Dictionary 2882 (2d ed. 1954)). The plurality opinion noted that "the phrase ['the waters of the United States'] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*. As for wetlands, the Justices in the plurality concluded that they only fall within the scope of the CWA if they have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." *Id*. at 742.

Justice Kennedy concurred. Although agreeing with the plurality's conclusion that the Corps' jurisdiction was more limited than the dissenters believed and that the case should be remanded, Justice Kennedy disagreed with the plurality's jurisdictional test. Under Justice Kennedy's approach, wetlands are subject to the strictures of the CWA if they possess a "significant nexus" with "waters of the United States," meaning that the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 779, 780 (Kennedy, J., concurring).

At first glance, the *Rapanos* opinions seem to present an analytical problem: the three opinions articulate three different views as to how courts should determine whether wetlands are subject to the CWA, and no opinion was joined by a majority of the Justices. So which test should apply? Interestingly, after explaining why he would have affirmed the judgments below, Justice Stevens noted that, "[i]t has been [the Supreme Court's] practice in a case coming to us

> from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate." *Id*. at 810 (Stevens, J., dissenting). That practice, he observed "has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views." *Id*. (citations omitted). Then, Justice Stevens stated that, although the Justices voting to remand disagreed about the appropriate test to be applied, the four dissenting Justices—with their broader view of the CWA's scope—would nonetheless support a finding of jurisdiction under either the plurality's or Justice Kennedy's test, and that therefore the Corps' jurisdiction should be upheld in all cases in which either test is satisfied. *Id*. at 810 & n.14.

United States v. Donovan, 661 F.3d 174, 179–80 (3d Cir. 2011) (parallel citations omitted).

In the immediate wake of *Rapanos*, the Agencies did not amend the definition of "waters of the United States" in 33 C.F.R. § 328.3, so federal courts (such as the Third Circuit in *Donovan*) were forced to grapple with what sort of gloss, if any, *Rapanos* imposed on that definition. Some courts, like the Third Circuit, concluded based on Justice Stevens's closing remarks that "the CWA is applicable to wetlands that meet either the test laid out by the plurality or by Justice Kennedy in *Rapanos*." *Donovan*, 661 F.3d at 184. Other courts, like the Seventh Circuit, have concluded that Justice Kennedy's "significant nexus" test controls. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006).

3. Colorado's Previous Suit to Prevent Federal "Overreach"

In 2015, the Agencies amended 33 C.F.R. § 328.3, purporting to codify Justice Kennedy's "significant nexus" test. *See* 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule"). Several states—including Colorado—successfully sued to enjoin the 2015 Rule. *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). Specifically, they convinced the district court that the 2015 Rule's interpretation of "significant nexus" likely "violate[d]

the congressional grant of authority to the EPA" because it swept more broadly than Justice Kennedy would have allowed. *Id*. at 1056. In the *North Dakota* case, Colorado very much cared to ensure that the Agencies did not overstep their jurisdiction, regardless of the environmental benefits of broader regulation. (*See North Dakota et al. v. EPA et al.*, No. 3:15-cv-59 (D.N.D.), ECF No. 212 at 39 (filed June 1, 2018) ("Any implication that waters and lands falling outside federal CWA jurisdiction are somehow 'unregulated' and thus 'unprotected' must be rejected: what is at issue here are the limits of federal jurisdiction, not environmental protection. . . . Instead of Plaintiff States regulating the land and water within their borders to advance their own sovereign responsibilities to protect their resources and citizens, the [2015] Rule would have them defer to the federal government's vast regulatory overreach.").)

4. The New Rule

Not long after taking office, President Trump directed the Agencies to rescind or revise the 2015 Rule, and to "consider interpreting the term 'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*." 82 Fed. Reg. 12497, 12497 (Feb. 28, 2017). In October 2019, after two district courts had invalidated the 2015 Rule following full merits briefing,[8] the Agencies repealed the 2015 Rule and reinstated the rule in effect at the time of *Rapanos*, *i.e.*, what this Court has called the "Current Rule." 84 Fed. Reg. 56626 (Oct. 22, 2019). Challengers promptly sued, arguing that the Current Rule violates the CWA by protecting too little, *Murray et al. v. Wheeler et al.*, No. 19-cv-1498 (N.D.N.Y., filed Dec. 4, 2019), and too much, *see, e.g.*, *N.M. Cattle Growers' Ass'n v. EPA et al.*, No.

[8] *See Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019).

19-cv-988 (D.N.M., filed Oct. 22, 2019).

In April 2020, the Agencies published the New Rule (formally, "The Navigable Waters Protection Rule"), to take effect June 22, 2020. 85 Fed. Reg. 22250 (Apr. 21, 2020). It makes numerous changes to the Current Rule, which the Court need not describe in detail. For present purposes, the Court notes that one of the explicit purposes of the New Rule is to establish "categorically jurisdictional and categorically excluded waters." *Id*. at 22270. Among the categorical exclusions are "[e]phemeral features, including ephemeral streams, swales, gullies, rills, and pools." *Id*. at 22340.

5. Colorado's Current Challenge

Since the *North Dakota* case, Colorado has had a change of Attorney General administrations, and federal "overreach" is apparently now no longer such a great concern. Colorado now wants to force the federal government to remain in the role carved out for it in the Current Rule. Colorado's lead argument in this regard is that the New Rule is contrary to the CWA's purpose and legislative history because the New Rule—surprisingly—"conflicts with Congress' intent to create *a federal-state partnership* in which both the Agencies and the states would *work together* to protect the broadly defined 'waters of the United States.'" (ECF No. 24 at 13 (emphasis added).)

The Court frankly does not understand what sort of "federal-state partnership" Colorado envisions in the dredge-and-fill sphere. Colorado's unusual legislative policy is that dredge and fill is forbidden—without exception. But, as a practical matter, Colorado overlooks this policy and relies on a federal permit loophole, *see* Colo. Rev. Stat. § 25-8-501(1), because some wetlands are worth filling in pursuit of money or, more nobly, safety. In other words, Colorado "delegates" to the federal government the decision whether to issue a permit to do something that Colorado otherwise would not

allow, and Colorado reaps the benefits, at the expense of legislative policy. Colorado therefore has an unusual view of "work[ing] together to protect the broadly defined 'waters of the United States.'" (ECF No. 24 at 13.) *See also Rapanos*, 547 U.S. at 798 n.6 (2006) (Stevens, J., dissenting) ("Indeed, the Corps approves virtually all section 404 permits, though often requiring applicants to avoid or mitigate impacts to wetlands and other waters." (internal quotation marks omitted; alterations incorporated)).

As it turns out, however, the Court need not decide whether Colorado's (current) view about the purpose and history of the CWA wins the day. One of Colorado's alternate arguments has much more obvious merit, namely, that *Rapanos* already forecloses the approach taken in the New Rule.

It is notoriously difficult to understand what *Rapanos* is *for*, *see, e.g.*, *United States v. Johnson*, 467 F.3d 56, 60–66 (1st Cir. 2006), but it is much simpler to understand what *Rapanos* is *against*. Specifically, five justices rejected the Scalia plurality's categorical exclusion of "channels containing merely intermittent or ephemeral flow." 547 U.S. at 733–34 (plurality op.); *compare id*. at 768–70 (Kennedy, J., concurring in judgment) (finding the plurality's approach to "intermittent and ephemeral streams" to be "without support in the language and purposes of the [CWA]"); *id*. at 800–04 (Stevens, J., dissenting [joined by Souter, Ginsburg, and Breyer]) (rejecting plurality's categorical exclusion of intermittent or ephemeral stream beds). And more generally, five justices found the plurality opinion to be "inconsistent with the [CWA's] text, structure, and purpose." *Id*. at 776 (Kennedy, J., concurring in judgment); *see also id*. at 800 (Stevens, J., dissenting) ("[the plurality's] creative opinion is utterly unpersuasive"). The New Rule, however, is self-consciously intended to take the

plurality opinion (including its categorical exclusion of ephemeral watercourses), flesh out the details, and make it the new law of the land. *See* 85 Fed. Reg. at 22259–325. *Rapanos* forecloses this interpretation of the CWA. *See Vasquez v. Hillery*, 474 U.S. 254, 262 n.4 (1986) (agreement of five justices, even when not joining each other's opinions, "carr[ies] the force of law").[9]

The Agencies emphasize Justice Kennedy's statement in *Rapanos* that, "[a]bsent more specific regulations, the Corps must establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to nonnavigable tributaries, in order to avoid unreasonable applications of the [CWA]." 547 U.S. at 782. The Agencies apparently view the New Rule as providing the called-for "more specific regulations." (ECF No. 51 at 15.) Whether or not the New Rule is more specific than the Current Rule, or helps to avoid unreasonable applications of the CWA, Justice Kennedy and the dissenters already rejected the specific approach the Agencies adopted here.

The Agencies also emphasize *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"). There, the Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction . . . only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id*. at 982. The Agencies argue that *Rapanos* was not this kind of prior court decision, so the Agencies were free to reinterpret "waters of the United States." (ECF No. 51 at

[9] *State of California* views the reasoning here as a "suspect attempt to cobble together a holding from the [*Rapanos*] concurrence and the dissent." (ECF No. 60-1 at 11.) That decision appears unaware of *Vasquez v. Hillery*.

14–15.) The Court agrees with the premise, but, under the circumstances, the conclusion does not follow.

Again, it is difficult to discern what *Rapanos* was *for*—no judicial construction of the CWA offered in that case had the support of five justices. So the Agencies are correct that *Rapanos* did not "hold[] that its construction [of the CWA] follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982. However, *Rapanos* is unambiguously *against* the construction offered in the plurality opinion, on which the New Rule is modeled.[10] So, although nothing in *Rapanos* forecloses reinterpretation of "waters of the United States," that decision *does* foreclose the reinterpretation at issue here.[11]

For at least these reasons, Colorado is likely to succeed in proving at least that the New Rule is "not in accordance with law." 5 U.S.C. § 706(2)(A).

C. Balance of Harms & Public Interest

In analyzing whether a preliminary injunction should issue against the government, the final two elements of the preliminary injunction test are treated

[10] For this reason, the Court disagrees with *State of California*'s reasoning that *Brand X* leaves open the interpretation adopted in the New Rule. (*See* ECF No. 60-1 at 11.) *Brand X* was about affirmative statements of how a statute *must* be interpreted, not about *foreclosed* interpretations (when other interpretations might be available).

[11] The problem for the Agencies, unfortunately, is that *Rapanos* arguably forecloses *every* formulation of "waters of the United States" proposed in *Rapanos*, or proposed by the Agencies thus far. For example, eight justices rejected Justice Kennedy's case-by-case "significant nexus" approach. *See Rapanos*, 547 U.S. at 753–57 (plurality op.) (arguing that Justice Kennedy's approach has no basis in the CWA); *id*. at 797–98, 807–09 (Stevens, J., dissenting) (arguing that case-by-case determination is foreclosed by earlier Supreme Court decisions and that Justice Kennedy's approach is therefore both incorrect and unnecessarily inefficient). And the plurality and Justice Kennedy (totaling five justices) rejected the categorically broad approach espoused by the dissenters and the Agencies. *See id*. at 746–53 (plurality op.); *id*. at 778–82 (Kennedy, J., concurring in judgment). In short, the Agencies will get sued—such as by Colorado, twice now—regardless of what they try. (*See* Part III.B.3, above.) But that is a problem for the Supreme Court to resolve. For present purposes, it remains unavoidable that five justices in *Rapanos* rejected the Agencies' current approach.

together. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Colorado argues, "When a case is brought under an environmental statute, the courts place extraordinary weight on a general concern for the public interest." (ECF No. 24 at 23 (citing *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1171 (D. Wyo. 1998)).) Colorado forgets that it wants this injunction, at least in part, so development can continue at the expense of the environment. Nonetheless, the Court agrees that the public interest would be better served by not allowing the New Rule to take effect at this time. If the Court were to decide otherwise, but then ultimately invalidate the New Rule (as appears probable on this record), it would likely create unnecessary confusion among the regulated community about what standard really applies. The Court finds it in the public interest, therefore, to maintain the *status quo*—what the regulated community is already accustomed to—pending resolution on the merits. *Cf*. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) ("the primary goal of a preliminary injunction is to preserve the pre-trial status quo").

The Agencies argue that any injunction must "address[] *only* the *specific* regulatory provisions purportedly creating imminent, irreparable harm." (ECF No. 51 at 30 (emphasis in original).) It appears, however, that the entire approach of the New Rule is contrary to *Rapanos*. Regardless, the Court finds it against the public interest to attempt to create a hybrid Current-New Rule, which would likely be even more confusing and unworkable than allowing the New Rule to take effect and later invalidating it. Rather, the Court will enjoin the Agencies to continue administering Section 404 in Colorado under the Current Rule.[12]

[12] Colorado does not seek a nationwide injunction (*see* ECF No. 55 at 12), presumably because Colorado is downstream of no other state, so it is difficult for Colorado to argue that

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Colorado's Amended Motion for Preliminary Injunction (ECF No. 24), construed as a motion for stay of agency action under 5 U.S.C. § 705, is GRANTED;
2. The effective date of the Navigable Waters Protection Rule, 85 Fed. Reg. 22250 (Apr. 21, 2020) is STAYED within the District of Colorado; and
3. The Agencies (along with their officers, agents, servants, employees, attorneys, and all others who are in active concert or participation with any of them) are hereby PRELIMINARILY ENJOINED to continue administering Section 404 in Colorado under the provisions of 33 C.F.R. § 328.3 as it is presently codified.

Dated at Denver, Colorado this 19th day of June, 2020.

BY THE COURT:

William J. Martínez
United States District Judge

implementation of the New Rule elsewhere affects Colorado.

No. 20-1238

In the

United States Court of Appeals

for the

Tenth Circuit

STATE OF COLORADO,
Plaintiff-Appellee,

– v. –

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellants, and

AMERICAN FARM BUREAU FEDERATION, et al.,
Intervenor-Defendant-Appellants.

Appeal from the U.S. District Court for the District of Colorado,
Judge William J. Martinez
No. 1:20-cv-01461-WJM-NRN

INTERVENOR-DEFENDANT-APPELLANTS' SUPPLEMENTAL APPENDIX

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U.S. District Court − District of Colorado
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #: 1:20−cv−01461−WJM−NRN

State of Colorado, The v. U.S. Environmental Protection Agency et al
Assigned to: Judge William J. Martinez
Referred to: Magistrate Judge N. Reid Neureiter
Case in other court: Tenth Circuit, 20−01238
Cause: 05:0706 − Judicial Review of Agency Action

Date Filed: 05/22/2020
Jury Demand: None
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Jurisdiction: U.S. Government Defendant

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National Association of Home Builders represented by **Brett Emerson Legner**
(See above for address)
ATTORNEY TO BE NOTICED

Colleen M. Campbell
(See above for address)
ATTORNEY TO BE NOTICED

Timothy S. Bishop
(See above for address)
ATTORNEY TO BE NOTICED

Intervenor Defendant

National Cattlemen's Beef Association represented by **Brett Emerson Legner**
(See above for address)
ATTORNEY TO BE NOTICED

Colleen M. Campbell
(See above for address)
ATTORNEY TO BE NOTICED

Timothy S. Bishop
(See above for address)
ATTORNEY TO BE NOTICED

Intervenor Defendant

National Corn Growers Association represented by **Brett Emerson Legner**
(See above for address)
ATTORNEY TO BE NOTICED

Colleen M. Campbell
(See above for address)
ATTORNEY TO BE NOTICED

Timothy S. Bishop
(See above for address)
ATTORNEY TO BE NOTICED

Intervenor Defendant

National Mining Association represented by **Brett Emerson Legner**
(See above for address)
ATTORNEY TO BE NOTICED

Colleen M. Campbell
(See above for address)
ATTORNEY TO BE NOTICED

Timothy S. Bishop
(See above for address)
ATTORNEY TO BE NOTICED

Intervenor Defendant

National Pork Producers Council represented by **Brett Emerson Legner**
(See above for address)
ATTORNEY TO BE NOTICED

Colleen M. Campbell
(See above for address)
ATTORNEY TO BE NOTICED

Timothy S. Bishop
(See above for address)
ATTORNEY TO BE NOTICED

Intervenor Defendant

National Stone, Sand, and Gravel Association represented by **Brett Emerson Legner**
(See above for address)
ATTORNEY TO BE NOTICED

Colleen M. Campbell
(See above for address)
ATTORNEY TO BE NOTICED

Timothy S. Bishop
(See above for address)
ATTORNEY TO BE NOTICED

Intervenor Defendant

Public Lands Council represented by **Brett Emerson Legner**
(See above for address)
ATTORNEY TO BE NOTICED

Colleen M. Campbell
(See above for address)
ATTORNEY TO BE NOTICED

Timothy S. Bishop
(See above for address)
ATTORNEY TO BE NOTICED

Intervenor Defendant

U.S. Poultry & Egg Association represented by **Brett Emerson Legner**
(See above for address)
ATTORNEY TO BE NOTICED

Colleen M. Campbell
(See above for address)
ATTORNEY TO BE NOTICED

Timothy S. Bishop
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
05/22/2020	1	COMPLAINT against All Defendants (Filing fee $ 400,Receipt Number 1082−7307196)Attorney Jennifer H. Hunt added to party State of Colorado, The(pty:pla), filed by State of Colorado, The. (Attachments: # 1 Summons U.S. Environmental Protection Agency, # 2 Summons Andrew Wheeler, # 3 Summons U.S. Army Corps of Engineers, # 4 Summons R.D. James, # 5 Notice of Related Cases, # 6 Civil Cover Sheet)(Hunt, Jennifer) (Entered: 05/22/2020)
05/22/2020	2	Case assigned to Judge Robert E. Blackburn. Text Only Entry. (trvo,) (Entered: 05/22/2020)
05/22/2020	3	SUMMONS issued by Clerk. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons, # 4 Magistrate Judge Consent Form) (trvo,) (Entered: 05/22/2020)
05/26/2020	4	ORDER DIRECTING PREPARATION OF JOINT CASE MANAGEMENT PLAN by Judge Robert E. Blackburn on 5/26/2020. (sphil,) (Entered: 05/26/2020)

05/28/2020	5	NOTICE of Entry of Appearance by Eric R. Olson on behalf of All Plaintiffs Attorney Eric R. Olson added to party State of Colorado, The(pty:pla) (Olson, Eric) (Entered: 05/28/2020)
05/28/2020	6	NOTICE of Entry of Appearance by Carrie Elizabeth Noteboom on behalf of State of Colorado, TheAttorney Carrie Elizabeth Noteboom added to party State of Colorado, The(pty:pla) (Noteboom, Carrie) (Entered: 05/28/2020)
05/28/2020	7	**STRICKEN** − MOTION for Preliminary Injunction by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7)(Noteboom, Carrie) Modified on 6/1/2020 to strike pursuant to 18 Order (athom,). (Entered: 05/28/2020)
05/28/2020	8	DECLARATION of *Patrick Bachmann* regarding MOTION for Preliminary Injunction 7 by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1)(Noteboom, Carrie) (Entered: 05/28/2020)
05/28/2020	9	DECLARATION of *Harry Crockett* regarding MOTION for Preliminary Injunction 7 by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 05/28/2020)
05/28/2020	10	DECLARATION of *Michael Gooseff* regarding MOTION for Preliminary Injunction 7 by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Noteboom, Carrie) (Entered: 05/28/2020)
05/28/2020	11	DECLARATION of *Karen Hamilton* regarding MOTION for Preliminary Injunction 7 by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Noteboom, Carrie) (Entered: 05/28/2020)
05/28/2020	12	DECLARATION of *Trevor Klein* regarding MOTION for Preliminary Injunction 7 by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Noteboom, Carrie) (Entered: 05/28/2020)
05/28/2020	13	DECLARATION of *Melynda May* regarding MOTION for Preliminary Injunction 7 by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Noteboom, Carrie) (Entered: 05/28/2020)
05/28/2020	14	DECLARATION of *Rebecca Pierce* regarding MOTION for Preliminary Injunction 7 by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 05/28/2020)
05/28/2020	15	DECLARATION of *Nicole Rowan* regarding MOTION for Preliminary Injunction 7 by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 05/28/2020)
05/28/2020	16	CERTIFICATE of Mailing/Service re 14 Declaration, 8 Declaration, 15 Declaration, 11 Declaration, 13 Declaration, 6 Notice of Entry of Appearance, 9 Declaration, 12 Declaration, 7 MOTION for Preliminary Injunction , 10 Declaration by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 05/28/2020)
05/29/2020	17	ORDER DIRECTING REASSIGNMENT re Motion for Preliminary Injunction [# 7]. The clerk of the court shall assign this case to a judge for resolution on the merits under the random assignment procedure of D.C.COLO.LCiv.R 40.1. By Judge Robert E. Blackburn on 05/29/2020. This case is randomly reassigned to Judge William J. Martinez. All future pleadings should be designated as 20−cv−01461−WJM. (athom,) (Entered: 05/29/2020)
05/29/2020	18	ORDER striking Plaintiff's Motion for Preliminary Injunction 7 for failure to comply with this Court's Revised Practice Standard III.C.1 which states that the page limits for "ALL OTHER motions... Motion and Response [shall be]: 15 pages; Reply: 10 pages." Given the nature of the claims raised, however, Plaintiff is GRANTED leave to file an Amended Motion for Preliminary Injunction not to exceed **22 pages**, exclusive of attorney signature blocks and certificate of service. SO ORDERED by Judge William J. Martinez on 5/29/2020. Text Only Entry(wjmsec,) (Entered: 05/29/2020)
05/29/2020	19	ORDER: This matter is before the Court *sua sponte*. Petitioner is reminded that "[a] party to a case shall file a notice identifying all cases pending in this or any other federal, state, or foreign jurisdiction that are related to the case." D.C.COLO.LCivR 3.1(a). Such a notice is due "at the time of [the party's] first appearance or the filing of its first pleading or document, or other matter addressed to the court." *Id*. at 3.1(c)(1). Thus, the notice is already overdue. Petitioner is therefore ORDERED to file the required Notice **on or before June 3, 2020**, or on the same day Petitioner files an

		Amended Motion for Preliminary Injunction, whichever comes first. Without limiting the scope of Petitioner's obligations under this Rule in any manner, such Notice shall include the identification of all cases, whether filed in a federal or state court, brought by the Attorney General or Department of Law of any sister state, raising the same or similar claims against the U.S. Environmental Protection Agency as those asserted in the instant action. SO ORDERED by Judge William J. Martinez on 05/29/2020. Text Only Entry (wjmlc1) (Entered: 05/29/2020)
06/01/2020	20	SUMMONS Returned Executed upon defendant(s) U.S. Environmental Protection Agency served on 5/22/2020, answer due 7/21/2020. (Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	21	SUMMONS Returned Executed upon defendant(s) U.S. Army Corps of Engineers served on 5/22/2020, answer due 7/21/2020. (Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	22	SUMMONS Returned Executed upon defendant(s) Andrew Wheeler served on 5/22/2020, answer due 7/21/2020. (Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	23	SUMMONS Returned Executed upon defendant(s) R.D. James served on 5/22/2020, answer due 7/21/2020. (Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	24	Amended MOTION for Preliminary Injunction by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7)(Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	25	DECLARATION of *Patrick Bachmann* regarding Amended MOTION for Preliminary Injunction 24 by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1)(Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	26	DECLARATION of *Harry Crockett* regarding Amended MOTION for Preliminary Injunction 24 by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	27	DECLARATION of *Michael Gooseff* regarding Amended MOTION for Preliminary Injunction 24 by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	28	DECLARATION of *Karen Hamilton* regarding Amended MOTION for Preliminary Injunction 24 by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	29	DECLARATION of *Trevor Klein* regarding Amended MOTION for Preliminary Injunction 24 by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	30	DECLARATION of *Melynda May* regarding Amended MOTION for Preliminary Injunction 24 by Plaintiff State of Colorado, The. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	31	DECLARATION of *Rebecca Pierce* regarding Amended MOTION for Preliminary Injunction 24 by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	32	DECLARATION of *Nicole Rowan* regarding Amended MOTION for Preliminary Injunction 24 by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	33	CERTIFICATE of Mailing/Service re 26 Declaration, 25 Declaration, 32 Declaration, 27 Declaration, 31 Declaration, 30 Declaration, 29 Declaration, 28 Declaration, 24 Amended MOTION for Preliminary Injunction by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 06/01/2020)
06/01/2020	34	NOTICE of Entry of Appearance by Sonya Joy Shea on behalf of All Defendants Attorney Sonya Joy Shea added to party R.D. James(pty:dft), Attorney Sonya Joy Shea added to party U.S. Army Corps of Engineers(pty:dft), Attorney Sonya Joy Shea added to party U.S. Environmental Protection Agency(pty:dft), Attorney Sonya Joy Shea added to party Andrew Wheeler(pty:dft) (Shea, Sonya) (Entered: 06/01/2020)

06/01/2020	35	NOTICE OF CASE ASSOCIATION *Notice of Related Cases* by Sonya Joy Shea on behalf of All Defendants (Shea, Sonya) (Entered: 06/01/2020)
06/02/2020	36	NOTICE of Entry of Appearance by Phillip Roark Dupre on behalf of R.D. James, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, Andrew WheelerAttorney Phillip Roark Dupre added to party R.D. James(pty:dft), Attorney Phillip Roark Dupre added to party U.S. Army Corps of Engineers(pty:dft), Attorney Phillip Roark Dupre added to party U.S. Environmental Protection Agency(pty:dft), Attorney Phillip Roark Dupre added to party Andrew Wheeler(pty:dft) (Dupre, Phillip) (Entered: 06/02/2020)
06/02/2020	37	ORDER REFERRING CASE to Magistrate Judge N. Reid Neureiter. Magistrate Judge Neureiter, or such other Magistrate Judge who may in the future be reassigned this case, is designated to conduct NDISPO proceedings pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed.R.Civ.P. 72(a) and (b). Court sponsored alternative dispute resolution is governed by D.C.COLO.LCivR 16.6. On the recommendation or informal request of the Magistrate Judge or on the request of the parties by motion, the court may direct the parties to engage in an early neutral evaluation, a settlement conference, or another alternative dispute resolution proceeding. SO ORDERED by Judge William J. Martinez on 6/2/2020. Text Only Entry (wjmsec,) (Entered: 06/02/2020)
06/02/2020	38	**ORDER: Counsel for the parties and all counsel who may later enter an appearance shall review and familiarize themselves with the undersigned's Revised Practice Standards (as most recently revised effective December 1, 2019 and as they may be amended from time to time), which may be downloaded here.** SO ORDERED by Judge William J. Martinez on 6/ 2/2020. Text Only Entry (wjmsec,) (Entered: 06/02/2020)
06/02/2020	39	ORDER: This matter is before the Court on the Plaintiff's Amended Motion for Preliminary Injunction 24 . Defendants are DIRECTED to file a Response to the Motion no later than **June 8, 2020**, not to exceed 22 pages in length, exclusive of attorney signature blocks and certificate of service. Plaintiff is DIRECTED to file a Reply in support of its Motion no later than **June 11, 2020**, not to exceed 11 pages in length, exclusive of attorney signature blocks and certificate of service. Upon receipt of Plaintiff's Reply, the Court will determine the necessity of an evidentiary hearing. It is FURTHER ORDERED that the Court will not be granting leave for the filing of any amicus brief in support of or in opposition to the currently pending Amended Motion for Preliminary Injunction. SO ORDERED by Judge William J. Martinez on 6/2/2020. Text Only Entry (wjmsec,) (Entered: 06/02/2020)
06/02/2020	40	NOTICE of Entry of Appearance by Annette M. Quill on behalf of State of Colorado, TheAttorney Annette M. Quill added to party State of Colorado, The(pty:pla) (Quill, Annette) (Entered: 06/02/2020)
06/03/2020	41	MINUTE ORDER by Magistrate Judge N. Reid Neureiter on 6/3/2020. Status Conference set for 8/6/2020 at 11:00 AM in Courtroom C203 before Magistrate Judge N. Reid Neureiter. PLEASE READ ATTACHED MINUTE ORDER. (rvill,) (Entered: 06/03/2020)
06/03/2020	42	MOTION to Intervene by Intervenor Defendants Chantell Sackett, Michael Sackett. (Attachments: # 1 Proposed Document Proposed Answer, # 2 Proposed Document Proposed Opposition to MPI)(Francois, Anthony) (Entered: 06/03/2020)
06/03/2020	43	DECLARATION of *Chantell Sackett* regarding MOTION to Intervene 42 by Intervenor Defendants Chantell Sackett, Michael Sackett. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Francois, Anthony) (Entered: 06/03/2020)
06/04/2020	44	ADVISORY NOTICE OF NONCOMPLIANCE WITH COURT RULES/PROCEDURES re: 42 MOTION to Intervene , 43 Declaration filed by attorney Anthony Lee Francois. The s/ signature did not match the filers name on the account for which the login and password are registered. **DO NOT REFILE THE DOCUMENT. Action to take** − future documents must be filed pursuant to D.C.COLO.LCivR 5.1(a) and 4.3(c) of the Electronic Case Filing Procedures (Civil cases). (Text Only Entry) (rvill,) (Entered: 06/04/2020)

06/08/2020	45	**STRICKEN** NOTICE of Entry of Appearance by Timothy S. Bishop on behalf of American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Chamber of Commerce of the United States of America, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand, and Gravel Association, Public Lands Council, U.S. Poultry & Egg AssociationAttorney Timothy S. Bishop added to party American Farm Bureau Federation(pty:intvd), Attorney Timothy S. Bishop added to party American Petroleum Institute(pty:intvd), Attorney Timothy S. Bishop added to party American Road and Transportation Builders Association(pty:intvd), Attorney Timothy S. Bishop added to party Chamber of Commerce of the United States of America(pty:intvd), Attorney Timothy S. Bishop added to party Leading Builders of America(pty:intvd), Attorney Timothy S. Bishop added to party National Alliance of Forest Owners(pty:intvd), Attorney Timothy S. Bishop added to party National Association of Home Builders(pty:intvd), Attorney Timothy S. Bishop added to party National Cattlemen's Beef Association(pty:intvd), Attorney Timothy S. Bishop added to party National Corn Growers Association(pty:intvd), Attorney Timothy S. Bishop added to party National Mining Association(pty:intvd), Attorney Timothy S. Bishop added to party National Pork Producers Council(pty:intvd), Attorney Timothy S. Bishop added to party National Stone, Sand, and Gravel Association(pty:intvd), Attorney Timothy S. Bishop added to party Public Lands Council(pty:intvd), Attorney Timothy S. Bishop added to party U.S. Poultry & Egg Association(pty:intvd) (Bishop, Timothy) Modified on 6/11/2020 to strike pursuant to 54 Order (angar,). (Entered: 06/08/2020)
06/08/2020	46	**STRICKEN** NOTICE of Entry of Appearance by Colleen M. Campbell on behalf of American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Chamber of Commerce of the United States of America, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand, and Gravel Association, Public Lands Council, U.S. Poultry & Egg AssociationAttorney Colleen M. Campbell added to party American Farm Bureau Federation(pty:intvd), Attorney Colleen M. Campbell added to party American Petroleum Institute(pty:intvd), Attorney Colleen M. Campbell added to party American Road and Transportation Builders Association(pty:intvd), Attorney Colleen M. Campbell added to party Chamber of Commerce of the United States of America(pty:intvd), Attorney Colleen M. Campbell added to party Leading Builders of America(pty:intvd), Attorney Colleen M. Campbell added to party National Alliance of Forest Owners(pty:intvd), Attorney Colleen M. Campbell added to party National Association of Home Builders(pty:intvd), Attorney Colleen M. Campbell added to party National Cattlemen's Beef Association(pty:intvd), Attorney Colleen M. Campbell added to party National Corn Growers Association(pty:intvd), Attorney Colleen M. Campbell added to party National Mining Association(pty:intvd), Attorney Colleen M. Campbell added to party National Pork Producers Council(pty:intvd), Attorney Colleen M. Campbell added to party National Stone, Sand, and Gravel Association(pty:intvd), Attorney Colleen M. Campbell added to party Public Lands Council(pty:intvd), Attorney Colleen M. Campbell added to party U.S. Poultry & Egg Association(pty:intvd) (Campbell, Colleen) Modified on 6/11/2020 to strike pursuant to 54 Order (angar,). (Entered: 06/08/2020)
06/08/2020	47	**STRICKEN** NOTICE of Entry of Appearance by Brett Emerson Legner on behalf of American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Chamber of Commerce of the United States of America, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand, and Gravel Association, Public Lands Council, U.S. Poultry & Egg AssociationAttorney Brett Emerson Legner added to party American Farm Bureau Federation(pty:intvd), Attorney Brett Emerson Legner added to party American Petroleum Institute(pty:intvd), Attorney Brett Emerson Legner added to party American Road and Transportation Builders Association(pty:intvd), Attorney Brett Emerson Legner added to party Chamber of Commerce of the United States of America(pty:intvd), Attorney Brett Emerson Legner added to party Leading Builders of America(pty:intvd), Attorney Brett Emerson Legner added to party National

		Alliance of Forest Owners(pty:intvd), Attorney Brett Emerson Legner added to party National Association of Home Builders(pty:intvd), Attorney Brett Emerson Legner added to party National Cattlemen's Beef Association(pty:intvd), Attorney Brett Emerson Legner added to party National Corn Growers Association(pty:intvd), Attorney Brett Emerson Legner added to party National Mining Association(pty:intvd), Attorney Brett Emerson Legner added to party National Pork Producers Council(pty:intvd), Attorney Brett Emerson Legner added to party National Stone, Sand, and Gravel Association(pty:intvd), Attorney Brett Emerson Legner added to party Public Lands Council(pty:intvd), Attorney Brett Emerson Legner added to party U.S. Poultry & Egg Association(pty:intvd) (Legner, Brett) Modified on 6/11/2020 to strike pursuant to 54 Order (angar,). (Entered: 06/08/2020)
06/08/2020	48	CORPORATE DISCLOSURE STATEMENT. (Bishop, Timothy) (Entered: 06/08/2020)
06/08/2020	49	Unopposed MOTION to Intervene by Intervenor Defendants American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Chamber of Commerce of the United States of America, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand, and Gravel Association, Public Lands Council, U.S. Poultry & Egg Association. (Attachments: # 1 Proposed Document Proposed Answer, # 2 Proposed Document Proposed Opposition, # 3 Declaration of Don Parrish, # 4 Exhibit A to Parrish Declaration, # 5 Exhibit B to Parrish Declaration, # 6 Exhibit C to Parrish Declaration, # 7 Exhibit D to Parrish Declaration, # 8 Exhibit E to Parrish Declaration)(Bishop, Timothy) (Entered: 06/08/2020)
06/08/2020	50	NOTICE of Entry of Appearance by Devon Lehman McCune on behalf of R.D. James, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, Andrew WheelerAttorney Devon Lehman McCune added to party R.D. James(pty:dft), Attorney Devon Lehman McCune added to party U.S. Army Corps of Engineers(pty:dft), Attorney Devon Lehman McCune added to party U.S. Environmental Protection Agency(pty:dft), Attorney Devon Lehman McCune added to party Andrew Wheeler(pty:dft) (McCune, Devon) (Entered: 06/08/2020)
06/08/2020	51	BRIEF in Opposition to 24 Amended MOTION for Preliminary Injunction filed by Defendants R.D. James, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, Andrew Wheeler. (Shea, Sonya) (Entered: 06/08/2020)
06/09/2020	52	**STRICKEN** NOTICE of Entry of Appearance by Glenn E. Roper on behalf of Chantell Sackett, Michael SackettAttorney Glenn E. Roper added to party Chantell Sackett(pty:intvd), Attorney Glenn E. Roper added to party Michael Sackett(pty:intvd) (Roper, Glenn) Modified on 6/11/2020 to strike pursuant to 54 Order (angar,). (Entered: 06/09/2020)
06/10/2020	53	ORDER striking Notice of Appearance by Timothy Bishop 45 , Notice of Appearance by Colleen Campbell 46 , Notice of Appearance by Brett Legner 47 , Notice of Appearance by Devon McCune 50 , and Notice of Appearance of Glenn E. Roper 52 . The aforementioned Notices of Appearance are STRICKEN given that they were entered without the entry of a prior order granting intervention, and are thus contrary to the practice of this District Court. Through their motions to intervene, counsel have already appeared for purposes of seeking intervention. While those motions are pending, counsel will continue to receive CM/ECF notices. If a motion to intervene is granted, counsel who filed the motion will be deemed to have already appeared by virtue of the motion, and in such instance no further notice of appearance will be necessary. If one or more of the intervention motions are denied, CM/ECF notices in this action to the respective attorney(s) will cease. SO ORDERED by Judge William J. Martinez on 6/10/2020. Text Only Entry (wjmsec,) (Entered: 06/10/2020)
06/11/2020	54	AMENDED 53 ORDER striking Notice of Appearance by Timothy Bishop 45 , Notice of Appearance by Colleen Campbell 46 , Notice of Appearance by Brett Legner 47 , and Notice of Appearance of Glenn E. Roper 52 . The aforementioned Notices of Appearance are STRICKEN given that they were entered without the entry of a prior order granting intervention, and are thus contrary to the practice of this District Court. Through their motions to intervene, counsel have already appeared for purposes of

		seeking intervention. While those motions are pending, counsel will continue to receive CM/ECF notices. If a motion to intervene is granted, counsel who filed the motion will be deemed to have already appeared by virtue of the motion, and in such instance no further notice of appearance will be necessary. If one or more of the intervention motions are denied, CM/ECF notices in this action to the respective attorney(s) will cease. SO ORDERED by Judge William J. Martinez on 6/11/2020. Text Only Entry (wjmsec,) (Entered: 06/11/2020)
06/11/2020	55	REPLY to Response to 24 Amended MOTION for Preliminary Injunction filed by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 06/11/2020)
06/11/2020	56	DECLARATION of *Nicole Rowan* regarding Reply to Response to Motion 55 by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 06/11/2020)
06/16/2020	57	ORDER: This matter is before the Court on the Plaintiff's Amended Motion for Preliminary Injunction 24 . Plaintiff's position is that the Colorado Water Quality Control Act forbids all (or almost all) dredge and fill "[b]ecause discharges of large quantities of fill, by their nature, are likely to result in exceedances of state water quality standards." (*Id*. at 8.) If that is correct, it appears that a party with a section 404 fill permit from the Corps of Engineers violates Colorado's stricter standards when carrying out those fill activities. *Cf*. 33 U.S.C. § 1344(t) (allowing states to have stricter standards than required for a section 404 permit). With this in mind, Plaintiff shall file a supplemental brief of no more than 5 pages (calculated according to WJM Revised Practice Standard III.C.1) no later than **this Thursday, June 18, 2020, at 10:00 a.m.**, addressing the following: Is the Court correct that parties with a section 404 fill permit violate the Colorado Water Quality Control Act when they discharge fill into "state waters"? If not, why not? If so, under what authority has Plaintiff elected to−date to forego state−law enforcement actions against such parties? And what authority compels Plaintiff to begin bringing state−law enforcement actions in such circumstances if the 2020 Rule goes into effect? SO ORDERED by Judge William J. Martinez on 06/16/2020. Text Only Entry (wjmlc1) (Entered: 06/16/2020)
06/18/2020	58	BRIEF in Support of 24 Amended MOTION for Preliminary Injunction *(Supplemental)* filed by Plaintiff State of Colorado, The. (Noteboom, Carrie) (Entered: 06/18/2020)
06/18/2020	59	NOTICE of Supplemental Authorities re: 24 Amended MOTION for Preliminary Injunction by Plaintiff State of Colorado, The (Attachments: # 1 Exhibit U.S. Supreme Court Opinion)(Hunt, Jennifer) (Entered: 06/18/2020)
06/19/2020	60	NOTICE of Supplemental Authorities re: 24 Amended MOTION for Preliminary Injunction by Defendants R.D. James, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, Andrew Wheeler (Attachments: # 1 California v. Wheeler, No. 3:20−cv−3005 (N.D. Cal.) Order Denying Motion for Preliminary Relief)(Shea, Sonya) (Entered: 06/19/2020)
06/19/2020	61	ORDER granting Plaintiff's Amended Motion for Preliminary Injunction 24 , construed as a motion for a stay of agency action under APA § 705, by Judge William J. Martinez on 06/19/2020. (wjmlc1) (Entered: 06/19/2020)
06/23/2020	62	NOTICE OF APPEAL as to 61 Order on Motion for Preliminary Injunction by Defendants R.D. James, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, Andrew Wheeler (Dupre, Phillip) (Entered: 06/23/2020)
06/23/2020	63	NOTICE OF CASE ASSOCIATION *(Supplemental)* by Sonya Joy Shea on behalf of All Defendants (Shea, Sonya) (Entered: 06/23/2020)
06/24/2020	64	LETTER Transmitting Notice of Appeal to all counsel advising of the transmittal of the 62 Notice of Appeal filed by U.S. Army Corps of Engineers, R.D. James, Andrew Wheeler, U.S. Environmental Protection Agency to the U.S. Court of Appeals. (USA,) (Attachments: # 1 Preliminary Record and Docket Sheet)(angar,) (Entered: 06/24/2020)
06/25/2020	65	TRANSCRIPT ORDER FORM re 62 Notice of Appeal by Defendants R.D. James, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, Andrew Wheeler (Shea, Sonya) (Entered: 06/25/2020)

06/25/2020	66	USCA Case Number 20−1238 for 62 Notice of Appeal filed by U.S. Army Corps of Engineers, R.D. James, Andrew Wheeler, U.S. Environmental Protection Agency. (angar,) (Entered: 06/26/2020)
06/29/2020	67	LETTER TO USCA and all counsel certifying the record is complete as to 62 Notice of Appeal filed by U.S. Army Corps of Engineers, R.D. James, Andrew Wheeler, U.S. Environmental Protection Agency. A transcript order form was filed stating that a transcript is not necessary. (Appeal No. 20−1238) Text Only Entry (angar,) (Entered: 06/29/2020)
07/02/2020	68	MOTION to Expedite *Ruling* by Intervenor Defendants Chantell Sackett, Michael Sackett. (Roper, Glenn) (Entered: 07/02/2020)
07/15/2020	69	ORDER Granting Motions to Intervene. The Sacketts' Unopposed Motion to Intervene (ECF No. 42) is GRANTED. The Unopposed Motion to Intervene of Proposed Business Intervenors (ECF No. 49) is GRANTED. The Sacketts' Unopposed Motion for Expedited Ruling on Unopposed Motion to Intervene (ECF No. 68) is DENIED AS MOOT. ORDERED by Judge William J. Martinez on 7/15/2020.(angar,) (Entered: 07/15/2020)
07/15/2020	70	NOTICE OF APPEAL as to 61 Order on Motion for Preliminary Injunction by Intervenor Defendants Chantell Sackett, Michael Sackett (Filing fee $ 505, Receipt Number 1082−7387742) (Roper, Glenn) (Entered: 07/15/2020)
07/15/2020	71	NOTICE OF APPEAL as to 61 Order on Motion for Preliminary Injunction by Intervenor Defendants American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Chamber of Commerce of the United States of America, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand, and Gravel Association, Public Lands Council, U.S. Poultry & Egg Association (Filing fee $ 505, Receipt Number 1082−7387981) (Bishop, Timothy) (Entered: 07/15/2020)
07/15/2020	72	BRIEF in Opposition to 24 Amended MOTION for Preliminary Injunction filed by Intervenor Defendants American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Chamber of Commerce of the United States of America, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand, and Gravel Association, Public Lands Council, U.S. Poultry & Egg Association. (Attachments: # 1 Declaration of Don Parrish, # 2 Exhibit A to Parrish Declaration, # 3 Exhibit B to Parrish Declaration, # 4 Exhibit C to Parrish Declaration, # 5 Exhibit D to Parrish Declaration, # 6 Exhibit E to Parrish Declaration)(Bishop, Timothy) (Entered: 07/15/2020)
07/16/2020	73	LETTER Transmitting Notice of Appeal to all counsel advising of the transmittal of the 70 Notice of Appeal filed by Michael Sackett, Chantell Sackett to the U.S. Court of Appeals. (Retained Counsel, Fee paid,) (Attachments: # 1 Preliminary Record and Docket Sheet)(angar,) Modified on 7/16/2020 to correct letter (angar,). (Entered: 07/16/2020)
07/16/2020	74	LETTER Transmitting Notice of Appeal to all counsel advising of the transmittal of the 71 Notice of Appeal,, filed by National Association of Home Builders, National Pork Producers Council, National Mining Association, U.S. Poultry & Egg Association, American Farm Bureau Federation, National Cattlemen's Beef Association, National Alliance of Forest Owners, Public Lands Council, National Stone, Sand, and Gravel Association, National Corn Growers Association, American Petroleum Institute, American Road and Transportation Builders Association, Leading Builders of America, Chamber of Commerce of the United States of America to the U.S. Court of Appeals. (Retained Counsel, Fee paid,) (Attachments: # 1 Preliminary Record and Docket Sheet)(angar,) (Entered: 07/16/2020)

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.

CHANTELL SACKETT and MICHAEL SACKETT,

Intervenor-Defendants.

AMERICAN FARM BUREAU FEDERATION; AMERICAN PETROLEUM INSTITUTE; AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; LEADING BUILDERS OF AMERICA; NATIONAL ALLIANCE OF FOREST OWNERS; NATIONAL ASSOCIATION OF HOME BUILDERS; NATIONAL CATTLEMEN'S BEEF ASSOCIATION; NATIONAL CORN GROWERS ASSOCIATION; NATIONAL MINING ASSOCIATION; NATIONAL PORK PRODUCERS COUNCIL; NATIONAL STONE, SAND, GRAVEL ASSOCIATION; PUBLIC LANDS COUNCIL; and U.S. POULTRY & EGG ASSOCIATION,

Intervenor-Defendants.

NOTICE OF APPEAL

Pursuant to Fed. R. App. P. 3 and 4(a)(1)(B), notice is hereby given that the Intervenors-Defendants in the above-captioned case, the American Farm Bureau Federation, American

Petroleum Institute, American Road and Transportation Builders Association, Chamber of Commerce of the United States of America, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand, and Gravel Association, Public Lands Council, , and U.S. Poultry & Egg Association (collectively "Business Intervenors"), appeal to the U.S. Court of Appeals for the Tenth Circuit from the Court's Order granting Plaintiff's Amended Motion for Preliminary Injunction, construed as a motion for a stay of agency action under APA § 705 (Dkt. No. 61), dated June 19, 2020.

DATED: July 15, 2020

Respectfully submitted,

/s/ Timothy S. Bishop

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2020, I electronically filed the foregoing Notice of Appeal 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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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' 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 15th day of July, 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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/s/ Timothy S. Bishop
TIMOTHY S. BISHOP

EXHIBIT A

to the

Declaration of Don Parrish

No. 15-3850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

DECLARATION OF DON PARRISH

I, Don Parrish declare upon personal knowledges as follows:

1. I am over eighteen years old and suffer from no disability that would preclude me from giving this declaration.
2. I am Senior Director of Regulatory Affairs at the American Farm Bureau Federation ("AFBF"). I offer this Declaration based on my 28 years working on behalf of AFBF's members, focusing primarily on Clean Water Act issues.
3. AFBF is a voluntary general farm organization formed in 1919, representing about 6 million member families through Farm Bureau organizations in all 50 states plus Puerto Rico, including members who are directly and adversely impacted by the rule challenged in this case. Each state Farm Bureau is an independent entity, affiliated with AFBF through a membership agreement. Individual and family Farm Bureau members are associate members of AFBF.

4. AFBF's primary function is to advance and promote the interests of farmers and ranchers and their rural communities. This involves advancing, promoting, and protecting the economic, business, social, and education interests of farmers and ranchers across the United States.

5. AFBF has a dedicated staff and expends a great amount of resources to advocate on many issues before Congress, the Executive Branch and federal courts to serve the interests of farmers and ranchers. AFBF seeks to promote the development of reasonable and lawful environmental regulations and regulatory policy that affect the use and development of agricultural land.

6. AFBF has expended great resources related to promoting a lawful and reasonable interpretation of the Clean Water Act's jurisdiction over agricultural lands. AFBF filed numerous amicus briefs supporting reasonable and lawful reading of the Clean Water Act before courts of appeals and the U.S. Supreme Court, including *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), and *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*").

7. AFBF filed detailed comments in connection with regulatory proposals published by the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively, "Agencies."). AFBF filed extensive comments on the Agencies' advanced notice of proposed rulemaking following the *SWANCC* decision. American Farm Bureau Federation Comments in Response to the U.S. Army Corps of Engineers' and U.S. Environmental Protection Agency's Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States'", Dkt. No. OW-2002-0050 (Apr. 16, 2003) (corrected Apr. 30, 2003).

8. AFBF later filed extensive comments in response to the Agencies' proposed guidance following the *Rapanos* decision. American Farm Bureau Federation, et al., "Comments in Response to the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Guidance Pertaining to Clean Water Act Jurisdiction After the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*," Dkt. No. EPA-HQ-OW-2007-0282-0204 (Jan. 22, 2008).
9. AFBF filed detailed comments on guidance proposed by the Agencies in 2011. Comments in Response to the Environmental Protection Agency's and U.S. Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act, Dkt. No. EPA-HQ-OW-2011-0409.
10. AFBF prepared extensive legal, policy and economic comments on the proposed rule. Comments of the American Farm Bureau Federation on the U.S. EPA and U.S. Army Corps of Engineers Proposed Rule to Define "Waters of the U.S." Under the Clean Water Act, Dkt. No. EPA-HQ-OW-2011-0880 (Nov. 5, 2014). AFBF also joined the Waters Advocacy Coalition (WAC), which submitted comments on behalf of a coalition of industry groups. Comments of the Waters Advocacy Coalition on the Envt'l Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, Dkt. No. EPA-HQ-OW-2011-0880 (Nov. 13, 2014) (corrected Nov. 14, 2014).
11. AFBF staff testified numerous times on the proposed and final rule before congressional committees. I testified before the U.S. Senate Committee on Environment and Public Works on May 24, 2015, on "Erosion of Exemptions and Expansion of Federal Control – Implementation of the Definition of Waters of Waters of the United States,

http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66. On March 17, 2015, AFBF's general counsel Ellen Steen testified on the impact of the rule on farmers, ranchers and rural America before the U.S. House of Representatives Committee on Agriculture, Conservation and Forestry Subcommittee. http://agriculture.house.gov/calendar/eventsingle.aspx?EventID=2428. On June 10, 2015, she testified before the Senate Committee on the Judiciary on the procedural concerns related to the rule in the context of "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity." http://www.judiciary.senate.gov/meetings/examining-the-federal-regulatory-system-to-improve-accountability-transparency-and-integrity.

12. AFBF expended resources to provide an extensive education of its members on the complexities and uncertainties of the rule.

13. Many AFBF members will be directly affected by the rule. Many of the water and dry landscape features typically found in and around private farmland, such as depressional areas, ditches and ephemeral drains, will be categorically regulated as "waters of the United States" under the rule challenged in this case. Regulation of those landscape features will require AFBF members to avoid any "discharges" of "pollutants" to those waters categorized as "waters of the United States." under the rule. AFBF members will need to take farm lands out of production to avoid an unlawful discharge or expend resources to obtain (and comply with) a Clean Water Act permit for discharges of pollutants to those "waters of the United States." In some cases, a Clean Water Act permit will be denied or unavailable to AFBF members.

14. Some AFBF members will be unsure of how the vague language in the rule applies to landscape features in and around their farm lands. To avoid the risk of an unlawful discharge to these landscape features, these members will need to expend resources to determine whether land and water features in and around their property are "waters of the United States" and alter their agricultural operations to ensure compliance with the Clean Water Act.

15. Vacatur of the Final Rule and a declaration that the final rule is unlawful would remedy these ongoing costs and uncertainties.

Executed this 20 day of September, 2016.

Don Parrish

EXHIBIT B

to the

Declaration of Don Parrish

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, *et al.*,
Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Defendants.

No. 3:15-cv-162

DECLARATION OF DON PARRISH

I, Don Parrish, declare upon personal knowledge as follows:

1. I am over eighteen years old 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"). I offer this Declaration based on my 30 years working on behalf of farmers and ranchers across the nation, focusing primarily on Clean Water Act issues.
3. I submitted a declaration on September 20, 2016, in support of AFBF's challenge to the so-called 2015 "Clean Water Rule" (WOTUS Rule). Every statement made in that declaration remains true.
4. It is my understanding that the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively, the "Agencies") are engaging in a multi-step regulatory process that may conclude with the repeal and replacement of the WOTUS Rule, which had expanded the scope of landscape features subject to Clean Water Act jurisdiction. The Agencies just finalized a revision to the WOTUS Rule adding an applicability date

(Applicability Date Rule). The Agencies have also proposed a rule to rescind the WOTUS Rule (Repeal Rule). The Agencies have indicated their intent to redefine and presumably narrow the definition of "waters of the United States" in a future replacement rule (Replacement Rule). Meanwhile, the rules and agency guidance that were in place prior to the WOTUS Rule continue to be implemented and enforced nationwide.

5. Based on countless press reports, there is no doubt that every step of this regulatory process will be vigorously challenged in court by several States and environmental groups, each seeking immediate injunctive relief from various carefully chosen district courts. I am concerned that one or more district courts will issue injunctions that bring the WOTUS Rule back into effect, at least in those States not subject to the District of North Dakota's regional preliminary injunction of the WOTUS Rule.

6. Any court injunction that allows the WOTUS Rule to go into effect will dramatically expand the scope of Clean Water Act jurisdiction as it applies to farm and ranch lands. The WOTUS Rule expanded jurisdiction to categorically regulate countless sometimes-wet landscape features that are ubiquitous in and around farmland. These common features include drains carrying rainfall away farm fields, ordinary farm ditches, and low areas in farm fields where water channels or temporarily pools after heavy rains.

7. The risk that the WOTUS Rule will go into and out of effect due to litigation means that AFBF members in every state must plan and prepare their activities to guard against inadvertent unlawful "discharges" of "pollutants" to waters categorized as "waters of the United States." Farmers who can identify landscape features on their land that *may* be jurisdictional "waters" as defined under the WOTUS Rule need to decide *now* whether to avoid those fields and features to avoid unlawful "discharges" from plowing, fertilizer

application, or disease and insect control if the legal landscape suddenly changes and the scope of WOTUS suddenly expands. The only way such farmers can fully guard against this risk would be to expend resources now to obtain (and comply with) a Clean Water Act permit, but the exorbitant cost of consultants, engineers, permit applications, mitigation costs and compliance costs makes that an untenable option for most farmers.

8. If the scope of Clean Water Act jurisdiction flip-flops multiple times over the next several years due to litigation, many AFBF members will be irreparably harmed by their inability to plan their farming activities and ensure maximum productivity of their land. For example, under the WOTUS Rule, farmers with drainage ditches and ephemeral drains located in and around farm fields will need to 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 to a "water of the United States." If the jurisdictional status of those common features flip-flops from year to year, farmers will have little ability to plan the purchase of seed, fertilizer and crop protection tools and are less likely to continue farming some, if not all, of that field. Similarly, tree farmers relying on aerial pesticide applications for the health of the trees are unlikely to hire sufficient workers to prune and harvest the trees if the ditches running alongside the rows are classified as "waters of the United States" in some years, but not others.

9. In many areas, farmers will be limited in their ability to conduct basic soil manipulation necessary for any farming – using a plow. If a field contains low areas deemed to be "adjacent waters" under the WOTUS Rule, farmers will be unable to plow through those low areas when the WOTUS Rule is in effect. Other common soil manipulation activities such as grading, laser leveling, and terracing are often necessary for agricultural production.

However, if a landscape feature is considered perfectly farmable land one month and "navigable water" the next, few farmers will be willing to conduct soil manipulation activities that risk Clean Water Act liability if the WOTUS Rule suddenly springs into effect. Farmers may choose to expend the resources necessary to seek Clean Water Act "dredge and fill" permits for these soil manipulation activities, even if the permit is not necessary. However, the Clean Water Act does not guarantee that a permit will be available or granted.

10. If the definition of "waters of the United States" is constantly changing with developments in litigation and the rulemaking process, it also will make it difficult for farmers to avoid the risk of Clean Water Act liability in constructing and maintaining important farm infrastructure, such as farm 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" depending on the status of litigation in a local district court. Farmers who dig post holes to construct a fence in or alongside an ephemeral drain while the Applicability Date Rule is in effect will not be in violation of the Clean Water Act (rules in place prior to the WOTUS Rule did not categorically regulate ephemeral drains). If a district court enjoins the Applicability Date Rule, and the WOTUS Rule comes into effect, farmers within that district court will be at risk of violating the Clean Water Act because installing a fence post in an ephemeral drain is an unlawful discharge to a jurisdictional water under the WOTUS Rule. This same cycle would repeat itself as future regulations are finalized by the Agencies and then subjected to new waves of legal challenges and district court injunctions.

11. The harm to AFBF members caused by a constantly changing regulatory climate is further compounded by the vague language and lack of clarity in the WOTUS Rule. That lack of clarity complicates efforts by AFBF members to determine how they can farm their land

because in many instances, they will be unable to identify jurisdictional "waters" on their land without expending resources on a technical consultant. The WOTUS Rule allows the Agencies to rely on desktop tools and remote sensing technology unavailable to farmers. As a result, many farmers will be unable to identify jurisdictional waters on their land with a naked eye, increasing the risk of an unintentional Clean Water Act violation, particularly in times when the WOTUS Rule is in place. To avoid the risk of an unlawful discharge to these landscape features, farmers are more likely to expend resources to determine whether land and water features in and around their property are "waters of the United States" and alter their agricultural operations to ensure compliance with the Clean Water Act.

12. The value of farmland will also be affected by the flip-flopping of regulatory definitions due to litigation and the regulatory process. Land containing jurisdictional features such as ephemeral drains, ditches and low areas has less value because of the land-use restrictions imposed on jurisdictional waters and surrounding land, even when there is no water in the feature and it otherwise appears to be dry land. The added cost of seeking a permit for agricultural or non-agricultural use makes the land more difficult to sell and lowers its value.

13. AFBF members may be unaware of which rule is in effect in their local area at any given time. The lack of regulatory continuity over which waters are regulated under the Clean Water Act will place farmers at risk for hefty civil fines and even jail time, causing many farmers to avoid common farming activities and lose productive capacity of their land.

14. Entering a nationwide stay of the WOTUS Rule at this time will ensure that the definition of a "water of the United States" is consistent for every AFBF member across the nation until the rulemaking process is complete and litigation over the process is resolved. Without a nationwide injunction, farmers must either scale back important and otherwise lawful

agricultural activities, roll the dice and assume the risk of potentially crippling future liability, or incur tens of thousands of dollars plus months or years of delay in farming to seek precautionary permits. This level of uncertainty leaves farmers with no appealing option.

Executed this 6th day of February, 2018.

Don Parrish

EXHIBIT C

to the

Declaration of Don Parrish

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

DECLARATION OF DON PARRISH

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"). I offer this Declaration based on my 30 years working on behalf of farmers and ranchers across the nation, focusing primarily on Clean Water Act issues.

3. I submitted a declaration on September 20, 2016, in support of AFBF's challenge to the so-called 2015 "Clean Water Rule" (WOTUS Rule) in the U.S. Court of Appeals for the Sixth Circuit. I also signed a declaration on February 6, 2018 in support of AFBF's challenge to WOTUS Rule in the Southern District of Texas. Any statement made in those declarations remains true except insofar as it has been superseded by anything I have declared here.

4. In the jurisdictions where the 2015 WOTUS Rule has entered into effect, it has significantly expanded the scope of Clean Water Act jurisdiction as it applies to farm and ranch lands. The WOTUS Rule expands jurisdiction to regulate countless sometimes-wet landscape features that are ubiquitous in and around farmland. These common features include drains carrying

rainfall away farm fields, ordinary farm ditches, and low areas in farm fields where water channels or temporarily pools after heavy rains.

5. AFBF members in the 26 states where the WOTUS Rule is currently in effect now must alter their activities to prevent inadvertent unlawful "discharges" of "pollutants" into waters categorized as "waters of the United States," which may require them to take lands out of production. Alternatively, they can obtain costly Clean Water Act permits, but the exorbitant cost of consultants, engineers, permit applications, mitigation costs and compliance costs makes that an untenable option for most farmers. This is despite the fact that the Agencies are currently working to repeal and replace the WOTUS Rule, such that it may soon be out of effect.

6. The enormous costs of taking land out of production or seeking and obtaining permits will be not be recoverable by these farmers and ranchers. Nor will the injuries be remedial to the employees they may have to let go as a consequence.

7. In many areas, farmers are now limited in their ability to conduct basic soil manipulation necessary for any farming – using a plow. If a field contains low areas deemed to be "adjacent waters" under the WOTUS Rule, farmers will be unable to plow through those low areas when the WOTUS Rule is in effect. Other common soil manipulation activities such as grading, laser leveling, and terracing are often necessary for agricultural production. But if a landscape feature is considered perfectly farmable land one month and "navigable water" the next, few farmers will be willing to conduct soil manipulation activities that risk CWA liability now that the WOTUS Rule is in effect. Farmers may choose to expend the resources necessary to seek Clean Water Act "dredge and fill" permits for these soil manipulation activities, even if the permit is not necessary. The costs associated with the permit process will not be recoverable.

8. The WOTUS Rule also makes it difficult for farmers to avoid the risk of Clean Water Act liability in constructing and maintaining important farm infrastructure, such as farm 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" depending on the status of litigation in a local district court. In states now subject to the WOTUS Rule, farmers within that district court will be at risk of violating the Clean Water Act because installing a fence post in an ephemeral drain is an unlawful discharge to a jurisdictional water under the WOTUS Rule.

9. The harm to AFBF members caused by a constantly changing regulatory climate is further compounded by the vague language and lack of clarity in the WOTUS Rule. That lack of clarity complicates efforts by AFBF members to determine how they can farm their land because in many instances, they are unable to identify jurisdictional "waters" on their land without expending resources on a technical consultant. The WOTUS Rule allows the Agencies to rely on desktop tools and remote sensing technology unavailable to farmers. As a result, many farmers are unable to identify jurisdictional waters on their land with a naked eye, increasing the risk of an unintentional Clean Water Act violation. To avoid the risk of an unlawful discharge to these landscape features, farmers will either expend resources to determine whether land and water features in and around their property are "waters of the United States" or alter their agricultural operations to avoid discharges into ambiguous features. Again, these costs will not be recoverable.

10. Without a nationwide injunction, farmers must either scale back important and otherwise lawful agricultural 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 farming to seek precautionary permits.

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

Dated: 9-10-18

Don Parrish

EXHIBIT D

to the

Declaration of Don Parrish

No. 15-3751 (lead)

In the

United States Court of Appeals

for the

Sixth Circuit

IN RE: ENVIRONMENTAL PROTECTION AGENCY
AND DEPARTMENT OF DEFENSE,
FINAL RULE: CLEAN WATER RULE:
DEFINITION OF "WATERS OF THE UNITED STATES,"
80 Fed. Reg. 37,054, Published on June 29, 2015 (MCP No. 135)

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

ADDENDUM TO OPENING BRIEF FOR THE BUSINESS AND MUNICIPAL PETITIONERS

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No. 15-3850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

DECLARATION OF TIM CANTERBURY

I, Tim Canterbury, 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 owner of Canterbury Ranch ("Canterbury Ranch"), and a member of a Public Lands Council affiliate. In this role, I oversee all aspects of operation of Canterbury Ranch, including compliance with the Clean Water Act and other regulatory requirements.

3. Canterbury Ranch has numerous ditches and other land and water features on its lands that we previously understood not to be subject to regulation under the Clean Water Act. Some of these features do or may constitute a "water of the United States" under EPA's recently promulgated WOTUS Rule, 80 Fed. Reg. 37,054 (June 29, 2015), although it is unclear which specific ones because the Rule is vague. These features include ditches and other features that can convey water.

4. The possibility that the features will be treated as waters of the United States creates uncertainty about whether and how Canterbury Ranch can use its lands and what regulatory

requirements of particular uses apply. The Rule would have direct effects on the use of land at the Canterbury Ranch, as discharges from point sources like farming equipment into features like ditches may require permits or changes in ranching practices.

5. I have reviewed the Rule in an effort to understand the requirements and determine the impact to the operation. Canterbury Ranch has dedicated time to identifying features that may be covered under the Rule, and has made plans to take further action in response to the Rule if there were no stay of the Rule in place.

6. Canterbury Ranch has expended time, money, and other resources in attempting to ascertain the implications of the Rule.

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

Dated: September 16, 2016

Tim Canterbury

No. 15-3850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

DECLARATION OF JIM CHILTON

I, Jim Chilton, 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 owner of Chilton Ranch LLC ("Chilton Ranch"), and a member of a Public Lands Council. In this role, I oversee all aspects of operation of Chilton Ranch, including compliance with the Clean Water Act and other regulatory requirements.

3. Chilton Ranch has dry washes and other features on the land that we previously understood not to be subject to regulation under the Clean Water Act. Some of these features do or may constitute "waters of the United States" under EPA's recently promulgated WOTUS Rule, 80 Fed. Reg. 37,054 (June 29, 2015), although it is unclear which specific ones because the Rule is vague. These features include dry washes and other features that can convey water.

4. The Chilton Ranch has a dry wash feature that is roughly twenty-four inches wide that may meet the definition of "tributary" under the Rule. This dry wash leads to a larger dry wash called the Aravaca Wash, which leads to the Santa Cruz River, a river that is dry and only has

water flow from precipitation events. The Santa Cruz River leads to the Gila River which leads to the Colorado River. The Colorado River is 265 miles away from the dry wash at Chilton Ranch.

5. The Army Corps of Engineers requested the Chilton Ranch obtain a 404 dredge and fill permit prior to constructing a bridge across the dry wash. The Chilton Ranch hired a consultant, an engineer, and a surveyor to get the 404 permit. The costs of obtaining the permit were burdensome and the process was time-consuming so Chilton Ranch decided to abandon the bridge project.

6. The possibility that features like the dry wash and other dry washes on the Chilton Ranch will be treated as waters of the United States creates uncertainty about whether and how Chilton Ranch can use its lands and what regulatory requirements of particular uses apply. The Rule would have direct effects on the use of land at the Chilton Ranch, as discharges from point sources like farming equipment into features like ditches may require permits or changes in ranching practices.

7. I have reviewed the Rule in an effort to understand the requirements and determine the impact to the operation. Chilton Ranch has dedicated time to identifying features that may be covered under the Rule, and has made plans to take further action in response to the Rule if there were no stay of the Rule in place.

8. Chilton Ranch has expended time, money, and other resources in attempting to ascertain the implications of the Rule.

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

Executed on September 16, 2016.

James K. Chilton, Jr.

No.15-4188

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WASHINGTON CATTLEMEN'S ASSOCIATION, et al.,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

Respondents

DECLARATION OF CAREN COWAN

BASED ON PERSONAL KNOWLEDGE, I, CAREN COWAN, DECLARE:

1. I am the Executive Director of the New Mexico Cattle Growers' Association, which is headquartered at 2231 Rio Grande Blvd., NW, Albuquerque, NM, 87104.
2. Describe organization's legal status, membership, and local affiliate structure: NM Cattle Growers' is an association organized to advance and protect the cattle industry in New Mexico. It has approximately 1,400 members in 32 of the state's 33 counties as well as 19 other states. Its objective includes providing an official and united voice on issues of importance to cattle producers and feeders.

3. Should the Final Rule on the Definition of "Waters of the United States" Under the Clean Water Act ("WOTUS Rule") be allowed to take effect, a significant number of NM Cattle Growers' members will be required to seek Clean Water Act Section 404 permits for projects on or adjacent to waters and land features not previously subject to Environmental Protection Agency or U.S. Army Corps of Engineers jurisdiction.
4. As a matter of organizational policy, NM Cattle Growers' advocates on behalf of its members on numerous issues related to federal laws that regulate the livestock industry, including the Clean Water Act and regulations adopted under it. NM Cattle Growers' lobbies on Clean Water Act issues, publishes information on Clean Water Act issues for its members, researches issues arising under the Clean Water Act, and submits comments to government agencies addressing concerns that Clean Water Act regulations pose for the organization and its members.
5. Since the original publication of the proposed WOTUS Rule, NM Cattle Growers' staff, members and consultants have expended significant time reading, researching, and analyzing the Rule and its potential impacts on NM Cattle Growers' members and their property and livestock operations.
6. NM Cattle Growers has communicated with and lobbied federal regulators and members and staff of Congress on the WOTUS Rule, as well as

communicated its concerns to state and local government agencies which are also subject to different and increased regulatory burdens as a result of the WOTUS Rule.

7. NM Cattle Growers has also communicated extensively with its members about the WOTUS Rule and related Clean Water Act issues, through regular organizational publications, its website, and by way of speakers and organizational discussions at its annual and mid-year meetings.

8. On November 13, 2014, NM Cattle Growers' joined several other New Mexico organizations and formally filed a fifteen page substantive comment letter, opposing adoption of the then-proposed WOTUS Rule.

9. NM Cattle Growers' has also directly encouraged its members to communicate directly with EPA and the Corps of Engineers, and with members and staff of Congress, to express their opposition to the WOTUS Rule and to communicate the adverse impacts that the Rule will likely have on their property and livestock operations.

10. The final WOTUS Rule was published on June 29, 2015. 80 Fed. Reg. 37054. However, the final Rule was so different from the draft rule that it was almost unrecognizable as the same rule. The final Rule changed the definition of covered waters and added numerous categories that would automatically be deemed "waters of the United States," such as all

"tributaries," including ephemeral streams and ditches, as well as various "adjacent" waters that are often found on member properties and which, for the first time, would be regulated by the federal government. The final Rule deprived NM Cattle Growers' and its members of the opportunity to comment on these changes to the detriment of the NM Cattle Growers' mission to inform and protect its members from arbitrary and onerous federal regulation.

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

Executed this 16th day of September, 2016.

Caren Cowan

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al., *Petitioners,*	No. 15-3850
v.	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents.*	

DECLARATION OF TERRANCE W. CUNDY

I, Terrance W. Cundy, declare that:

1. I am over the age of eighteen years, and the facts contained in this declaration are based upon my personal knowledge. I suffer from no disability that would preclude me from giving this declaration.

2. My current position is Manager of Silviculture, Wildlife and Environment for Potlatch Land and Lumber Corporation ("Potlatch"). Potlatch is a National Association of Forest Owners member company. I am responsible for supporting Potlatch's forestry operations in understanding and complying with environmental regulatory requirements.

3. Potlatch owns timberlands in a number of states throughout the United States. These timberlands contain features on its lands (the "Features") that do or may constitute a water of the United States under the definition of Waters of The United States," 80 Fed. Reg. 37,054 (JUNE 29, 2015) (the "Rule").

4. The possibility that the Features will be treated as waters of the United States creates uncertainty about whether and how Potlatch can use its lands and about what regulatory requirements of particular uses may apply. These requirements include, but are not limited to

whether to obtain or amend national pollutant discharge elimination system (NPDES) permits under Section 402 of the Clean Water Act for discharges to Features and whether to obtain or amend dredge and fill permits under Section 404 of the Clean Water Act for certain discharges to Features. Obtaining these permits or modifying these permits often takes significant time and expenses and once issued are often costly to ensure compliance. Alternatively, changing forestry practices to avoid discharges to Features can be very costly and severely limit how Potlatch uses its lands.

5. Potlatch has undertaken a detailed internal review of the Rule in an effort to interpret the requirements and determine the impact to timberland operations encompassing a multi-state land base. Staff and contractors have dedicated significant time and expended money to identifying Features covered under the Rule. Potlatch has made and will need to take further actions if the Rule is upheld.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 17, 2016.

Terrance W. Cundy

TERRANCE W. CUNDY

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents.*	No. 15-3850

DECLARATION OF BLAYDE FRY

I, Blayde Fry, declare that:

1. I am over the age of eighteen years, and the facts contained in this declaration are based upon my personal knowledge. I suffer from no disability that would preclude me from giving this declaration.

2. My current position is Vice President, General Manager for the Northwest Timberlands Division of Green Diamond Resource Company ("Green Diamond"), a National Association of Forest Owners member company. In this role, I am responsible for managing Green Diamond's forestry operations in Washington State, including compliance with regulations for the protection of resources and the environment.

3. Green Diamond owns and manages over 1.3 million acres of timberland in California, Oregon, and Washington. Green Diamond has features on its timberlands (the "Features") that do or may constitute a water of the United States under the definition of "Waters of The United States," 80 FED. REG. 37,054 (JUNE 29, 2015) (the "Rule").

4. Determining which of the Features qualify as waters of the United States and which do not is difficult and costly. This is especially the case for ephemeral tributaries and wetlands that are within rule-defined distances from tributaries that are not easily identified. The possibility that Green Diamond personnel might err in identifying and delineating the Features that will be treated as waters of the United States creates uncertainty about what regulatory requirements should be applied to particular uses of Green Diamond timberlands to ensure compliance with the Clean Water Act.

5. Prior to the imposition of a stay on the Rule, Green Diamond initiated an internal review of the Rule as it applies to the Features in an effort to assess the expanded scope of regulatory requirements that may apply to Green Diamond's timberland management activities and to determine the impact on timberland operations under the Rule. Green Diamond staff have dedicated considerable time and resources to identifying and delineating Features that appear to be covered under the Rule, but the task is inherently ambiguous and may never be completed with substantial certainty. Based on our understanding of the Rule and our initial analysis of the Features, Green Diamond anticipates that if the Rule comes into effect, the new definition of "waters of the United States" will likely require that Green Diamond's timberland management practices be modified to ensure compliance.

6. Green Diamond has expended time, money and other resources in attempting to ascertain the implications of the Rule and expects that additional effort and resources will be required if the Rule is implemented.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 20, 2016.

Blayde Fry

Blayde Fry

No. 15-3850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

DECLARATION OF NICK GOLDSTEIN

I, Nick Goldstein, declare based on personal knowledge as follows.

1. I am the Vice President of Regulatory and Scientific Affairs and Assistant General Counsel at the American Road & Transportation Builders Association (ARTBA) in Washington, D.C. Since September of 2004, I have worked on behalf of ARTBA's members, focusing on key regulatory issues impacting the transportation construction industry. At ARTBA, I oversee efforts addressing multiple regulatory topics, including air, climate, water, safety and contracting issues. I coordinate ARTBA's advocacy efforts with respect to these issues, including but not limited to, the drafting of regulatory comments as well as necessary legislative and litigation efforts.

2. ARTBA, founded in 1902, is America's oldest and most respected national transportation construction related association. It represents the interests of the transportation construction industry by advocating in a non-partisan way for policies that support and protect the U.S. transportation construction market. ARTBA's membership includes more than 6,500 private and public sector members that are involved in the planning, designing, construction and

maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems. Our industry generates more than $380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

3. ARTBA is the industry's primary environmental, legal and regulatory advocate. Its members undertake a variety of activities that are subject to the environmental review and approval process in the normal course of their business operations. ARTBA's public sector members adopt, approve, or fund transportation plans, programs, or projects. ARTBA's private sector members plan, design, construct and provide supplies for these federal transportation improvement projects. The interests at stake in this litigation are therefore germane to ARTBA's mission and purpose.

4. While ARTBA's members would have standing to bring suit in this case individually, their participation is not indispensible here, and they are relying instead on ARTBA to represent their interests before this Court.

5. In light of the significant potential impacts of the proposed Rule on ARTBA and our members, ARTBA submitted comments on the proposed rule. ARTBA's comments are available at http://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15521 and identify significant policy, legal, and procedural flaws in the agencies' Rule. If ARTBA had been given an opportunity to comment on the final Rule, which varies substantially from the proposed Rule, it would have submitted additional comments. The agencies' failure to provide an adequate opportunity for public comment on the final Rule thus hindered ARTBA's pursuit of its mission on behalf of its members.

6. The economic effects of federal jurisdiction over waters and landscape features are of great concern to ARTBA because such jurisdiction impacts ARTBA's members' ability to

plan, design, construct and provide supplies for federal transportation improvement projects.

7. ARTBA's members are subject to close regulation under the Clean Water Act. They often must obtain Clean Water Act permits to construct roads, bridges and other transportation projects across the United States.

8. ARTBA is particularly concerned with the treatment of roadside ditches under the rule. Current federal regulations say nothing about ditches, but the proposed rule expands EPA and Corps jurisdiction to the point where virtually any ditch with standing water could be covered. Federal environmental regulation should be applied when a clear need is demonstrated and regulating all roadside ditches under the theory of interconnectedness fails to meet this threshold. A ditch's primary purpose is safety and they only have water present during and after rainfall. In contrast, traditional wetlands are not typically man-made nor do they fulfill a specific safety function. As such, roadside ditches are not, and should not be regulated as, traditional jurisdictional wetlands because the only time they contain water is when they are fulfilling their intended purpose.

9. The length of the environmental review and approval process for federal-aid highway projects has been routinely documented and acknowledged by both political parties and the current administration. Adding more layers of review—for unproven benefits—will only lengthen this process. Delays in the environmental review and approval process often cause project owners to delay and/or scale back transportation improvement projects. This, in turn, creates uncertainty for ARTBA member companies and can result in less work for their employees.

10. Further, requiring wetland permits for ditch construction and maintenance would force project sponsors and the private sector to incur new administrative and legal costs. The

potential delays and increased costs that would result from EPA's proposal would divert resources from timely ditch maintenance activities and potentially threaten the role ditches play in promoting roadway safety.

11. ARTBA members work on transportation construction projects in areas of the United States that contain land features that may be deemed dry "tributaries" to navigable waters under the Rule. Under some conditions, project owners may be able to obtain general permits, which impose financial costs and time delays. If general permits are unavailable, however, our members are required to obtain individual permits, which typically them hundreds of thousands of dollars and years of time. Increased cost and delays can lead to projects being scaled down or cancelled, creating economic harm for ARTBA members and their employees who work on those projects.

12. The Rule's test to determine the "significant nexus" of a dry land feature or waterbody to a jurisdictional water is vague. The Rule's vagueness and ambiguity will require both project owners and ARTBA members to expend considerable time and money to determine whether the waters or dry landscape features involved on any job site bear a "substantial nexus" to jurisdictional waters and are subject to the Rule's requirements. These are costs that members would not bear were it not for the Rule.

13.

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

Executed this 12th day of Sept., 2016.

Nick Goldstein

No. 15-3850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

DECLARATION OF Chris Hawkins

I, Chris Hawkins, declare based on personal knowledge as follows.

1. My name is Chris Hawkins and I am the Chief Operating Officer of Hawkins Construction Company. In the position of Chief Operating Officer I am responsible for all construction projects performed by Hawkins; hiring, promoting and terminating employees; and all general company operations.

2. Hawkins Construction Company is a 4th generation family-owned and operated construction firm. Hawkins Construction Company provides construction services in nearly all sectors of the construction industry. The types of projects which Hawkins Construction Company works on include, but are not limited to commercial buildings, industrial facilities, airports, railways, highways and bridges.

3. Hawkins Construction Company is a member of the Contractors Division of the American Road and Transportation Builders Association (ARTBA). As part of Hawkins Construction Company's membership in ARTBA, I have attended ARTBA regional and national meetings.

4. In light of the significant potential impacts of the proposed rule on our company, our company supports ARTBA's advocacy efforts on behalf of its membership against the proposed rule. This includes supporting the current litigation efforts as well as both regulatory comments and regulatory testimony offered to the United States Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps).

5. The economic effects of federal jurisdiction over waters and landscape features are of great concern to our company because such jurisdiction impacts our ability and costs to design and construct transportation improvements. Our company has expended time and money to ascertain the implications of the final Rule on our company.

6. A significant number of jobs Hawkins Construction Company works on are transportation improvement projects. As part of constructing any federal transportation project, Hawkins Construction Company undertake a variety of activities that are subject to the environmental review and approval process in the normal course of our business operations. Specifically, activities involved in transportation construction often impact wetland areas. When any activity associated with construction impacts a wetland area or a "water of the United States" as defined by the Clean Water Act, a permit is required under Section 404 of the Act.

7. Hawkins Construction Company believes the final rule will expand federal jurisdiction udder the Clean Water Act and require permits for areas which had not previously been defined as "waters of the United States." At a minimum, Hawkins Construction Company believes the final rule will cause confusion over what is and what is not considered a "water of the United States."

8. Increased permitting requirements and confusion over federal jurisdiction will lead to delays in the project review and approval process. Delays will result in increased material costs and uncertainty of work schedules for our employees. Additionally, increased

permitting requirements will also drive up the total cost associated with transportation improvement projects and possibly force project owners to scale back transportation projects, resulting in less work for Hawkins Construction Company and its employees.

9. Hawkins Construction Company is particularly concerned with the treatment of roadside ditches under the rule. A ditch's primary purpose is safety, and a ditch typically carries water present only during and after rainfall.

10. The NPDES and Section 404 permit review and approval process will lengthen the already burdensome review process for federal-aid highway projects, inflicting new administrative and legal costs on our company. The potential delays and increased costs that would result from EPA's proposal would divert resources from timely ditch maintenance activities and potentially threaten the role ditches play in promoting roadway safety.

11. In addition, the rule creates a completely new concept of allowing for "aggregation" of the contributions of all similar waters "*within an entire watershed.*" This concept results in a blanket jurisdictional determination—meaning the EPA and Corps could regulate the complete watershed. Such a broadening of jurisdiction would literally leave no transportation project untouched regardless of its location, as there is no area in the United States not linked to at least one watershed.

12. Our company works on transportation construction projects in areas of the United States that contain land features that may be deemed dry "tributaries" to navigable waters under the Rule. Such dry tributaries are per se jurisdictional under the final Rule. Determining which land features qualify as jurisdictional "tributaries" under the Rule will require the expenditure of substantial resources, including the hiring of engineers. The treatment of those dry channels as jurisdictional will require project owners to obtain permits under Sections 402 and 404 of the Clean Water Act for disturbances to those features or for discharges into those features. Under

some conditions, project owners may be able to obtain general permits, which impose financial costs and time delays. If general permits are unavailable, however, project owners are required to obtain individual permits, which typically cost hundreds of thousands of dollars and years of time. The increased cost and delay project owners feel results in projects being scaled back and job uncertainty for Hawkins construction employees.

13. Hawkins has built at least 20 transportation projects every year for the past 5 years and anticipates continuing at the rate. Almost every one of those projects has been constructed near areas which could be defined as wetlands under the new rule.

14. Determining that a particular water or dry landscape feature is *not* jurisdictional under the new Rule will require our company to assume substantial risk. Given the vagueness and malleability of the Rule's "significant nexus" definition, the U.S. Army Corps of Engineers or EPA may later challenge a finding of no significant nexus and bring an enforcement action against the company for failure to comply with the Clean Water Act. This may lead to civil fines and criminal penalties.

15. More generally, the possibility that various previously-non-jurisdictional features will be treated as waters of the United States creates uncertainty about whether and how our company can construct transportation improvements. This issue is exacerbated where Hawkins works with non-public entities who lack the resources to regularly assist and share the risk in wetlands analysis. Hawkins constructs multiple land improvement and private transportation projects (such as for short-line railroads) every year which fall into this latter category.

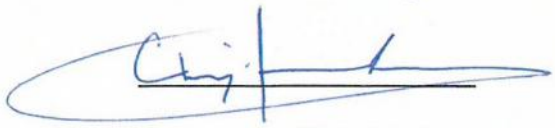
16. Overall, if the stay of the Rule were lifted and the Rule were allowed to go into effect, the Rule's expansion of regulatory jurisdiction and its malleability and vagueness would

and have enormous practical impacts on the company's willingness to undertake new transportation construction projects and on the cost of those projects that it elects to undertake.

17. Vacatur of the Rule would save the company these substantial costs.

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

Executed this 13th day of September, 2016.



Chris Hawkins

Cases Nos. 15-3751, 15-3799, 15-3817, 15-3820, 15-3822, 15-3823, 15-3831, 15-3837, 15-3839, 15-3850, 15-3853

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: ENVIRONMENTAL PROTECTION AGENCY AND DEPARTMENT OF DEFENSE, FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES," 80 FED. REG. 37,054, PUBLISHED ON JUNE 29, 2015 (MCP NO. 135)

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

DECLARATION OF MICHAEL JACOBS

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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 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 2015. After my property was cleared, I had intended to raise about 30 cattle on the property. I had planned to take these cattle to market in the summer or fall of 2016 and, hopefully, to 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. If the WOTUS Rule takes effect, 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 future 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. The WOTUS Rule will stifle the valuable and productive use of my property. This Court should strike down the rule.

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

Executed on ~~September~~ November 1, 2016

Michael Jacobs

No. 15-3850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

DECLARATION OF KENT MANN

I, Kent Mann, 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 owner of M/M Feedlot ("M/M") located in Parma, Idaho, and a National Cattlemen's Beef Association member. In this role, I oversee all aspects of operation of M/M, including compliance with the Clean Water Act and other regulatory requirements.

3. M/M has numerous land and water features on its lands that it previously understood not to be subject to regulation under the Clean Water Act. But some of these features may constitute a "water of the United States" under EPA's recently promulgated WOTUS Rule, 80 Fed. Reg. 37,054 (June 29, 2015)—though given the Rule's vagueness, it is not clear which ones. These features include a constructed pond and ditches.

4. Because M/M qualifies as a "concentrated animal feeding operation" under 40 C.F.R. § 122.23, it is considered a "point source" under the Clean Water Act. Thus, it must

obtain a NPDES permit under the Act in order to discharge any pollutant into "waters of the United States."

5. The possibility that the WOTUS Rule will lead to the designation of additional features on M/M's land as "waters of the United States" creates uncertainty about whether and how M/M can use its lands. Any increase in the portion of M/M's land subject to Clean Water Act jurisdiction will mean an increase in the number of activities that require NPDES permitting.

6. If the Rule goes into effect, it is almost certain that M/M will either have to change the use of its land or otherwise seek further regulatory approval of its family farming operation. Either outcome would cost M/M substantial time and resources.

7. M/M has reviewed the Rule in an effort to understand the requirements and determine the impact to the operation. M/M has dedicated time to identifying features on its lands that may be covered under the Rule, and has made plans to take further action in response to the Rule. Those plans would have to be implemented if the Rule were allowed to go into effect.

8. M/M has expended time, money, and other resources in attempting to ascertain the implications of the Rule.

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

Dated: 9-7-16

No. 15-3850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

DECLARATION OF WILLIAM R. MURRAY

I, William R. Murray, declare, based on my 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 Vice President for Policy and General Counsel for the National Alliance of Forest Owners ("NAFO"), a trade association that represents the interests of owners and managers of over 80 million acres of private forests in 47 states.

3. NAFO works aggressively to sustain the ecological, economic, and social values of forests and to assure an abundance of healthy and productive forest resources for present and future generations.

4. NAFO is committed to helping policy makers understand that working forests are essential to the natural resources infrastructure of the nation and key to addressing some of the highest priority issues facing our nation today.

5. NAFO advocates for its members' interests before Congress and federal agencies and in judicial proceedings.

6. NAFO met several times with EPA during the rulemaking process, commented on the proposed Rule and engaged in education of its members on complexities and ambiguities of the Rule. *See* Comments of the National Alliance of Forest Owners on Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22,188 (Apr. 21, 2014), Dkt. No. EPA-HQ-OW-2011-0880 (Nov. 14, 2014). If the agencies had sought additional comments on what is now the final rule, NAFO would have submitted additional comments.

7. NAFO members often have features on their lands that may qualify as waters of the United States under the Rule which generally require analysis to determine the applicability of the Rule. This creates uncertainty about the regulatory implications of the Rule and members may have to alter their behavior in response to the Rule and/or to expend resources to determine applicability of, and compliance with, the Rule.

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

Dated: Sept 7, 2016

No. 15-4211

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ASSOCIATION OF AMERICAN RAILROADS, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

DECLARATION OF JEFF NORWOOD

I, Jeff Norwood, 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 General Manager for the Port Terminal Railroad Association (PTRA).

3. PTRA is an unincorporated terminal railroad association with its principal place of business in Houston, Texas. PTRA provides rail service to more than 200 shippers in the Houston area and functions as agent for a number of railroads in connection with line-haul shipments.

4. PTRA maintains 7 rail yards, 154 miles of rail track, and 20 bridges in the Houston area. Proper operation of these facilities and structures requires frequent construction and maintenance of the rail track, yards, and bridges. The expansive definition of "waters of the United States" in the proposed Waters of the United States Rule (the "Rule"), which was issued on June 29, 2015 (80 Fed. Reg. 37,054), will have significant adverse effects on PTRA's

construction, operations, and maintenance activities, and will hinder PTRA's ability to perform necessary emergency repairs.

5. For example, because the Rule provides only vague descriptions of the land and water features that purportedly constitute "waters of the United States" and often requires unpredictable, case-specific determinations by the U.S. Environmental Protection Agency or the U.S. Army Corps of Engineers, PTRA faces substantial uncertainty in evaluating which features on the lands over which its rail yards, rail track, and bridges are situated are "waters of the United States," and which are not.

6. Consequently, under the Rule, PTRA will face significant uncertainty and unnecessary burden in assessing its regulatory obligations, and could be subject to permitting and mitigation requirements that have never before applied to activities of this sort.

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

Dated: 10-21-2016

Jeff Norwood

Jeff Norwood, General Manager
Port Terminal Railroad Association
8934 Manchester
Houston, Texas 77012-2149

No.15-4188

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WASHINGTON CATTLEMEN'S ASSOCIATION, et al.,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

Respondents

DECLARATION OF WALLACE RONEY

BASED ON PERSONAL KNOWLEDGE I, WALLACE RONEY, DECLARE:

1. I ranch on approximately 100 thousand acres of land in the California counties of Butte, Tehama, Lassen and Plumas.

2. The ranch has been for the past 50+ years a member in good standing of the California Cattlemen's Association ("CCA") and I currently serve on CCA's Executive Committee. I also serve on the Board of Directors of CCA's local affiliate Tehama County Cattlemen's Association and have for many years.

3. I am aware of the pending "waters of the United States" Rule (the "Rule"). I have thought about which waters on my ranch might be regulated by the rule and how I might need to change my ranching practices to avoid violating the law under the Rule.

4. My ranch is owned by a corporation of which I am the sole shareholder and president. My family has been cattle ranchers since the 1850's.

5. I raise beef cattle. My Tehama and Butte county land is used as year-round pasture. The land is in California's Sacramento Valley has no appreciable rainfall from April through October so the grazing is limited.

6. While I am not aware of the presence of any wetlands on my ranch which would be jurisdictional under Supreme Court decisions such as *Rapanos*, there are constructed "stock ponds" on the land to provide perennial water for the cattle and wildlife. There are also areas which are shallow depressions on top of mostly impervious soil/rock which accumulate water during the rainy season.

7. Part of my ranch is in an arid area which receives about 25 inches of rain in a normal year, primarily in the winter; there are some defined ephemeral drainage channels but a large portion of the ranch consists of undulating land with shallow depressions which catch and hold water during rain events.

8. The naturally-occurring ephemeral drains on my ranch only carry water after it rains. Some of these natural ephemeral drains have been improved as ditches to provide better flow of water for domestic, stock water and irrigation to extend the limited growing season. These ditches carry water only after a moderate or heavy rain.

7. It is my understanding that under the Rule, my drainage ditches meet the definition of "tributaries" and are therefore categorically considered to be "waters of the United States." I also understand that they would not qualify for the rule's exclusion of certain ditches because they were excavated in natural erosional features that are likely also to have been "tributaries" as defined under the Rule.

8. My ditches have never previously been identified as "waters of the United States" under the Clean Water Act, and no regulator has ever found that they had a "significant nexus" to downstream navigable waters. I have never believed that I had a legal obligation to seek a federal permit for any of my ranching activities in and around these drainage ditches.

9. To the best of my knowledge, virtually none of the water which accumulates in the shallow depressions on my ranch ever makes its way to either

groundwater or to a defined water course which eventually connects to a navigable waterway during a normal weather pattern.

10. These shallow depressions that hold water are determined under the rule to be "similarly situated," however, even isolated shallow depressions on my ranch may be deemed to have a "significant nexus" with waters classified as "waters of the U.S." under the Rule, and may themselves thus be determined to be jurisdictional where a case-by-case analysis under the former Rule would not have determined a significant nexus.

12. On the ranch there are numerous dirt roads and feeding areas and working pens which are in proximity to the ephemeral streams and shallow depressions. I am currently replacing an area of working pens, routinely drive on the roads and have cattle causing dust which could constitute discharge of dirt (a pollutant) if those ephemeral waterways or shallow depressions were classified as waters of the United States. It is not clear to me that my activities are "normal farming activities" or whether they would qualify for any other potential exemption from permit requirements under Clean Water Act section 404 as a neighbor is being currently prosecuted for plowing a dry swale. For this reason, I will either have to seek a permit or face great uncertainty about whether my activities are violating the law.

13. If the Court does not invalidate the Rule, I will incur many thousands of dollars in costs and lost revenue to comply with the Rule. This will make my multi-generational cattle ranch economically unviable.

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

Executed this 19 day of October, 2016.

Wallace Roney

No. 15-4211

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ASSOCIATION OF AMERICAN RAILROADS, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

DECLARATION OF MICHAEL J. RUSH

I, Michael J. Rush, 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 Vice President, Safety and Operations, for the Association of American Railroads (AAR).

3. AAR is a national trade association whose members include freight railroads that operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. AAR's members also include passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR's members each own, operate, construct, maintain, and/or facilitate transportation via railroads in the United States. Railroads are a critical component of the nation's transportation system, providing for the movement of freight and passengers throughout the continental United States and Alaska. Railroads operate over approximately 139,000 miles of right-of-way in the United States.

4. AAR is the nation's leading railroad policy, research, standard setting, and technology organization. AAR and its members are committed to operating the safest, most efficient, cost-effective, and environmentally sound freight transportation system in the world.

5. A primary purpose of AAR is to represent and protect the interests of its members in federal rulemaking and in litigation that relates to or has the potential to impact its members' activities. To that end, AAR submitted comments on November 14, 2014, on the proposed Waters of the United States Rule (the "Rule"), which was later issued on June 29, 2015 (80 Fed. Reg. 37,054).

6. Proper operation and maintenance of railroads requires construction and maintenance of track, yards, bridges, culverts, ditches, and other facilities, structures, and features within railroad right-of-ways across the United States. AAR's members operate and maintain tens of thousands of bridges and hundreds of thousands of culverts across the United States. The Rule's expansive definition of "waters of the United States" will have significant adverse effects on railroad construction, operations, and maintenance vital to the nation's rail network, and will hinder AAR's members' ability to perform necessary emergency repairs.

7. As one example, ditches play a critical role in railroad safety by ensuring proper drainage, thus preventing the undermining of railroad bed material and potential sloughing, shifting, and uneven trackage. Railroad ditches also avoid washouts and ensure safe travel. AAR and its members estimate that there are over 100,000 miles of railroad ditches in the United States along railroad right-of-ways. Although the Rule provides an exclusion for ditches, the exclusion is subject to exceptions that raise substantial questions as to which of the railroad ditches would be considered "waters of the United States" and which would not. In addition, identifying certain railroad ditches as "waters of the United States" would restrict the railroads' ability to maintain ditches for safe operations.

8. In addition, because the Rule provides only vague descriptions of the land and water features that purportedly constitute "waters of the United States," AAR's members would face substantial and harmful uncertainty in evaluating those features on the lands over which their railroads run, or on which their rail terminals, rail yards and other facilities are situated, are "waters of the United States," and which are not.

9. Some of AAR's members have initiated or will soon initiate the process of seeking jurisdictional determinations or permits under the Clean Water Act in connection with construction, operation, and/or maintenance of their railroads, rail terminals, or rail yards in order to comply, or mitigate the risk of noncompliance, with the Rule. This process is costly, burdensome, and can result in project delays and potentially costly mitigation.

10. The interests that AAR seeks to protect in this action are manifestly germane to its organizational purposes. AAR has worked with its members on issues related to the scope and effect of the Clean Water Act and its regulations for decades, and it can represent its members' interests in this litigation without the direct participation of any of its member companies.

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

Dated: October 26, 2016

Michael J. Ruane

No. 15-3850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

DECLARATION OF FRANK SCHROEDER

I, Frank Schroeder, declare based on personal knowledge as follows.

1. Frank Schroeder is Vice President of the Delaware Basin Business Unit for Devon Energy Corporation ("Devon"). He is responsible for strategy development and the planning, direction and coordination of all activities involving company exploration and production for the company's assets in the Delaware Basin.

2. Devon is a Fortune 500 company headquartered in Oklahoma City, Oklahoma. Devon's operations are focused onshore in the United States and Canada. In the United States, Devon produces, stores and transports crude oil, natural gas liquids and natural gas in Texas, Oklahoma, New Mexico, Montana and Wyoming. Devon is a member of the National Association of Manufacturers ("NAM") and American Petroleum Institute ("API"). API submitted comments to the Proposed Rule in November 2014, and Devon endorsed those comments and incorporated those comments in its own comments submitted to EPA.

3. In light of the significant potential impacts of the proposed rule on the company, Devon submitted comprehensive comments on the proposed WOTUS Rule on November 14,

2014 and those comments can be viewed here. Our comments state that the Rule does not follow established Supreme Court precedent by expanding federal jurisdiction to waters and wetlands with no clear or discernable hydrologic water connection to navigable waters and creates more confusion than it clarifies. Devon's and API's comments identified the arbitrary, unreasonable and confusing aspects of the rule that result in the technical impracticability and economic unreasonableness of implementing the Rule. Implementation of this Rule will result in deleterious and unintended consequences for our company. If we had been given an opportunity to comment on the final Rule, which varies substantially from the proposed Rule, we would have submitted additional comments.

4. The economic effects of federal jurisdiction over waters and landscape features are of great concern to our company because such jurisdiction impacts our ability and costs to explore for, develop, produce and transport crude oil, natural gas, and natural gas liquids throughout the United States. Our company has expended significant time and money to ascertain the implications of the final Rule on our company.

5. In order to extract crude oil or natural gas from the subsurface, our company must clear and grade areas of land to construct a "well pad," on which the equipment necessary to drill for and extract the oil or natural gas will be placed. We must also construct access roads to transport equipment and personnel to and from the well pad. We always seek to avoid constructing well pads on or through waters or dry landscape features that would be deemed jurisdictional under the final Rule, but we are not always able to avoid such impacts. For impacts to jurisdictional waters involved in any of these activities, the Rule requires a permit under Section 404 of the Clean Water Act. The significant expansion of jurisdictional waters under the Rule will also likely result in a substantial increase in the number permits required for

storm water discharges from such construction activities under Section 402 of the Clean Water Act. Further, the Final Rule will have significant impacts on which sites will be required to have Spill Prevention, Control and Countermeasure Plan.

6. Our company develops oil and natural gas in areas of the United States that contain land features that may be deemed dry "tributaries" to navigable waters under the Rule. Such dry tributaries are per se jurisdictional under the final Rule. Determining which land features qualify as jurisdictional "tributaries" under the Rule will require the expenditure of substantial resources, including the hiring of engineers. The treatment of those dry channels as jurisdictional will require our company to obtain permits under Sections 404 and 402 of the Clean Water Act for disturbances to those features or for discharges into those features. Under some conditions, we may be able to obtain general permits, which impose financial costs and time delays. If general permits are unavailable, however, we are required to obtain individual permits, which typically cost our company thousands of dollars and many months of time.

7. The Rule's test to determine the "significant nexus" of a dry land feature or waterbody to a jurisdictional water is vague. The Rule's vagueness and ambiguity will require our company to expend considerable time and money to determine whether the waters or dry landscape features involved in oil or natural gas development, transportation, or other activities bear a "substantial nexus" to jurisdictional waters and are subject to the Rule's requirements. These are costs that we would not bear were it not for the Rule.

8. For example, Spill Prevention, Control, and Countermeasures (SPCC) Plans are required by EPA as directed within 40 CFR Parts 110 and 112 for all non-transportation-related facilities that have the potential or may "reasonably be expected" to have a discharge of oil into navigable waters or adjoining shorelines. Based on Devon's internal decision-making process

regarding SPCC applicability, it has been determined that many sites in the states in which Devon operates that were previously determined to be exempt would now be required to have SPCC plans.

9. Determining that a particular water or dry landscape feature is *not* jurisdictional under the new Rule will require our company to assume substantial risk. Given the vagueness and malleability of the Rule's "significant nexus" definition, the U.S. Army Corps of Engineers or EPA may later challenge the company's finding of no significant nexus and bring an enforcement action against the company for failure to comply with the Clean Water Act. This may lead to civil fines, criminal penalties, and the termination of the extractive activity. To mitigate the risk imposed by the Rule's vagueness, the company is likely obtain permits and prepare SPCC Plans even where none are required under a reasonable reading of the Clean Water Act and the Rule. Alternatively, the Rule's vagueness and ambiguities may also cause our company to forego oil and natural gas development out of concern that the federal government may later deem that area a jurisdictional water.

10. More generally, the possibility that various previously-non-jurisdictional features will be treated as waters of the United States creates uncertainty about whether and how our company can use its lands. For example, , in the Delaware Basin of New Mexico, based on Devon's internal decision-making process regarding SPCC applicability, it has been determined that many sites that were previously determined to be exempt would now be required to have SPCC plans

11. Over all, if the stay of the Rule were lifted and the Rule were allowed to go into effect, the Rule's expansion of regulatory jurisdiction and its malleability and vagueness would

and have enormous practical impacts on the company's willingness to undertake new development projects and on the cost of those projects that it elects to undertake.

12. Vacatur of the Rule would save the company these substantial costs.

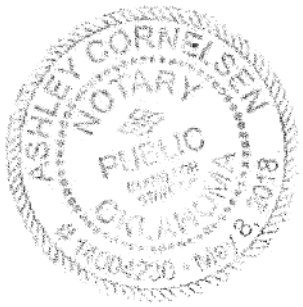
I, Frank Schroeder, declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of Sept, 2016.

Frank Schroeder

State of Oklahoma
County of Oklahoma

Signed and affirmed to before on (date) by Frank Schroeder



Ashley Cornelsen
Notarial Officer

My Commission Expires: May 8, 2018)
My Commission Number: 14004230)

No. 15-3751

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MURRAY ENERGY CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et. al.,
Respondents.

DECLARATION OF C. CRELLIN SCOTT
DIRECTOR OF ENVIRONMENTAL COMPLIANCE
MURRAY ENERGY CORPORATION

1. I am C. Crellin Scott, and I make this Declaration in support of the opening brief filed by the Business and Municipal Petitioners in *Murray Energy Corporation v. U.S. Environmental Protection Agency*, No. 15-3751 (and consolidated cases).

2. I am currently Director of Environmental Compliance for Murray Energy Corporation (Murray Energy), and I have been employed by Murray Energy since 2011. Murray Energy and its subsidiary companies own and operate eleven active coal mines in six states (Ohio, Illinois, Kentucky, Pennsylvania, Utah, and West Virginia).

3. Murray Energy filed suit in the United States Court of Appeals for the Sixth Circuit to challenge and halt implementation of the Final Rule due to its unlawful scope and the numerous unlawful substantive and procedural defects that led to the Final Rule's adoption. That case, styled *Murray Energy Corporation v. U.S. Environmental Protection Agency*, No. 15-3751, is the lead case in this consolidated litigation.

4. Murray Energy is also a member of the National Mining Association (NMA). NMA joined a cross-industry coalition of other Business and Municipal Petitioners in challenging the Final Rule in Case No. 15-3850, which has since been consolidated.

5. Murray Energy filed comments on the proposed rule in which we detailed at length the numerous legal and procedural flaws in the proposed rule, both facially and as applied to Murray Energy's mining operations.

6. As detailed below and in the accompanying opening brief, the Final Rule did not adequately address Murray Energy's comments or the numerous additional comments submitted by the Business and Municipal petitioners.

7. Murray Energy and its affiliates currently employ approximately 5,400 persons throughout its mining operations. Murray Energy is the largest underground coal mining company in America and is a global leader in underground longwall mining, a process that entails the full extraction of coal along a linear path that is up to several miles long.

8. In my role as Director of Environmental Compliance, I am responsible for overseeing and managing, among other things, the Clean Water Act (CWA) permitting requirements related to the expansion and operation of the company's mines. I have over 35 years of experience with respect to CWA jurisdictional and permitting matters.

9. I have read and am familiar with the Final Rule issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) redefining the term "waters of the United States."

10. Based on my experience and information and belief, the Final Rule, if allowed to go into effect, will have a direct and substantial impact on Murray Energy's active mining operations, and will require additional permits and aquatic resource mitigation for features never previously subject to CWA jurisdiction.

11. Murray Energy has extensive experience with permitting under sections 402 and 404 of the CWA, both of which hinge on the definition of "waters of the U.S." at issue in the Final Rule.

12. Murray Energy's mine sites generally contain numerous and varied water features, and the activities at these sites, including those associated with initial mine development, daily operations and routine expansions, often require some level of impact or interaction with these features, which, depending upon jurisdictional status, may or may not trigger Section 402 and 404 permitting. Murray Energy is thus keenly interested in and directly impacted by the Final Rule, which drastically expands the scope of Section 402 and 404 permitting requirements under the CWA.

13. For Murray Energy, the Final Rule, if allowed to go into effect, would significantly impede initial mine development, daily operations and routine expansions at many of our mine sites. EPA's extension of federal jurisdiction to previously unregulated features such as ephemeral streams, sediment ponds, drainage ditches, vernal pools, and other "fill and spill" features is particularly impactful to our mine sites. These features are abundant and pervade the eastern and western coalfields and, as a result, are frequently encountered during routine activities such as construction and maintenance of access and haul roads, as well as roadside ditches. Having to account for these features within the Section 402 or 404 permitting context would increase by several orders of magnitude both permitting costs and associated economic losses due to project delays.

14. By way of example, the Nolan Run Saddle Dike Extension is a refuse impoundment located at one of our mine sites in West Virginia. The CWA permitting for the impoundment has been completed, but additional permits have been requested for the Saddle Dike Extension. The proposed diversion ditches used to divert water away from the active mining areas will contribute flow to a perennial unnamed tributary of Jones Creek, which drains to Jones Creek and from there to Tenmile Creek. The ditches would be jurisdictional under the Final Rule, but are not jurisdictional under the old rule. These

ditches total approximately 3,300 linear feet. The costs associated with permitting and mitigation are estimated to be approximately $1.9 million.

15. The Final Rule will also extend CWA jurisdiction to numerous other features on our mine sites that not jurisdictional under the old rule. For example, wastewater treatment systems on mine sites utilize a series of ponds (*i.e.*, bench ponds and sediment ponds), natural drainages, and man-made drainage ditches, including both permanent and temporary ditches. These systems are required at mining operations under separate federal regulations promulgated pursuant to the Surface Mining Control and Reclamation Act (SMCRA). *See, e.g.*, 30 C.F.R. §816.41. Construction of surface mine bench ponds and sediment ponds is already generally subject to Section 402 permitting requirements. However, the Final Rule would add a burdensome and unworkable layer of complexity to this permitting scheme by making drainage ditches *themselves* subject to CWA jurisdiction. These man-made ditches must be frequently altered or moved at mine sites for maintenance or operational reasons, as well as to ensure compliance with SMCRA. In fact, the federal SMCRA regulations specifically authorize and direct mine operators to divert flow from mined areas. These regulations require, for instance, that temporary diversion ditches be removed promptly when no longer needed. *See* 30 C.F.R § 816.43. If these routine interactions with natural drainages and constructed ditches were subject to Section 404 permitting, as the Final Rule would have it, the cost and impact to mining companies like Murray Energy would be staggering.

16. The types of features identified above as falling within the CWA's jurisdiction under the Final Rule are all prevalent in and across Murray Energy's mine sites. As a result, I expect that the Final Rule will have an impact on nearly all of Murray Energy's mine sites and the costs noted above for Nolan Run would be typical for other sites, as well. For a company like Murray Energy, the costs associated with the Final Rule would be significant. For example, the $1.9 million attributable to the impacts of the Final Rule on Nolan Run alone could pay the yearly salaries for 22 mine workers making an approximate average salary of $88,000 per year. Again, this $1.9 million figure is for

just one of Murray Energy's eleven mining operations, and the impacts are expected to be exponentially higher across the enterprise.

17. Over the past few years, Murray Energy has had to substantially reduce its workforce nationwide. These workforce reductions are directly attributable to the regulations and policies of the current Administration, many of which appear designed to dismantle the coal mining sector. The Final Rule, if allowed to go into effect, will only exacerbate and expedite this end.

18. Moreover, the Final Rule makes Murray Energy less competitive with other sources of energy that may have fewer impacts from the Final Rule. The Final Rule also makes Murray Energy less competitive with coal producers in other countries, such as China, with whom we compete for global coal exports.

19. The rights to develop mine sites are extremely valuable, costing Murray Energy millions of dollars to obtain the legal and regulatory rights to operate. The Final Rule, if allowed to go into effect, would make our mine sites less valuable because it will cost significantly more to develop and operate them.

20. The Final Rule will force Murray Energy to redesign how mine sites will be developed and operated. This is a complicated process and involves legal, regulatory, and business decisions unique to each mine. In some instances, the Final Rule may make some mine sites uneconomical or logistically infeasible to operate.

21. Additionally, the Final Rule, if allowed to go into effect, would cause Murray significant business uncertainty with respect to how it approaches labor agreements, capital allocation, supplier contracts, and investment in land, labor, and equipment. This business uncertainty results from the lack of clarity in the Final Rule, and the costs associated with applying for, obtaining, and complying with CWA permits for geographic features that were previously not subject to CWA jurisdiction. These costs

are difficult to ascertain, but there is no doubt that the Final Rule will force Murray Energy to expend significant sums on CWA jurisdictional issues.

22. As noted above, the Final Rule is just part of the Administration's regulatory assault on the coal industry. The Final Rule serves as the foundation for a separate rulemaking by the Office of Surface Mining Reclamation and Enforcement (OSMRE) called the "Stream Protection Rule" or "SPR." *See* 80 Fed. Reg. 44436 (July 27, 2015).

23. The SPR borrows wholesale from the Final Rule's unlawful change to the definition of "waters of the U.S." Specifically, OSMRE claims that the SPR "promote[s] consistency with the Clean Water Act [by proposing] to define [Waters of the U.S.] as having the same meaning as the corresponding definition [as the Final Rule] in 40 C.F.R. 230.3(s)." 80 Fed. Reg. at 44478. The SPR effectively bans underground mining that will result in the subsidence of any "stream," the definition of which is dependent on the Final Rule and the arbitrary science that EPA used to support the Final Rule.

24. The inclusion of ephemeral streams within the definition of "streams" in the SPR is based on scientific studies conducted by EPA in the rulemaking leading to the Final Rule. Most of the ephemeral streams that EPA is seeking to assert jurisdiction over in the Final Rule (and OSMRE through the SPR), particularly those in headwaters such as Appalachia coal country, are little more than insignificant, dry ditches with minimal biological value. Yet OSMRE blindly relies upon the dubious scientific data for the Final Rule as the rationale for extending the SPR to these water features. Accordingly, the Final Rule's misguided and unlawful jurisdictional expansion of the CWA has emboldened other federal agencies to produce regulations that are based on the same flawed science and methodology. This constitutes a separate and unique threat to the mining industry, including Murray Energy, that is a direct and immediate consequence of the Final Rule.

25. If the Final Rule is vacated, as it should be, the harm to Murray Energy resulting from the Final Rule (and other federal rules that rely on it) would be redressed, and the costs,

uncertainties, and potential for unfettered and subjective enforcement of the Final Rule would be averted.

I, C. Crellin Scott, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 24 day of Oct, 2016.

C. Crellin Scott
Director of Environmental Compliance
Murray Energy Corporation

No.15-4188

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WASHINGTON CATTLEMEN'S ASSOCIATION, et al.,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

Respondents

DECLARATION OF VICTOR E. STOKES

BASED ON PERSONAL KNOWLEDGE I, VICTOR E. STOKES, DECLARE:

1. My family and I operate a hay and cattle ranch located at 20647 State Route 20, Twisp, Washington 98856.

2. I am the immediate Past President of the Washington Cattlemen's Association and am familiar with the new rule defining "waters of the United States" (WOTUS) and its implications for my ranch.

3. We own about 1,600 acres of land consisting of fields and grazing land. The grazing land accounts for about 1,400 acres of the total and is punctuated with draws, swales or small canyons that have ephemeral streams with identifiable bed and banks and ultimately flow offsite into a navigable waterway. These water features only flow during periods of snow melt or rain from intense summer storms.

4. We also graze similar lands, with ephemeral streams, that we lease from the

State of Washington and the United States Forest Service. These lands encompass approximately 20,000 acres.

5. The new WOTUS rule will undoubtedly cover these water features (either categorically as "tributaries" or "adjacent" waters, or on a case-by-case determination) for the first time. As I understand it, covered waters cannot be disturbed without federal approval. Even minor, unintended discharges are a technical violation of the Act that can lead to civil and criminal enforcement.

6. Therefore, the new WOTUS rule will increase my risk of liability and add additional burdens to my operation through permitting requirements and more management costs such as an increased need for fencing or stock water development. Currently, fencing in our area costs between $12,000 to $15,000 per mile for a completed fence. Not only is fence costly to construct, it has future costs in maintenance that are hard to calculate, but nonetheless real. Depending on the type of stock water development, whether it be a groundwater well or distributing surface water, the cost can range from a few thousand to several thousand dollars. A recent stock water well we drilled cost around $20,000 for just the well alone.

7. It is also likely that, with the implementation of the WOTUS rule, the State of Washington or the U.S. Forest Service will require greater protections for the ephemeral streams on the leased lands, adding to the regulatory and economic burden on our grazing operation.

8. Consequently, the WOTUS rule will have great impacts on my family's

operation. Whereas these ephemeral streams were not previously regulated, they will be regulated under the new WOTUS rule. This will affect where and how we graze our cattle and plant and harvest hay.

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

Executed this 19TH day of September, 2016.

Victor E. Stokes

Victor E. Stokes

No. 15-3850

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

DECLARATION OF STEPHEN WRIGHT

I, Stephen Wright, declare based on personal knowledge as follows.

1. My name is Stephen Wright and I am the Chief Executive Officer of Wright Brothers Construction Company, Inc. In my position I am responsible for overall management of a regional construction company working in 7 states employing in excess of 400 people.

2. Wright Brothers Construction Company, Inc. is recognized as one of the largest civil contractors in the Southeastern United States and is based out of Charleston, Tennessee, with projects located across the Southeast. Our design and construction services include grading, site development, highway and bridge construction, landfill construction, asphalt production and paving, aggregate processing, commercial concrete services, and industrial maintenance services. Services associated with this work are asphalt paving, earth and rock excavation, drilling and blasting of rock, crushing and screening of rock, graded stone placement, storm drainage installation, leachate collection installation, utility installation, foundation work, steel erection, bridge construction, miscellaneous concrete construction, and erosion control installation. Wright Brothers currently performs these services in Alabama, Georgia,

Kentucky, Mississippi, North Carolina, Tennessee, and Virginia.

3. Wright Brothers Construction Company, Inc. is a member of the Contractors Division of the American Road and Transportation Builders Association (ARTBA). I have served as ARTBA's Chairman and am currently a member of ARTBA's Board of Directors.

4. The economic effects of federal jurisdiction over waters and landscape features are of great concern to our company because such jurisdiction impacts our ability and costs to design and construct transportation improvements. Our company has expended significant time and money to ascertain the implications of the final Rule on our company. We submitted regulatory comments on the rule which can be found at: http://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-17060. Additionally, Wright Brothers Construction company supports ARTBA's comments on the rule.

5. A significant number of jobs Wright Brothers Construction Company works on are transportation improvement projects. As part of constructing any federal transportation project, Wright Brothers Construction Company undertakes a variety of activities that are subject to the environmental review and approval process in the normal course of their business operations. Specifically, activities involved in transportation construction often impact wetland areas. When any activity associated with construction impacts a wetland area or a "water of the United States" as defined by the Clean Water Act, a permit is required under Section 404 of the Act.

6. Wright Brothers Construction Company has concluded that the final rule will expand federal jurisdiction under the Clean Water Act and require permits for areas which had not previously been defined as "waters of the United States," including waters on our lands and the lands that we develop for our clients and customers. At a minimum, Wright Brothers

Construction Company believes the final rule is confusing and vague. If the Rule is allowed to come into force, this lack of clarity will require us to obtain permits defensively, even when none is necessary, given the economic ruin that criminal and civil penalties can inflict.

7. Increased permitting requirements and confusion over federal jurisdiction will lead to delays in the project review and approval process. Delays will result in increased material costs and uncertainty of work schedules for our employees. Additionally, increased permitting requirements will also drive up the total cost associated with transportation improvement projects. Wright Brothers Construction Company is particularly concerned with the treatment of roadside ditches under the rule. Requiring wetland permits for ditch construction and maintenance would force our company to incur new administrative and legal costs in virtually every project we undertake. The potential delays and increased costs that would result from EPA's proposal would divert resources from timely ditch maintenance activities and potentially threaten the role ditches play in promoting roadway safety.

8. Our company works on transportation construction projects in areas of the United States that contain land features that may be deemed dry "tributaries" to navigable waters under the Rule. Such dry tributaries are per se jurisdictional under the final Rule. Determining which land features qualify as jurisdictional "tributaries" under the Rule will require the expenditure of substantial resources, including the hiring of engineers. The treatment of those dry channels as jurisdictional will require project owners to obtain permits under Sections 404 of the Clean Water Act for disturbances to those features or for discharges into those features. Under some conditions, project owners may be able to obtain general permits, which impose financial costs and time delays. If general permit are unavailable, however, project owners are required to obtain individual permits, which typically cost our company hundreds of thousands of dollars

and years of time. This added uncertainty in the permitting process hampers the ability of Wright Brothers Construction to set work schedules for our employees and can also result in projects being scaled back.

9. The Rule's test to determine the "significant nexus" of a dry land feature or body of water to a jurisdictional water is vague. The Rule's vagueness and ambiguity will require our company to expend considerable time and money to determine whether the waters or dry landscape features involved on any job site bear a "substantial nexus" to jurisdictional waters and are subject to the Rule's requirements. These are costs that we would not bear were it not for the Rule.

10. For example, on public transportation projects in the areas we work, it is customary for contractors to be required to acquire and permit property for the import of or the disposal of excess/unsuitable excavation generated by projects. The normal time allowed between public advertisement and receipt of bids is less than 30 days. The inertia of this system often does not allow for the necessary time for a complete and reliable assessment of various potential sites prior to bid. The inability to quickly and reliably determine if an area is jurisdictional or not dramatically increases the risk to the contractor in the bid process. This increased risk ultimately has to be passed along to the public as increased construction costs. In cases where the time does exist the costs for every site can run into the thousands of dollars, which again must ultimately be passed along to the tax paying customers.

11. Determining that a particular water or dry landscape feature is *not* jurisdictional under the new Rule will require our company to assume substantial risk. Given the vagueness and malleability of the Rule's "significant nexus" definition, the U.S. Army Corps of Engineers or EPA may later challenge the either the project owner's or the company's finding of no

significant nexus and bring an enforcement action against the company for failure to comply with the Clean Water Act. This may lead to civil fines, criminal penalties, and the termination of the extractive activity. To mitigate the risk imposed by the Rule's vagueness, the company is likely obtain permits even where none are required under a reasonable reading of the Clean Water Act and the Rule. Alternatively, the Rule's vagueness and ambiguities may also cause our company to forego transportation construction projects out of concern that the federal government may later deem that area a jurisdictional water.

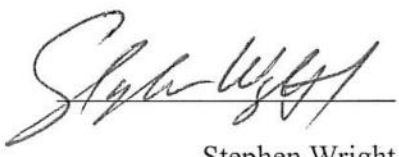
12. More generally, the possibility that various previously-non-jurisdictional features will be treated as waters of the United States creates uncertainty about whether and how our company can construct transportation improvements. For example, we currently have a transportation project in the Appalachian Mountains which has a significant amount of excess material. The excess material must be placed outside the DOT right of way, on private property. To date we are two years into the projects and are still not finished evaluating and permitting waste sites. This has added significant cost to the project and delayed progress. The proposed rule might very well make expensive and time consuming become impossible.

13. Over all, if the stay of the Rule were lifted and the Rule were allowed to go into effect, the Rule's expansion of regulatory jurisdiction and its malleability and vagueness would have enormous practical impacts on the company's willingness to undertake new transportation construction projects and on the cost of those projects that it elects to undertake.

14. Vacatur of the Rule would save the company these substantial costs.

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

Executed this 22 day of September, 2016.



Stephen Wright

EXHIBIT E

to the

Declaration of Don Parrish

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

DECLARATION OF EMILY W. COYNER

I, Emily W. Coyner, declare based upon personal knowledge that:

1. The National Stone, Sand and Gravel Association ("NSSGA") member companies are responsible for the essential raw materials found in every home, building, road, bridge and public works project in the U.S. and produce more than 90% of the crushed stone and 70% of the sand and gravel consumed annually in the United States. The industry employs about 100,000 men and women nationally. NSSGA and its predecessor organizations have represented the industry for over 100 years.

2. NSSGA works to advance public policies that protect and expand the safe, environmentally responsible use of aggregates. NSSGA favors a public policy environment that fosters business growth for the aggregates construction materials industries, including reasonable regulations.

3. NSSGA submitted comments on the 2015 WOTUS Rule on November 13, 2014, as well as signed onto the WAC comments letter. *See Comments on EPA and Corps Proposed Rule Defining Waters of the United States Under the Clean Water Act*, Dkt. No. EPA-HQ-OW-2011-0880 (Nov. 13, 2014); *Comments of the Waters Advocacy Coalition on the Envt'l Protection Agency's and*

U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, Dkt. No. EPA-HQ-OW-2011-0880 (Nov. 13, 2014) (corrected Nov. 14, 2014). NSSGA's comments included numerous examples of how the rule would make the 404 permitting process more difficult and expensive due to the inclusion of dry stream beds and isolated wetlands. NSSGA met with EPA to discuss the technical problems the Rule would impose on a typical aggregates operation. A member of NSSGA, Memphis Stone & Gravel Co., testified before the US House of Representatives Small Business Committee on the negative impacts the rule would have on their business, including increased costs and uncertainty. NSSGA also submitted comments on 12 congressional hearings on the Rule. NSSGA has worked to inform members about Rule via presentations and articles.

4. NSSGA has worked with its members on CWA jurisdictional issues for decades, and can readily defend its members' interests in opposing the rule.

5. Because aggregates are often created by water, they are located near water, such that jurisdictional definitions are of primary importance.

6. The scope and reach of CWA jurisdiction has a direct impact on the costs of planning, financing, constructing, and operating an aggregates facility. Aggregates operators invest in properties with quality aggregates for decades in the future. Because the Rule increases the jurisdictional reach of the CWA, those reserves will become increasingly difficult to permit due to their proximity to natural wetlands, flood plains, and intermittent streams. The Rule would impose additional permitting and mitigation costs and add significant time delays in permitting for aggregates mining activities.

7. The Rule will make it even more difficult and expensive for companies to meet the needs of their customers who depend on a steady supply of aggregate for essential public works projects such as new road construction, flood control, water and wastewater treatment, and the repair

of existing bridges and highways. Ultimately these increased infrastructure costs will be borne by taxpayers.

8. The uncertainty surrounding the Rule and its implementation will make opening a new operation or expanding an existing operation that much more difficult. In some cases, property owners will have to walk away from reserves because of increased compliance costs. Because the 2015 Rule is unclear and vague, member companies will have to expend even more time and money hiring consultants and in some areas evaluate the effect the Rule will have on their operations. It is virtually certain that some of our member companies will have to alter their operations to comply with the Rule.

9. Allowing the Rule to go into effect for even a short time is having a damaging effect on the aggregates industry. Where the WOTUS Rule has been implemented, member companies have had to expend time and expense hiring consultants for jurisdictional determinations. Member companies in jurisdictions where the 2015 Rule is stayed have also expended resources to evaluate the effects of the Rule on their operations should the stay be lifted for a short time before a new Rule is in place.

10. Many of our members operate in multiple states. Because the Rule is stayed in some states but has entered effect in others, these members therefore are currently subject to two regulatory systems, leading to confusion. Because of the confusion and uncertainty, producers will likely hold off on permitting new facilities or expansions, possibly causing shortages of crucial building materials for vital infrastructure projects. Holding off on these projects, along with the resources that members will have to expend to ensure compliance under the current regulatory regime, could result in a loss of jobs.

11. A national injunction is necessary to prevent irreparable harm to the industry, including many project delays and increased costs.

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

Dated: 9/16/18

Emily W. Coyner

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, AMERICAN FARM BUREAU FEDERATION, *et al.*, *Intervenor-Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

DECLARATION OF ROSS EVAN EISENBERG

I, Ross Evan Eisenberg, declare based on personal knowledge as follows.

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

2. I am Vice President of Energy and Resources Policy at the National Association of Manufacturers ("NAM"), the largest manufacturing association in the United States, representing over 14,000 small and large manufacturers in every industrial sector and in all 50 states. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

3. NAM members own or have development rights over property that contain waters or landscape features that may qualify as waters of the United States in the 26 states currently subject to the 2015 rule ("WOTUS Rule"). The scope of waters and landscape features subject to the WOTUS rule is vague and unclear, thereby causing imminent harm to the NAM's members. For example:

   a. Relatively minor activities such as clearing sediment from stormwater basins or moving stormwater drains can require additional permitting and reviews under the WOTUS Rule. This increases time and money required to complete work;

b. Ditches, including roadside ditches that have perennial flow, are regulated under the WOTUS Rule. The WOTUS Rule includes exemptions for certain ditches, but there are many other types of ditches that are now regulated as tributaries. Even dry ditches that are either a relocated tributary or were excavated in a tributary are now regulated by the EPA. It is up to landowner to prove that their ditches do not excavate or relocate a historic tributary. This allows the federal government to assert jurisdiction based on past conditions, not present;

c. Increased stream numbers and tributary lengths could undermine the utility of nationwide permits in some cases. This stalls transmission line maintenance, infrastructure expansion, and other projects that currently rely on nationwide permits;

d. At a minimum, energy exploration and production companies expect the number of permits required to double. Managing the nine-to-eighteen- month individual permitting process is difficult and could lead to loss of leases and production. For the increases in permitting, site delineations, and modified construction practices, one NAM member informed the NAM that costs could increase in the range of 100 to 750 percent under the WOTUS Rule;

e. When homebuilders face increased site costs under the WOTUS Rule, homeowners are forced to sacrifice other items, like upgrades to high efficiency appliances, windows, and doors, to stay within budget;

f. If a manufacturer needs to install a larger loading dock and build additional space to manufacture products, the WOTUS Rule could force the manufacturer to seek additional permits and potentially put major systems in place to treat stormwater that would not have applied before the WOTUS Rule's expanded jurisdiction; and

g. A heavy equipment manufacturer's site for testing equipment and moving dirt has rain flow, and as a result may now be covered under the WOTUS Rule. Even if the agencies say it is not a problem, citizen suits could hamper operations and maintenance work or prevent clearing out ponds and holes used for testing.

4. The application of the WOTUS rule in 26 states will delay important new projects or activities that would require new permits under the apparent requirements of the WOTUS Rule—permits that would not have been required under the rules and guidance in effect before promulgation of the WOTUS rule in 2015. I anticipate that these delays could impede the construction and operation of new facilities or expansions and could cost American jobs.

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

Dated: September 7, 2018

Ross Evan Eisenberg

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

DECLARATION OF DON PARRISH

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"). I offer this Declaration based on my 30 years working on behalf of farmers and ranchers across the nation, focusing primarily on Clean Water Act issues.

3. I submitted a declaration on September 20, 2016, in support of AFBF's challenge to the so-called 2015 "Clean Water Rule" (WOTUS Rule) in the U.S. Court of Appeals for the Sixth Circuit. I also signed a declaration on February 6, 2018 in support of AFBF's challenge to WOTUS Rule in the Southern District of Texas. Any statement made in those declarations remains true except insofar as it has been superseded by anything I have declared here.

4. In the jurisdictions where the 2015 WOTUS Rule has entered into effect, it has significantly expanded the scope of Clean Water Act jurisdiction as it applies to farm and ranch lands. The WOTUS Rule expands jurisdiction to regulate countless sometimes-wet landscape features that are ubiquitous in and around farmland. These common features include drains carrying

rainfall away farm fields, ordinary farm ditches, and low areas in farm fields where water channels or temporarily pools after heavy rains.

5. AFBF members in the 26 states where the WOTUS Rule is currently in effect now must alter their activities to prevent inadvertent unlawful "discharges" of "pollutants" into waters categorized as "waters of the United States," which may require them to take lands out of production. Alternatively, they can obtain costly Clean Water Act permits, but the exorbitant cost of consultants, engineers, permit applications, mitigation costs and compliance costs makes that an untenable option for most farmers. This is despite the fact that the Agencies are currently working to repeal and replace the WOTUS Rule, such that it may soon be out of effect.

6. The enormous costs of taking land out of production or seeking and obtaining permits will be not be recoverable by these farmers and ranchers. Nor will the injuries be remedial to the employees they may have to let go as a consequence.

7. In many areas, farmers are now limited in their ability to conduct basic soil manipulation necessary for any farming – using a plow. If a field contains low areas deemed to be "adjacent waters" under the WOTUS Rule, farmers will be unable to plow through those low areas when the WOTUS Rule is in effect. Other common soil manipulation activities such as grading, laser leveling, and terracing are often necessary for agricultural production. But if a landscape feature is considered perfectly farmable land one month and "navigable water" the next, few farmers will be willing to conduct soil manipulation activities that risk CWA liability now that the WOTUS Rule is in effect. Farmers may choose to expend the resources necessary to seek Clean Water Act "dredge and fill" permits for these soil manipulation activities, even if the permit is not necessary. The costs associated with the permit process will not be recoverable.

8. The WOTUS Rule also makes it difficult for farmers to avoid the risk of Clean Water Act liability in constructing and maintaining important farm infrastructure, such as farm 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" depending on the status of litigation in a local district court. In states now subject to the WOTUS Rule, farmers within that district court will be at risk of violating the Clean Water Act because installing a fence post in an ephemeral drain is an unlawful discharge to a jurisdictional water under the WOTUS Rule.

9. The harm to AFBF members caused by a constantly changing regulatory climate is further compounded by the vague language and lack of clarity in the WOTUS Rule. That lack of clarity complicates efforts by AFBF members to determine how they can farm their land because in many instances, they are unable to identify jurisdictional "waters" on their land without expending resources on a technical consultant. The WOTUS Rule allows the Agencies to rely on desktop tools and remote sensing technology unavailable to farmers. As a result, many farmers are unable to identify jurisdictional waters on their land with a naked eye, increasing the risk of an unintentional Clean Water Act violation. To avoid the risk of an unlawful discharge to these landscape features, farmers will either expend resources to determine whether land and water features in and around their property are "waters of the United States" or alter their agricultural operations to avoid discharges into ambiguous features. Again, these costs will not be recoverable.

10. Without a nationwide injunction, farmers must either scale back important and otherwise lawful agricultural 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 farming to seek precautionary permits.

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

Dated: 9-10-18

Don Parrish

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

DECLARATION OF JANET PRICE

I, Janet Price, 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 Environmental Manager for Rayonier Inc, a National Association of Forest Owners member company. In this role, I am responsible for supporting Rayonier's forestry operations in understanding and complying with environmental regulatory requirements.

3. Rayonier Inc., through its subsidiaries (collectively, "Rayonier"), owns over two million acres of land in the United States in states including Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, Oklahoma, South Carolina, Washington, and Oregon. Some of these states are subject to the 2015 WOTUS Rule, 80 Fed. Reg. 37,054 (June 29, 2015), while others are not.

4. Rayonier has features on its lands that Rayonier has historically understood not to be subject to regulation under the Clean Water Act. Some of these features may constitute a "water of the United States" under the 2015 Rule. Because the 2015 Rule is vague, it is not certain which features qualify.

5. Rayonier has undertaken a detailed internal review of the 2015 Rule in an effort to interpret the requirements and determine the impact to timberland operations encompassing a multi-

state land base. This review has entailed substantial time and resources, which are not recoverable, and will continue to be incurred as I and other Rayonier staff and contractors work to identify features potentially covered under the 2015 Rule.

6. The 2015 Rule may have expanded the scope of "waters of the United States" to cover additional features on Rayonier lands that are difficult to characterize, such as dry ephemeral drains or ditches crossing Rayonier land that may eventually feed into some other water feature offsite of Rayonier property.

7. The possibility that these features will be treated as "waters of the United States" creates uncertainty about whether and how Rayonier can use its lands and about what regulatory requirements of particular uses may apply.

8. The 2015 Rule further affects Rayonier's use of some pesticide application general permits in states in which Rayonier operates. Rayonier must identify and quantity features on its lands that are "waters of the United States" and demonstrate that it does not discharge into such areas above a particular threshold. Because the 2015 Rule is unclear and covers land features that are difficult to identify, this process is rendered extraordinarily difficult and uncertain.

9. To ensure that Rayonier continues to engage in best management practices under the 2015 Rule, I anticipate that Rayonier will have to establish additional buffering around potential "waters of the United States," which would irreparably take land out of production.

10. The regulatory uncertainty surrounding the 2015 Rule makes the situation untenable. It is my understanding that the 2015 Rule has been the subject of legal challenges and that the EPA is currently seeking to repeal and replace the 2015 Rule. Because the 2015 Rule may soon be replaced, our efforts to identify features that qualify as "waters of the United States" may soon become moot. Adding to the complexity and uncertainty, the 2015 Rule is now in effect in some, but not all, of the states in which we operate. This shifting legal landscape impacts Rayonier's ability to plan its operations to ensure compliance.

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

Dated: 09/10/2018 Janet Price

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, AMERICAN FARM BUREAU FEDERATION, *et al.*, *Intervenor-Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

DECLARATION OF ROBERT E. REED

I, Robert E. Reed, 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 farm about 3,000 acres of land near Bay City, Matagordo County, Texas.

3. I am today and have been for the past 40 years a member in good standing of the Matagorda County Farm Bureau, Texas Farm Bureau, and American Farm Bureau Federation. I served on the board of directors of the Texas Farm Bureau from 1999-2005 and 2011-2017.

4. I am aware of the 2015 "waters of the United States" Rule (the "Rule"). I have thought about which waters on my farm may be regulated by the Rule and how I will need to change my farming practices in order to avoid the possibility of liability under the Rule.

5. I am what is commonly called a "cash tenant," meaning I lease, rather than own the land I farm. I pay rent on land that I lease, even if am not able to farm any portion of it. I have been farming this land for the last 40 years.

6. I farm rice and sorghum and graze cattle, although the cattle belong to another local tenant farmer. The land was first converted to rice fields in the early 1900s. I started farming rice in 1979, which is planted in a three year rotation. Cattle graze on fallowed fields as part of this rotation.

7. While I am not aware of the presence of any wetlands on my farm, I have constructed ponds on my land in the last ten years. These ponds serve two purposes: to provide water for cattle and to serve as habitat for ducks for hunting.

8. The ponds are generally filled with runoff from rains. Rice fields are drained prior to harvest and where drainage allows, the water from rice fields is also captured in these ponds. Also, at the end of irrigation season, if the Lower Colorado River Authority has water available, it can be purchased and diverted to the duck ponds.

9. The terrain on my farm appears flat but it has gradual natural slope. I have not precision-leveled my fields. As a result, when water moves through my farm, it typically forms a channel and moves with the natural contours of the land.

10. The land I farm has naturally occurring ephemeral drains that carry water only after it rains. Some of these natural ephemeral drains have been improved as ditches to provide better flow of water from my fields. These ditches carry water only after a moderate or heavy rain or

when there is overflow from my rice fields. From what I can see (now and prior to their improvement), these ditches have a lower area of vegetation (less than a bed), an area of higher elevation (possibly a bank) and the flow of stormwater tends to move vegetation and leave visible marks in the soil (possibly an ordinary high water mark). These ditches lead to a creek and eventually to Matagorda Bay and the Gulf of Mexico.

11. It is my understanding that under the Rule (but not under prior guidance), my drainage ditches meet the definition of "tributaries" and are therefore categorically considered to be "waters of the United States." I also understand that they would not qualify for the Rule's exclusion of certain ditches because they were excavated in natural erosional features that are likely also to have been "tributaries" as defined under the Rule.

12. My ditches have never previously been identified as "waters of the United States" under the Clean Water Act, and no regulator has ever found that they had a "significant nexus" to downstream navigable waters. I had never before believed that I had a legal obligation to seek a permit for any of my farming activities in and around these drainage ditches.

13. I have always recognized that the water in my ditches eventually reaches Matagorda Bay. I therefore have always taken care to place a small buffer and farm around those ditches to avoid spraying pesticides and fertilizers into them. Now, however, I understand that I will have a legal obligation to ensure that absolutely no fertilizers or pesticides fall into those ditches, even when the ditches are dry, without first obtaining a Clean Water Act permit.

14. Because my ditches are now probably "waters of the U.S." under the Rule, if the Rule remains in effect, I will need to either establish a large buffer around those ditches, at least 15 feet, to avoid an unlawful "discharge" of any "pollutant" (including, for example, fertilizers and pesticides) to those ditches. I will need to take about 5 percent of the field out of production, which is about 5 acres of lands from a 100 acre field, to ensure compliance the rule. In a typical crop year, taking that amount of land out of production would cost me about $1,400 an acre in revenue. Even if I must take this land out of production, my rent charges remain the same.

15. It is my understanding that the 2015 Rule has currently entered effect in Texas, but that it is the subject of legal challenges and may be invalidated even a short time from now. However, I must prepare my land for the next year's planting season months in advance. Timing is critical. I face two options. First, I can till the field as I normally would absent the 2015 Rule, and risk that the costs I expend preparing the land for planting will be lost if the 2015 Rule is still in effect during the planting season and requires me to leave those lands out of production. Or, I can leave those portions of the field untilled as described in Paragraph 14, but will lose the opportunity to plant in those areas, even if the 2015 Rule is later invalidated. In either case, I face an unrecoverable loss of revenue.

16. I have traditionally used aerial applications of pesticides and fertilizers for my rice fields. Based on my understanding of my new legal obligations, I will no longer be able to use aerial applications of pesticides or fertilizers on my rice fields unless I can be sure that there is absolutely no unlawful "discharge" of "pollutants" to these ditches, even at times when they are not carrying water. I am also concerned because many of these ditches are very close to the rice field levees. While aerial application of pesticides and fertilizers is aimed at a particular target rice field, there is a certain amount of imprecision in application, resulting in product falling outside the rice field. To prevent any potentially unlawful "discharge" to ditches in close proximity to my rice fields, I will need to stop aerially applying fertilizers and pesticides within a 35 foot buffer on the inside perimeter of my rice fields. If field conditions are dry enough at the right times, I may be able to use ground applicators to apply fertilizer or pesticide on the perimeter of the fields (but outside of the buffer zone around the ditches). This would involve additional time and cost. If ground conditions do not allow for ground applications, my rice production acreage will be reduced by about 10% since plants within the perimeter would not receive sufficient fertilizer or pesticides to cultivate a viable crop. This will cost me about $14,000 per 100 acre field in unrecoverable revenue losses.

17. All of these ditches have culverts and pipe crossings, enabling me to move my farm equipment over the ditches. Many of the culverts will need to be replaced in the near future. Replacement of a culvert will likely result in the discharge of dirt and gravel (a pollutant) into these ditches. Unless my culvert improvements are deemed "normal farming activities" by the Corps, I will need to seek a permit. It is unclear to me whether replacing a culvert qualifies as a

"normal faming activity" or qualifies for any other exemption under the 2015 Rule. I therefore have no way to know with confidence whether replacing the culverts would be lawful without a permit.

18. If the Court does not invalidate the Rule, I will incur many thousands of dollars in costs and lost revenue to comply with the Rule. These costs will not be recoverable.

19. I signed a declaration on August 24, 2016 in support of the American Farm Bureau and Texas Farm Bureau's challenge to the 2015 Rule in the U.S. Court of Appeals for the Sixth Circuit. Everything I stated in that declaration remains accurate except insofar as it has been superseded by anything I have declared here.

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 10 day of September, 2018.

Robert E. Reed

Robert E. Reed

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

DECLARATION OF JEFF SLAVEN

I, Jeff Slaven, 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 owner of Maple Springs Farm ("Maple Springs"), and a National Cattlemen's Beef Association member. In this role, I oversee all aspects of operation of Maple Springs, including compliance with the Clean Water Act and other regulatory requirements.

3. Maple Springs has numerous ditches and other land and water features on its lands that it previously understood not to be subject to regulation under the Clean Water Act. Some of these features do or may constitute a "water of the United States" under EPA's recently promulgated WOTUS Rule, 80 Fed. Reg. 37,054 (June 29, 2015), although it is unclear which ones because the Rule is vague. The United States Geological Survey's National Hydrography Dataset shows an intermittent stream flowing through my property. Standing on the land, there is no visual indication of an intermittent stream. In fact, Maple Springs recently constructed a covered cattle barn that is located on, or about, a portion of this mapped feature. I am particularly

concerned that the government will interpret this mapped feature to be a water of the United States under the WOTUS Rule and require me to get a permit under the Clean Water Act.

4. Maple Springs qualifies as an "animal feeding operation" (AFO) under 40 C.F.R. § 122.23. Pursuant to 40 C.F.R. § 122.23(c), an AFO can be designated as a "concentrated animal feeding operation" (CAFO) based upon, among other things, "the location of the AFO relative to waters of the United States."

5. A CAFO is considered a "point source" under the Clean Water Act. *See* 33 U.S.C. § 1362(14). Thus, CAFOs must obtain a NPDES permit under the Act in order to discharge any pollutant into "waters of the United States." Accordingly, the possibility that the WOTUS Rule will designate additional features on Maple Springs' land as "waters of the United States" creates uncertainty about whether and how Maple Springs can use its lands. The presence of additional waters of the United States near Maple Springs' lands could cause it to be designated a CAFO—which, in turn, would require Maple Springs to obtain NPDES permits for activities that previously would not have required one or otherwise to cease those activities.

6. Separate and apart from possible CAFO designation, the Rule would also have direct effects on the use of Maple Springs' lands, as discharges from point sources like farming equipment into features like ditches may require permits or changes in farming practices.

7. Maple Springs has reviewed the Rule in an effort to understand the requirements and determine the impact to its operations. Maple Springs has dedicated time to identifying features on its lands that may be covered under the Rule, and has made plans to take further action in response to the Rule.

8. Due to the decision of a federal judge in the U.S. District of South Carolina, the WOTUS Rule is now in effect in the State of Virginia, where Maple Springs is located. I am spending additional time, money, and resources to access and implement further plans to come

compliance with the law. These further plans include relocating three-hundred steer calves to a sod confinement lot to complete the backgrounding phase. Consequently, I expect a loss of weight gain, increased labor associated with daily feeding, and reduced overall cattle performance at an estimated cost of $0.35/pound and $15,750. Additionally, I have increased concern for placing three-hundred head of cattle in the semi-confinement sod boundary for 90-100 days due to the associated nitrogen, phosphorus, and sediment runoff that will occur due to sod degradation from cattle movement.

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

Dated: 9/20/2018

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

DECLARATION OF THOMAS WARD

I, Thomas J. Ward, declare and state under penalty of perjury as follows:

1. I am a resident of Virginia, over 18 years of age, and have personal knowledge of the matters contained herein.

2. I am the Vice President for Legal Advocacy for the National Association of Home Builders ("NAHB"). In this capacity, I am familiar with the mission and goals of NAHB in the administrative, legislative and judicial areas. Furthermore, as the head of NAHB's Litigation Department, I am knowledgeable of the ongoing litigation surrounding the 2015 *Definition of "Waters of the United States*," and the subsequent related rulemakings.

3. NAHB is a national trade association, headquartered in Washington, D.C., whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all consumers to have safe, decent and affordable housing.

4. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 140,000 members are home builders and/or remodelers. The remaining members are associates working in closely related fields within the housing industry, such as land development, mortgage finance and building products and services.

5. NAHB works closely with federal agencies during adjudicative and rulemaking processes to ensure that the agencies' decisions do not adversely impact the home building industry.

6. NAHB commented extensively on the 2015 *Definition of "Waters of the United States,*" and has commented on all of the subsequent related rulemakings.

7. Due to the August 16, 2018 Order filed in the District Court of South Carolina vacating the Environmental Protection Agency's rule titled *Definition of ''Waters of the United States''—Addition of an Applicability Date to 2015 Clean Water Rule*, NAHB has had to expend resources to inform its members of the impact of the South Carolina decision.

8. Because of the nationwide confusion caused by August 16 Order, and the preliminary injunctions of the 2015 *Definition of "Waters of the United States*," NAHB has explained to its membership that some states will continue to conduct Clean Water Act jurisdictional determinations ("JDs") under the so-called 1986 definition of the term "waters of the United States" while in other states, JD's will be conducted under the 2015 definition of that term.

9. In addition, I personally have answered questions from members in some of the 23 states where the 2015 definition is currently applicable. All of the questions concern whether they should wait some amount of time before seeking a JD on their property. I have explained that if they were to obtain a JD under the 2015 definition, there is a likelihood that more of their property will be determined to be a "water of the United States" than under the 1986 definition. Furthermore, I have explained that if they obtain a JD under the 2015 definition, they may be precluded from having the property reassessed under the 1986 definition, or that any reassessment will cause a delay in their project. The NAHB members that I have spoken to have explained that postponing a JD will delay their project thereby costing more money to bring the project to completion.

10. NAHB would not have taken these actions but for the confusion caused by the South Carolina District Court's August 2018 Order and the preliminary injunctions of the 2015

Definition of ''Waters of the United States.''

11. Under Clean Water Act section 404, the Corps of Engineers issues both individual and nationwide (or general) permits. Individual permits are site specific and the permittee does not know the conditions of the permit before it is issued. In my experience, it take over 2 years to obtain an individual permit and costs over $250,000.

12. In contrast, nationwide permits are general, and the permittee knows the conditions of the permit before applying. Furthermore, to qualify for a nationwide permit, a landowner may only impact a limited area (or linear footage) of jurisdictional waters. In my experience, a landowner can usually obtain a nationwide permit in less than a year with an average cost of around $30,000.

13. Many homebuilders obtain their Clean Water Act approvals pursuant to nation-wide permits. Homebuilders choose to operate under nationwide permits because they can obtain their approval in less time and less expensively than under an individual permit.

14. Under the 2015 definition, the jurisdictional area (or linear footage) of waterbodies will be greater than under the 1986 definition. Thus, many projects that obtain JDs under the 2015 definition will have more or larger jurisdictional waters on site. Therefore, many projects will not qualify for a nationwide permit under the 2015 definition.

15. Therefore, many homebuilders that operate in states where the 2015 definition is now applicable will delay their projects to avoid having to obtain an individual permit and some projects may even be abandoned.

16. This means NAHB members' operations are being irreparably delayed and disrupted by the 2015 Rule.

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

Dated: 09/13/18

Thomas J Ward

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with 10th Cir. R. 30.2.

/s/ *Timothy Bishop*
Timothy Bishop
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3000
Attorney for Intervenor-Defendant-Appellants

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redaction have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender Version 1.319.1543.0, last updated July 15, 2020, and according to the program are free of viruses.

/s/ *Timothy Bishop*
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Attorney for Intervenor-Defendant-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on July 16, 2020. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via the appellate CM/ECF system.

/s/ *Timothy Bishop*
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