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

BUSINESS INTERVENOR-PLAINTIFFS' MOTION TO AMEND THE COURT'S PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

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INTRODUCTION AND SUMMARY OF THE NATURE OF THE CASE

The Business Intervenor-Plaintiffs respectfully move this Court for an order expanding its preliminary injunction (Dkt. 174) to apply nationwide, or alternatively to the 22 additional States and the District of Columbia not currently covered by this Court's or any other court's preliminary injunction against enforcement of the WOTUS Rule. Those States, in addition to the District of Columbia, are California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Washington.

As the Court is aware, the WOTUS Rule defines the EPA's and Army Corps of Engineers' regulatory jurisdiction under the Clean Water Act (CWA). A subsequent regulation (the Applicability Date Rule) amended the WOTUS Rule with an applicability date of February 6, 2020. The Applicability Date Rule prevented the WOTUS Rule from taking effect while the agencies were working to repeal it. But the Applicability Date Rule has now been invalidated by the District of South Carolina. *See South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018). As a consequence, the WOTUS Rule came into effect for the first time in nearly three years in a patchwork of 26 States across the country. After the entry of additional orders in North Dakota and Texas, that number has now been reduced to 22 States and the District of Columbia.

This is a deeply troubling state of affairs. A rule this fundamental to the CWA's regulatory scheme should not apply in a patchwork manner. Nor, indeed, should it apply *at all*: As this Court and three other federal courts now have concluded, the WOTUS Rule is almost certainly unlawful. *See Georgia v. Pruitt*, 2018 WL 2766877, at *9 (S.D. Ga. 2018) (likelihood of success on the merits "overwhelmingly" favors preliminary relief); *see also In re EPA*, 803 F.3d 804, 806, 808 (6th Cir. 2015); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015); Order, *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165, Dkt. 87 (S.D. Tex. Sept. 12, 2018) (Ex. A). And as the district court

in Texas recently added, the public interest weighs in favor of enjoining its enforcement "to an overwhelming degree." Ex. A at 2.

Recognizing that all of the elements of the preliminary injunction framework are manifestly satisfied, this Court has already entered an order enjoining the WOTUS Rule within the boundaries of the 11 plaintiff States. But circumstances have changed since this Court's entry of relief on June 8, 2018, warranting reconsideration and an expansion of the initial relief entered.

First, the Applicability Date Rule has been enjoined on a nationwide basis. Accordingly, the WOTUS Rule has come into force and effect in what can only be called a jumbled manner. Regional preliminary injunctions are preventing the WOTUS Rule's enforcement in 28 States, while the Rule is operative in the remaining 22 States and the District of Columbia.

Second, the agencies themselves have now expressed their own doubt concerning the Rule's legality, and they have clarified their intent to permanently repeal it. *See Definition of "Waters of the United States"—Recodification of Preexisting Rule*, 83 Fed. Reg. 32,227, 32,248 (July 12, 2018) ("Supplemental Notice").

Third, the Business Intervenors are now parties to this litigation. *See* Dkt. 187. The Business Intervenors are trade groups with members in every State, and they represent vast segments of the national economy, including the nation's construction, real estate, mining, manufacturing, forestry, agriculture, and energy industries. The ability of their members to plan projects and organize their affairs is highly sensitive to the scope of the agencies' regulatory jurisdiction under the Clean Water Act, and their operations are being directly and irreparably disrupted by the WOTUS Rule and its patchwork application. That is especially true with respect to those companies that operate on a nationwide or multistate basis. Those members, in particular, find themselves straddling two conflicting legal regimes and unable to plan for their multistate operations. The injuries they are incurring as a result are significant and irremediable.

The same harms that this Court's original preliminary injunction was designed to forestall are now coming to pass for the Business Intervenors and their members in the District of Columbia and the 22 States not presently covered by a regional preliminary injunction. In light of these changed circumstances, an expansion of the preliminary injunction to apply nationwide, or at least to cover those additional jurisdictions, is warranted.

BACKGROUND

A. The WOTUS Rule and the ensuing litigation

On June 29, 2015, the Agencies published the WOTUS Rule, which purports to "clarify" the definition of "waters of the United States" within the meaning of the Clean Water Act. *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015). Because the Agencies' regulatory jurisdiction extends to "waters of the United States" and no more, the WOTUS Rule establishes the scope of the Agencies' regulatory jurisdiction under the CWA.

Shortly after its promulgation, the WOTUS Rule was subject to dozens of legal attacks from all sides. Challenges to the WOTUS Rule were consolidated before the U.S. Court of Appeals for the Sixth Circuit. Several petitioners moved for, and the Sixth Circuit granted, a nationwide stay of the WOTUS Rule pending that court's consideration of the merits. *See In re EPA*, 803 F.3d 804 (6th Cir. 2015). The court held, in particular, that "petitioners have demonstrated a substantial possibility of success on the merits of their claims," and described the Rule's promulgation as "facially suspect." *Id.* at 807. Indeed, "it is far from clear that the new Rule's distance limitations are harmonious" with even the most generous reading of the prevailing Supreme Court precedents. *Id.*

Acknowledging "the pervasive nationwide impact of the new Rule on state and federal regulation of the nation's waters" and the risk of injury "visited nationwide on governmental bodies, state and federal, as well as private parties," the Court concluded that "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status

quo for the time being." *In re EPA*, 803 F.3d at 806, 808. The Sixth Circuit thus enjoined the Agencies from enforcing the WOTUS Rule nationwide. *Id.* at 808-09.

Even before the Sixth Circuit entered its stay of the WOTUS Rule, a number of States challenging the WOTUS Rule in the U.S. District Court for the District of North Dakota moved for, and that court granted, a preliminary injunction. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). Like the Sixth Circuit, the North Dakota court held that the moving States were "likely to succeed on the merits of their claim that the EPA has violated its grant of authority in its promulgation of the [WOTUS] Rule." *Id*. at 1055. Indeed, that court found that the WOTUS Rule suffered from numerous "fatal defect[s]," including that is inconsistent with any plausible reading of Supreme Court precedent; it is arbitrary and capricious; the Agencies failed to seek additional public comment after making major, unforeseeable changes to the proposed version of the WOTUS Rule; and the Agencies failed to prepare an environmental impact statement as required by the National Environmental Policy Act (NEPA). *See id.* at 1055-58.

The North Dakota court further concluded that the moving States had "demonstrated that they will face irreparable harm in the absence of a preliminary injunction." *North Dakota*, 127 F. Supp. 3d at 1059. It held, in particular, that the WOTUS Rule would "irreparably diminish the States' power over their waters" and inflict "irreparable harm in the form of unrecoverable monetary harm." *Id*. Finding that those harms outweighed any asserted injury to the public interest, the Court granted the preliminary injunction, but only within the geographic limits of Alaska, Arizona, Arkansas, Colorado, Idaho, Iowa, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. *Id*. at 1051 n.1, 1059-60. *See also* Order, *North Dakota v. EPA*, 3:15-cv-00059, Dkt. 250 (D.N.D. Sept. 18, 2018) (Ex. B).

After the Sixth Circuit stayed the WOTUS Rule nationwide, the National Association of Manufacturers—which is one of the Business Intervenor-Plaintiffs but did not join the petitions for

review in the courts of appeals—intervened in the petitions for review and moved to dismiss each for lack of jurisdiction. The Sixth Circuit denied the motions to dismiss, holding that jurisdiction belongs in the court of appeals, not the district courts. *See In re Dep't of Def. & EPA Final Rule*, 817 F.3d 261 (6th Cir. 2016).

The National Association of Manufacturers then filed a petition for a writ of certiorari. The Supreme Court granted the petition and, on January 22, 2018, issued a decision reversing the Sixth Circuit. The Supreme Court held, in short, that "any challenges to the [WOTUS] Rule … must be filed in federal district courts." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018). Soon thereafter, the Sixth Circuit dismissed the pending petitions for review and dissolved its nationwide stay of the WOTUS Rule.

While the litigation was ongoing, the agencies published a proposal to repeal and replace the WOTUS Rule in a "comprehensive, two-step process." *See Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34,899, 34,899 (July 27, 2017). The first step of this process—what we refer to as the " Repeal Rule"—would "rescind" the 2015 WOTUS Rule, restoring the status quo ante. *Id.* "In a second step," the government "will conduct a substantive re-evaluation of the definition of 'waters of the United States.'" *Id*.

The time necessary to finalize the Repeal Rule has been lengthy, and the rule has not yet been promulgated. In light of the delay, and anticipating that the Supreme Court would reverse the Sixth Circuit's jurisdictional holding and that the Sixth Circuit's stay would dissolve, the agencies set out "to maintain the status quo" while they continued to consider comments on the Repeal Rule and work on the substance of a replacement rule. *Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule*, 82 Fed. Reg. 55,542, 55,542 (Nov. 22, 2017). To that end, the agencies amended the WOTUS Rule with "an applicability date" to provide "continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the

public while the agencies continue to consider possible revisions." *Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule*, 83 Fed. Reg. 5,200, 5,200 (Feb. 6, 2018).

On August 16, 2018, the United States District Court for the District of South Carolina issued an order enjoining the Applicability Date Rule on a nationwide basis. *S.C. Coastal Conservation League*, 318 F. Supp. 3d at 969-70. In entering its order, however, the South Carolina court declined to consider the illegality of the WOTUS Rule and its significant harmful effects, even though the practical impact of its order was to bring the WOTUS Rule into effect throughout nearly half the Nation. *Id*. at 963 n.1. The South Carolina court's injunction against the Applicability Date Rule thus created a patchwork regulatory regime, bringing the WOTUS Rule to life for the first time in nearly three years, but only in the 26 States where it was not enjoined. Subsequently, the Southern District of Texas entered a preliminary injunction covering three additional States (Ex. A), and the District of North Dakota clarified that its injunction covers the State of Iowa (Ex. B). As a consequence, the WOTUS Rule is now enjoined in 28 States and in force in 22 (and the District of Columbia).

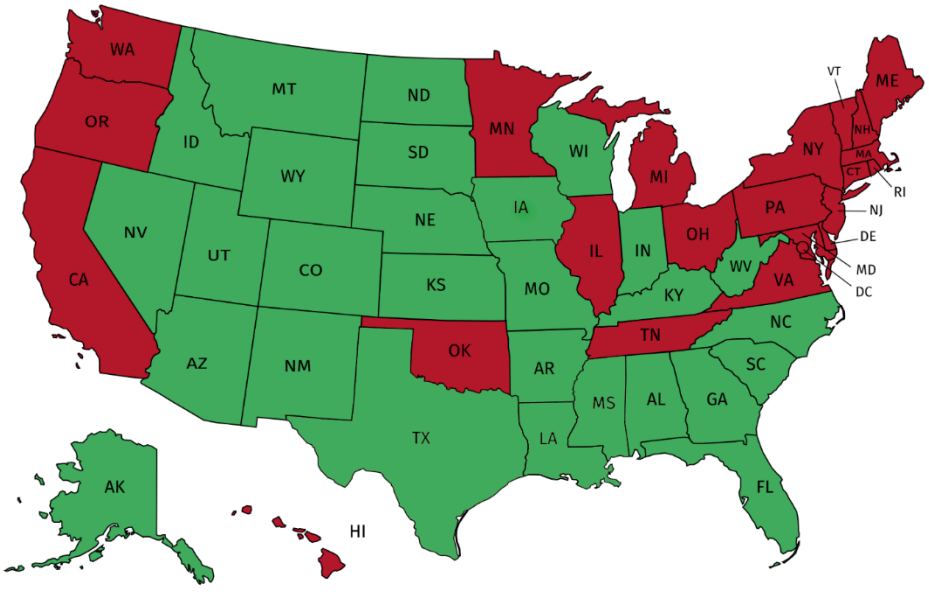

Figure 1: The regulatory patchwork following this Court's injunction: in green states, the 2015 WOTUS Rule is enjoined; in red states, it is now in effect.

Meanwhile, the agencies themselves have come to doubt the WOTUS Rule's legality. First, they issued the Supplemental Notice clarifying their intent to "permanently repeal the [WOTUS] Rule in its entirety." Supplemental Notice at 32,227-28, 32,249. In that notice, they explained that "rather than achieving its stated objectives of increasing predictability and consistency under the CWA, the 2015 Rule is creating significant confusion and uncertainty for agency staff, regulated entities, states, tribes, local governments, and the public." *Id*. at 32,228 (citation omitted). And, they concluded, "the interpretation of the statute adopted in the 2015 Rule is not compelled and raises significant legal questions." *Id*.

More recently, in the litigation pending before the Southern District of Texas, the agencies took the position that "clarity, certainty, and consistency nationwide are best served by the 2015 WOTUS Rule remaining inapplicable during the Agencies' active and ongoing rulemaking to reconsider that Rule.'" Resp. to Pls.' Notices, *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165, Dkt. No. 83, at 3 (S.D. Tex. August 22, 2018) (quotation marks omitted) (Ex. C).

B. The Court's original preliminary injunction opinion

In June 2018—before the Applicability Date Rule was invalidated—this Court granted preliminary injunctive relief against application of the 2015 WOTUS Rule within the boundaries of the 11 plaintiff States, holding: "Plaintiffs have clearly met the burden of persuasion on each of the four factors entitling them to a preliminary injunction." *Georgia*, 2018 WL 2766877, at *9.

The Court found that likelihood of success on the merits, the balance of the harms, and the public interest "overwhelmingly" weighed in plaintiffs' favor. *Georgia*, 2018 WL 2766877, at *9.

First, the Court determined that plaintiffs "have demonstrated a likelihood of success on their claims that the WOTUS Rule was promulgated in violation of the CWA and the APA." *Georgia*, 2018 WL 2766877, at *3. In particular, the Court found the WOTUS Rule "plague[d]" by the "same fatal defect" that doomed the regulation in *Rapanos v. United States*, 547 U.S. 715 (2006), because it

reaches drains, ditches, and streams "'remote from any navigable-in-fact'" water. *Id*. at * 4 (quoting *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment)). It also found the WOTUS Rule contrary to *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), another Supreme Court precedent invalidating a CWA regulation that impermissibly expanded the agencies' authority to "'nonnavigable, isolated, intrastate waters'" in a manner that would upset the federal-state balance. *Id*. (quoting *SWANCC*, 531 U.S. at 171). The WOTUS Rule is likely to be held arbitrary and capricious, the Court continued, because it asserts jurisdiction over "remote and intermittent waters" lacking a "nexus with any navigable-in-fact waters," and the final rule is not a "logical outgrowth" of the proposed rule. *Id*. at *5.

Next, the Court found that if the WOTUS Rule were allowed to come into effect, it would trigger "immediate" irreparable injury. It would lead to unrecoverable monetary costs and deprive States of their sovereignty. *Georgia*, 2018 WL 2766877, at *7-8. Although the Court noted that, at the time, the Applicability Date Rule had delayed application of the WOTUS Rule, it found this harm "sufficiently imminent." *Id.* At bottom, it held that the alleged harm to the agencies from having to comply with an injunction during the course of the litigation "pales" in comparison to harm faced by the plaintiffs. *Id*. Thus, the balance of the equities favored issuing an injunction. *Id*. at *8.

Finally, this Court determined an injunction served the public interest, because the public *has* no interest in the enforcement of an illegal rule. *Georgia*, 2018 WL 2766877, at *9. Should the WOTUS Rule become effective, the Court reasoned, "farmers, homeowners, and small businesses will need to devote time and expense to obtaining federal permits—all to comply with a rule that is likely to be invalidated." *Id*. The Court also noted the value of national consistency, observing that "enjoining the WOTUS Rule will put the eleven States in this case in the same position as the thirteen [S]tates granted preliminary injunctive relief by the District of North Dakota, thereby adding

consistency of judicial determination as well as of the Rule's applicability." *Id*. Accordingly, the Court issued injunctive relief against enforcement of the WOTUS Rule in the 11 Plaintiff-States before it. *Id*. The Business Intervenor-Plaintiffs now ask this Court to expand that injunction to protect them nationwide from what is a nationwide irreparable harm.

LEGAL STANDARD

To obtain a preliminary injunction, a plaintiff must establish "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the potential harm to the defendant; and (4) that the injunction will not disserve the public interest." *Palmer v. Braun*, 287 F.3d 1325, 1329 (11th Cir. 2002). "In shaping equity decrees, the trial court is vested with broad discretionary power." *Lemon v. Kurtzman*, 411 U.S. 192, 201 (1973); *see also Gore v. Turner*, 563 F.2d 159, 165 (5th Cir. 1977) ("[F]raming an injunction appropriate to the facts of a particular case is a matter peculiarly within the discretion of the district judge"). To fashion equitable relief, "courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved." *Lemon*, 411 U.S. at 201.

"The scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). A nationwide preliminary injunction against an unlawful administrative regulation is appropriate where, as here, "a patchwork system would 'detract[] from the integrated scheme of regulation' created by Congress." *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015) (alteration in original).

ARGUMENT

A. Like the plaintiff States, the Business Intervenor-Plaintiffs are likely to succeed on the merits of their claims

This Court has already held that plaintiffs' likelihood of success on their claims that the WOTUS Rule is unlawful "overwhelmingly" favors a preliminary injunction. *Georgia*, 2018 WL

2766877, at *9.

First, the WOTUS Rule is substantively unlawful. It has "[t]he same fatal defect" that doomed the regulation in *Rapanos*, because it regulates "'drains, ditches, and streams remote from any navigable-in-fact water." *Georgia*, 2018 WL 2766877, at *4 (quoting *Rapanos*, 547 U.S. at 781 (Kennedy, J.)). It also "will likely fail for the same reason that the rule in *SWANCC* failed," because it reaches "'nonnavigable, isolated intrastate waters' such as seasonal ponds'" *Id*. at * 4-5 (quoting *SWANCC*, 531 U.S. at 171). And the Rule "asserts jurisdiction over remote and intermittent waters without evidence that they have a nexus with any navigable-in-fact waters." *Id.* at *5.

Second, the WOTUS Rule is procedurally defective: The final Rule was not a logical outgrowth of the proposed rule "in significant ways." *Georgia*, 2018 WL 2766877, at * 5. Given the strength of these arguments, the Court did not reach plaintiffs' additional claims that the WOTUS Rule violates the Commerce Clause and the Tenth Amendment.

As we have demonstrated in our motion for summary judgment, the WOTUS Rule is infected by numerous other legal flaws, including that it is unconstitutionally vague in its reliance on broad, amorphous definitions to identify "waters of the United States." *See* Dkt. 199, at 11-22.

B. The Business Intervenors and their members are suffering irreparable harm outside the geographic boundaries of the plaintiff States

This Court has already determined that enforcement of the WOTUS Rule is "trigger[ing] immediate irreparable harm." *Georgia*, 2018 WL 2766877, at *7, *9. Among other things, the plaintiffs are certain to incur significant "monetary losses" that are "unrecoverable" because "no avenue exists to recoup [them]." *Id*. at *6 (citing *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable.")).

Judge Erickson of the District of North Dakota reached the same conclusion, emphasizing

that allowing the WOTUS Rule to come into effect would result in "unrecoverable monetary harm," among other injuries. *North Dakota*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015).

When this Court entered its injunction, the Applicability Date Rule prevented immediate application of the WOTUS Rule in *any* State. But because the Applicability Date Rule has been enjoined nationwide, reinstating the WOTUS Rule on a piecemeal basis, irreparable harm is now occurring.

1. The Business Intervenors' members operate nationwide. *See, e.g.*, Ex. D at A-1, A-5. They own and work on real property that includes land areas that contain numerous dry and wet land features that qualify as "waters of the United States" under the WOTUS Rule. *Id*. Because the WOTUS Rule unlawfully expands the agencies' jurisdiction under the CWA, each member is required to comply with the CWA's prohibition against unauthorized "discharges" into any such areas. In many cases, this entails obtaining costly permits, which must be planned for and sought years in advance. These increased costs and delays will significantly and irreparably disrupt the Business Intervenors' members' operations. Energy exploration and production companies expect the number of permits required for projects to double. Ex. D at A-6. Many members will delay or simply abandon projects, such as the construction of new facilities, to avoid the extra costs. Ex. D at A-3, A-6, A-23.

The unlawful expansion of CWA jurisdiction under the 2015 WOTUS Rule also obstructs members' ability to operate under less costly general permits. Under the CWA, the Corps of Engineers issues both individual and nationwide (or general) permits. Individual permits are site specific, and in the experience of one declarant, take over two years and cost over $250,000 to obtain. Ex. D at A-23. In contrast, nationwide permits can be obtained in less than a year, and cost on average around $30,000; however, only landowners who impact a limited area may qualify. *Id*. While many industry members currently operate under the less costly and easier-to-obtain general

permits, companies anticipate that they may no longer qualify for nationwide permits because of jurisdictional expansion of the 2015 WOTUS Rule under the CWA. *Id*.

Costs are compounded by the vague and uncertain scope of the WOTUS Rule. Ex. D at A-3, A-11, A-13, A-22-23; *see also* Excerpts of Addendum to the Opening Br. of Municipal Pet'rs at 31a-32a, 56a-57a, 84a-85a, *In Re EPA*, No. 15-3751 (6th Cir. Nov. 1, 2016) (Dkt. 129-2) (Ex. E). For example, the question of whether dry ephemeral drains or ditches that may eventually feed into some other water feature offsite from a landowner's property are "waters of the United States" has significant implications for the ability of a forestry company to plan its operations. To ensure that it engages in best-management practices under the 2015 WOTUS Rule, the company will have to establish additional buffering around land features that potentially qualify "as waters of the United States," irreparably taking that land out of production. Ex. D at A-12-14. The vague nature of the Rule will also render it incredibly difficult for the company to identify and quantify features on their lands that qualify as jurisdictional to demonstrate that they qualify for pesticide application general permits. *See id*.

The agricultural industry faces similar concerns. Farmers may be required to take land out of production to comply with the 2015 WOTUS Rule. *See* Ex. D at A-12-14, A-15-16, A-18-20; Excerpts of App. to Pls.' Mot. for a Nationwide Prelim. Inj., *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165, at 3-5, 13-15 (S.D. Tex. Feb. 7, 2018) (Ex. F). Because of the enormous risk associated with liability under the CWA, many farmers—who cannot tell which parts of their land can be put to use and which must be kept free of farming equipment, dirt and gravel, seed, and fertilizer—will either (1) alter their agricultural operations to avoid discharges into certain features for fear of incurring liability under vague regulations that may or may not be in effect at any given point in time over the coming years or otherwise (2) expend irrecoverable resources attempting to determine whether a feature is jurisdictional. *See* Ex. D at A-9-11; Ex. E at 9a-12a, 16a-19a, 74a-79a, 82a-83a,

127a-129a, 173a-175a.

The question of whether certain features qualify as "waters of the United States" under the 2015 WOTUS Rule also has enormous implications for National Stone, Sand and Gravel Association member companies, which are responsible for essential raw minerals in construction projects. The vagueness surrounding the 2015 WOTUS Rule will require member companies to spend more time and money hiring consultants and evaluating the Rule's effect on their operations. Ex. D at A-1-4. It will also impose significant permitting and mitigation costs and time delays in mining activities, which may lead companies to hold off on permitting new facilities or expansions. *Id*. Similar concerns cut across all aspects of nearly every industry in the country, and adjustments to members' operations may come at the cost of jobs. *See id.* at A-5-6, A-9-10; Ex. E at 61a-69a, 105a-106a, 135a-149a, 204a-208a; Ex. F at 3-5, 10-15.

The geographic inconsistency in the current regulatory scheme magnifies these irreparable harms. The WOTUS Rule has come into effect in 22 States and the District of Columbia, but it remains preliminarily enjoined in the remaining 28 States. The resulting complications are significant. The operation of two, fundamentally incompatible definitions of "waters of the United States" generates significant confusion in planning business operations. *See* Ex. D at A-2-3, A-21-23. Many members engage in projects that cross state lines. *See, e.g.*, *id.* at A-2-3, A-12-14. These areas are now subject to conflicting permitting obligations. *Id*. As just one example, because the WOTUS Rule defines isolated interstate waters as "waters of the United States," a small seasonal wetland on the North Carolina-Virginia border will be subject to incompatible laws. It is almost impossible to sort out which regulatory regime applies to which activities under which circumstances. As a result of this confusion, the Business Intervenor-Plaintiffs' members may hold off on new projects. *See, e.g.*, *id.* at A-3, A-6, A-9-11. Thus, as the agencies admitted before the Southern District of Texas, "[h]aving different regulatory regimes in effect throughout the country

[is] complicated and inefficient for both the public and the agencies." Ex. C at 4.

2. Courts have found injuries less serious than these sufficient to satisfy the irreparable injury prong of a preliminary injunction analysis. First, the costs that the Business Intervenors must expend to comply with the unlawful 2015 WOTUS Rule are not recoverable. "In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." *Odebrecht Constr.*, 715 F.3d 1268, 1289.

Additionally, the loss of business opportunities alone is a valid ground for finding irreparable harm. *See Advantus, Corp. v. T2 Int'l, LLC*, 2013 WL 12122313, at *10 (M.D. Fla. 2013) ("Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm.") (quoting *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012)); *see also Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 (5th Cir. 1981) (finding irreparable harm where business faced substantial losses if it refrained from sales, but the threat of criminal prosecutions under a potentially unlawful ordinance if it continued sales).

In *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016), the Fifth Circuit found a serious threat of irreparable harm in a similar situation where the challenged regulation threatened "tremendous costs" and other "threatened harms—including unemployment and the permanent closure of plants." *Id*. at 433-434. Reasoning that such harms "are great in magnitude" and would not be compensable with mere awards of money damages, the court held that the harm would be irreparable and stayed implementation of the regulation. *Id*. at 434-36. The chaotic regulatory scheme directly impeding the Business Intervenors' members' abilities to sort out which regime applies to which activities is not a mere matter of uncertainty as to whether an agency may reverse its position. *Cf. N.E. Power Generators Ass'n, Inc., v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) (economic harm not alleged for

purposes of standing where plaintiff relied on "the possibility an agency may one day reverse its position" absent any factual support). The harm for which the Business Intervenor-Plaintiffs will never be compensated is occurring *right now*.

Further, we have shown in our summary judgment briefing that the 2015 WOTUS Rule is unconstitutionally vague. *See* Dkt. 199, at 19-22. Deprivation of constitutional rights "for even minimal periods of time" constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Enormously consequential national regulations like the WOTUS Rule—which subject commonplace activities involved in building, farming, and pest management to a complex and burdensome federal permitting and enforcement scheme, including criminal penalties—should not apply differently depending on whether the activity happens to be located on one side of a state line or the other. Against this backdrop, the presence of irreparable harm on a nationwide basis is undeniable.

C. The balance of harms and public interest favors a nationwide injunction

The public is undeniably harmed absent an injunction that covers the District of Columbia and the 22 States in which the WOTUS Rule is being applied. As this Court previously found—even before injunction of the Applicability Date Rule introduced a chaotic patchwork regime—the balance of the equities weighs "heavily" and "overwhelmingly" in favor of the plaintiffs. *Georgia*, 2018 WL 2766877, at *8-9. As the Sixth Circuit summed it up, while there is no "indication that the integrity of the nation's waters will suffer imminent injury if the new scheme is not immediately implemented and enforced . . . , the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo." *In re EPA*, 803 F.3d at 808.

Now that the Applicability Date Rule is no longer in effect, enjoining the WOTUS Rule in every State is in the public interest. The CWA regulatory scheme is trapped in chaos. Otherwise piecemeal implementation of the Rule will continue to disrupt the operations of nationwide

industries and impose difficulties on regulator-States and federal agencies in enforcing the CWA. These injuries outweigh any interest in enforcement of a vague, unconstitutional regulation during the pendency of the litigation. Indeed, "'[t]he public has no interest in the enforcement of what is very likely' an unenforceable rule." *Georgia*, 2018 WL 2766877, at *9 (quoting *Odebrecht Constr.*, 715 F.3d at 1290). On the other hand, the WOTUS Rule imposes heavy costs on States, the agencies, and regulated parties.

We have already outlined the significant and irreparable harms now faced by the Business Intervenor-Plaintiffs and their industry members absent a preliminary injunction of nationwide scope. *Supra*, pages 12-14. And, as this Court already determined, the States and municipal bodies face loss of sovereignty and unrecoverable monetary harms. *Georgia*, 2018 WL 2766877, at *6.

The agencies themselves are also harmed. As the agencies recognized in promulgating the Applicability Date Rule in the first place, enforcing the CWA under an uncertain, patchwork regime is inefficient and complex. As just one example, what are the agencies to do when a multistate project implicates earth-moving activities in small, isolated features characterized as wetlands across portions of Illinois and Kentucky? That single project will now be subject to two fundamentally different regulatory regimes—with only the portion in Illinois likely to demand federal permitting (at great expense and delay). The problem would be multiplied many times over throughout the country in similar cases.

And even for single state projects, the current patchwork requires the agencies—as well as national organizations like the Business Intervenor-Plaintiffs and their members—to navigate different federal regulatory regimes in different States, increasing the complexity and cost of regulation, enforcement, and compliance. EPA's geographic regions cut across states where the 2015 WOTUS Rule is enjoined and those in which it is in effect, compounding the administrative headache the agencies face.

Against this background, the agencies themselves have expressly acknowledged that "a regulatory patchwork does not serve the public interest; as the Agencies have explained, it would be 'complicated and inefficient for both the public and the agencies.'" Ex. C at 3 (quoting 83 Fed. Reg. at 5,202). And they stated before the Southern District of Texas that "they and their policies would not be harmed from—and the public interest is advanced by—'a framework for an interim period of time that avoids these inconsistencies, uncertainty, and confusion, pending further rulemaking action by the agencies.'" *Id*. at 5 (quoting 83 Fed. Reg. at 5,202).

In issuing its preliminary injunction, this Court previously recognized the benefit to the public interest from "adding consistency of judicial determination as well as of the Rule's applicability." *Georgia*, 2018 WL 2766877, at *9. Consistency in preventing harmful enforcement of the WOTUS Rule is now only possible if this Court's preliminary injunction is modified to match the national parties who are plaintiffs before it. The Court should therefore enjoin enforcement of the WOTUS Rule on a nationwide basis, or at minimum in the jurisdictions not already covered by the Court's or another court's preliminary injunction.

CONCLUSION

The motion to expand the scope of the preliminary injunction to apply nationwide—or alternatively to include the territorial limits of the District of Columbia, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Washington—should be granted.

Dated: September 26, 2018

Respectfully submitted,

/s/ *Mark D. Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that, on September 26, 2018, I filed and thereby caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of Georgia on all parties registered for CM/ECF in the above-captioned matter.

/s/ *Mark D. Johnson*

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

AMERICAN FARM BUREAU FEDERATION, *et al*,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 3:15-CV-00165
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al*,	§	
Defendants.	§	

ORDER

Pending before the Court is Plaintiffs' Motion for a Preliminary Injunction. (Dkt. 61). Having read the briefs in support of this motion, the response, and the reply, this Court hereby **ORDERS** that the motion is **GRANTED** and that the "Clean Water Rule: Definition of 'Waters of the United States'" (the "Rule"), 80 Fed. Reg. 37,054 (June 29, 2015), be enjoined temporarily as to Texas, Louisiana, and Mississippi until this case is finally resolved.

In order to obtain a preliminary injunction, the applicant must demonstrate: (1) a substantial likelihood that it will prevail on the merits, (2) a substantial threat that it will suffer irreparable injury if the injunction is not granted, (3) that its threatened injury outweighs the threatened harm to the party whom it seeks to enjoin, and (4) that granting the preliminary injunction is in the public's interest. *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). While each of these factors must be met in order for a preliminary injunction to be granted, a stronger showing of one factor can compensate for a weaker showing of another. *State of Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975) ("[A]s we have noted, none of the four prerequisites [for a preliminary injunction] has a fixed quantitative value. Rather, a sliding scale is utilized,

which takes into account the intensity of each in a given calculus."); *see also Siff v. State Democratic Executive Comm.*, 500 F.2d 1307, 1309 (5th Cir. 1974).

Here, the applicant Associations have made a sufficient showing that a preliminary injunction should be granted in this case. At this early stage in the proceedings, the strength of the Associations' case should not be overstated. While the Court does believe that each of the above listed factors for a preliminary injunction have been met, it is the fourth factor pertaining to the public's interest in this matter that tipped the balance in favor of granting an injunction—and did so to an overwhelming degree.

As both the Plaintiff and the Defendant have pointed out, clarification regarding what is, and what is not, a navigable water under the Clean Water Act is long overdue. *See United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (holding that Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), provided the controlling test for what is a navigable water under the Clean Water Act); *cf. United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (approving of the use of the plurality's opinion and the Kennedy opinion in *Rapanos* as the controlling test for determining what is a navigable water); *cf. also United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (applying pre-R*apanos* Circuit precedent because it could not discern clear direction from *Rapanos*). And, until that question can ultimately be answered, a stay provides much needed governmental, administrative, and economic stability.

Were the Court not to temporarily enjoin the Rule now, it risks asking the states, their governmental subdivisions, and their citizens to expend valuable resources and time operationalizing a rule that may not survive judicial review. *See* companion case, *State of Texas et al v. United States Environmental Protection Agency, et al*, 3:15-CV-00165, Dkt. 79, Exh. 1 at p. 3 (implementation of the rule "would require TxDOT to spend significant time and taxpayer resources attempting to determine how [the United States Army Corps of Engineers] will interpret and implement the Rule."); *see also id.*, Dkt. 79,

Exh. 3 at p. 2 (implementation of the rule will cause a reduction in the production and refinement of oil and gas resources); *see also id*., Dkt. 93, Exh. 8 at p. 3 (implementation of the rule will make it harder for agricultural producers to operate their business). Accordingly, the Court has decided to avoid the harmful effects of a truncated implementation, and enjoin the Rule's effectiveness until a permanent decision regarding the Rule's constitutionality can be made. Determining which governmental bodies have jurisdiction over our nations waters is an important task, and one that this Court is unwilling to do without full discovery and briefing on the matter.

Finally, after additional review, the Court finds it inappropriate to issue a nationwide preliminary injunction in this case. An extraordinary remedy, a preliminary injunction should only be granted nationwide when it is clear and unambiguous that the harm threatened is one of a national character. Here, the evidence before the Court is insufficient to establish whether implementation of the Rule presents an irreparable harm to those States not a party to this litigation. Accordingly, the Court declines to enjoin the Rule nationwide at this time. This ruling is without prejudice to the Court's reconsideration of this issue based on future decisions and developments in this case.

SIGNED at Galveston, Texas, this 12th day of September, 2018.

George C. Hanks Jr.
United States District Judge

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

State of North Dakota, *et al.*,	)	
	)	
Plaintiffs,	)	**ORDER**
	)	
vs.	)	Case No. 3:15-cv-59
	)	
U.S. Environmental Protection Agency, *et al.*,	)	
	)	
Defendant.	)	

On August 22, 2018, Plaintiff-Intervenor Kimberly Reynolds, Governor of the State of Iowa, filed a "Request for Expedited Clarification that the Preliminary Injunction in this Matter Applies to Iowa." See Docket No. 247.

On June 29, 2015, Plaintiffs—twelve states and two agencies of a thirteenth state–filed this lawsuit for declaratory and injunctive relief against the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively "the Agencies"), challenging a final rule promulgated by the Agencies to clarify the definition of "waters of the United States" ("WOTUS") that are protected under the Clean Water Act, 33 U.S.C. §§ 1251-1388 (rule referred to hereafter as "WOTUS Rule"). See Docket No. 1. The WOTUS Rule was set to go into effect on August 28, 2015. On August 27, 2015, the district court granted the Plaintiffs' motion for a preliminary injunction, enjoining the WOTUS Rule during the pendency of the litigation. See Docket No. 70. The district court later issued an order limiting the scope of the preliminary injunction to the "parties in this litigation." See Docket No. 79, p. 4.

On November 17, 2015, Terry Branstad, then-Governor of Iowa, filed a motion to intervene in the suit as a plaintiff on behalf of the State of Iowa. See Docket No. 100. The EPA did not take a position on the motion to intervene because, at that time, the Sixth Circuit Court of Appeals had issued a nationwide stay of the WOTUS Rule, making the issue moot. See Docket No. 103. The district court granted the unopposed motion to intervene on December 11, 2015. See Docket No. 107.

On February 6, 2018, the EPA published the Suspension Rule, which in effect, delayed the WOTUS Rule until 2020. 83 Fed. Reg. 5200. The Suspension rule was challenged and on August 16, 2018, a South Carolina federal district court granted a motion for summary judgment against the EPA's Suspension Rule, and enjoined the Suspension Rule nationwide and reinstated the WOTUS Rule in the states where the WOTUS Rule had not been preliminarily enjoined. See Docket No. 245-1. As a result of the invalidation of the Sixth Circuit's nationwide stay of the WOTUS Rule and the District of South Carolina ruling reinstating the Rule, Plaintiff-Intervenor Kimberly Reynolds seeks an order from this Court expressly stating that the WOTUS Rule is enjoined in Iowa. See Docket No. 247, p. 3.

Reynolds argues it is now a party to this litigation and the district court previously issued a preliminary injunction ruling that it should apply to all the "parties in this litigation." See Docket No. 247, p. 3. Reynolds asserts she became a party after the original order and the subsequent order clarifying its scope, and that is not a sufficient basis to exclude her and the citizens of Iowa from the scope of the injunction. See Galbreath v. Metropolitan Trust Co. of California, 134 F.2d 569, 570 (10th Cir. 1943) ("It is also equally true that one who intervenes in a suit in equity thereby becomes a party to the suit, and is bound by all prior orders and adjudications of fact and law as though he had been a party from the commencement of the suit."). Further, Reynolds asserts she has conferred with defense counsel, and the Agencies do not object and Defendant-Intervenor Sierra Clubs indicated they take no position on the motion. See Docket No. 247, p. 4. For good cause shown, the Court **GRANTS** Plaintiff-Intervenor Reynolds' request (Docket No. 247). The Court finds that the WOTUS Rule is enjoined in Iowa.

IT IS SO ORDERED.

Dated this 18th day of September, 2018.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

Exhibit C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, et al., *Plaintiffs,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants.*	§ § § § § § § § § §	CIVIL ACTION NO. 3:15-cv-162

AMERICAN FARM BUREAU FEDERATION, et al., *Plaintiffs,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants.*	§ § § § § § § § § §	CIVIL ACTION NO. 3:15-cv-165

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICES AND MOTION REGARDING D.S.C. DECISION

The United States Environmental Protection Agency, the Department of the Army, and all other "Federal Defendants" (or "the Agencies") hereby respond to "Plaintiff States' Notice of Order in the United States District Court for the District of South Carolina," filed on August 17, 2018, and "States' Motion for Entry of an Order on an Expedited Basis" filed by the States of Texas, Louisiana, and Mississippi—the "Plaintiff States" in Case No. 3:15-cv-162 (Notice at ECF No. 130, Motion at ECF No. 131) —and

"Plaintiffs' Notice of the District of South Carolina's Nationwide Injunction Against Enforcement of the Applicability Date Rule," filed on August 16, 2018, by the American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Leading Builders of America, Matagorda County Farm Bureau, National Alliance of Forest Owners, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, Public Lands Council, and Texas Farm Bureau—the "Plaintiff Associations" in Case No. 3:15-cv-165 (Notice at ECF No. 81).

In February 2018, when the Agencies initially responded to Plaintiff States' and Plaintiff Associations' motions for a preliminary injunction of the "2015 WOTUS Rule," 80 Fed. Reg. 37,054 (June 29, 2015), the Agencies explained that there was not any immediacy associated with the allegations of irreparable harm because, under the "Applicability Rule," 83 Fed. Reg. 5200 (Feb. 6, 2018), the 2015 WOTUS Rule would not apply to any person until February 6, 2020. *See* Federal Defendants' Opp'n to Plaintiffs' Motions for a Nationwide Preliminary Injunction ("Fed. Def. Opp'n," ECF No. 101 in Case No. 3:15-cv-162) at pp. 2, 7-11. The Agencies further explained that, although the Applicability Rule had been challenged in several District Courts, including (*inter alia*) the District of South Carolina, "[n]o substantive order or any other development in any of these cases has occurred that alters the applicability date of the 2015 WOTUS Rule." Fed. Def. Opp'n at p. 12.

A substantive order has now issued. In a final judgment dated August 16, 2018, the South Carolina court enjoined the Applicability Rule nationwide. *See S.C. Coastal Conservation League v. Pruitt*, No. 2:18-cv-330, 2018 WL 3933811 (D.S.C. Aug. 16, 2018). The decision's upshot is that the 2015 WOTUS Rule is now applicable throughout 26 states—including Texas, Louisiana, and Mississippi—where preliminary injunctions of that Rule have not, to date, been issued.

At least one set of parties has already filed a notice of appeal and moved for a stay of the South Carolina decision. The Agencies similarly expect to pursue an appeal, believing that "clarity, certainty, and consistency nationwide" are best served by the 2015 WOTUS Rule remaining inapplicable during the Agencies' active and ongoing rulemaking to reconsider that Rule. 83 Fed. Reg. at 5,202.[1] If the South Carolina decision stands, one definition of "waters of the United States" will apply in some states while another definition will apply in the remaining states. Such a regulatory patchwork does not serve the public interest; as the Agencies have explained, it would be "complicated and inefficient for both the public and the agencies." 83 Fed. Reg. at 5,202.

Here, absent a stay or reversal of the South Carolina decision, the Agencies now withdraw their argument that there is not any immediacy associated with the Plaintiffs' allegation that the 2015 WOTUS Rule causes them irreparable harm. Similarly, the Agencies now agree that the motions for a preliminary injunction are ripe for

[1] Indeed, the Agencies recently issued a supplemental notice and solicited public comment on a proposal to permanently repeal the 2015 WOTUS Rule in its entirety. 83 Fed. Reg. 32,227 (July 12, 2018).

adjudication, and that a full evaluation of all of the preliminary injunction elements would be appropriate.

Due to the pending rulemaking referenced above, the Agencies continue to refrain from expressing views on the preliminary injunction element regarding the Plaintiffs' likelihood of success and other aspects of the merits of the 2015 WOTUS Rule. *See* Fed. Def. Opp'n at 15. At the same time, however, the Agencies acknowledge the pertinence of the findings they made in support of the Applicability Rule to the remaining preliminary injunction elements, i.e., "that [the Plaintiffs are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tip in [their] favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 21 (2008) (citation omitted).

More specifically, the Agencies have found that "[h]aving different regulatory regimes in effect throughout the country would be complicated and inefficient for both the public and the agencies." 83 Fed. Reg. at 5202. This concern has reemerged due to the South Carolina court's injunction, which reestablishes a confusing and shifting regulatory landscape with "inconsistencies between the regulatory regimes applicable in different States, pending further rulemaking by the agencies." *Id.* This concern also follows from ongoing litigation and preliminary injunctions against the 2015 WOTUS Rule, determinations from courts that they are "likely" to rule against the Rule, and the Agencies' reconsideration proceedings. *See* Fed. Def. Opp'n at 15; *see also Georgia v. Pruitt*, No. 2:15-cv-79, 2018 WL 2766877 (S.D. Ga. June 8, 2018).

Likewise, the Agencies have concluded that they and their policies would not be harmed from—and the public interest is advanced by—"a framework for an interim period of time that avoids these inconsistencies, uncertainty, and confusion, pending further rulemaking action by the agencies." 83 Fed. Reg. at 5202. The Agencies concluded that, until February 2020, it would be best if "the scope of [Clean Water Act] jurisdiction [is] administered nationwide exactly as it is now being administered by the agencies, and as it was administered prior to the promulgation of the 2015 Rule." *Id.*[2]

There is no change, however, in the Agencies' argument that "in no event should the scope of [any preliminary injunction] be nationwide." Fed. Def. Opp'n at 16.

Dated: August 22, 2018

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
JONATHAN D. BRIGHTBILL
Deputy Assistant Attorney General
Environment and Natural Resources Division

/s/ *Andrew J. Doyle*
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Counsel for Federal Defendants

[2] Although the Applicability Rule is currently enjoined, the South Carolina decision does not preclude this Court from considering these findings as they regard the 2015 WOTUS Rule. *See S.C. Coastal Conservation League*, 2018 WL 3933811, at *3 n.1 ("The court reiterates that the issue currently before the court is not the merits of the 2015 rule . . . .").

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon counsel of record.

/s/ Andrew J. Doyle

Exhibit D

TABLE OF CONTENTS

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;

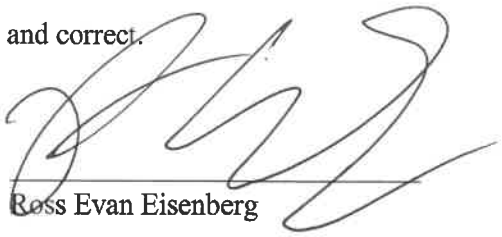
f. If a manufacturer needs to install a larger loading dock and build additional space to manufacture products, the WOTUS Rule could force the manufacturer to seek additional permits and potentially put major systems in place to treat stormwater that would not have applied before the WOTUS Rule's expanded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

Exhibit E

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.

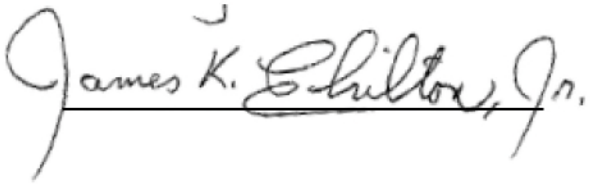
6. The possibility that features like the dry wash and other dry washes on the Chilton Ranch will be treated as waters of the United States creates uncertainty about whether and how Chilton Ranch can use its lands and what regulatory requirements of particular uses apply. The Rule would have direct effects 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.



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,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

No. 15-3850

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

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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 Flum

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 NOTARY PUBLIC OKLAHOMA #14004230 MAY 8, 2018

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 F

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

AMERICAN FARM BUREAU FEDERATION, *et al.*, *Plaintiffs*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Defendants*.	No. 3:15-cv-165

APPENDIX TO PLAINTIFFS'
MOTION FOR A NATIONWIDE PRELIMINARY INJUNCTION

TAB 2

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 ROSS EVAN EISENBERG

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

1. 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 nearly 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.

2. NAM members own property that is often developed and managed in ways that often have features on their lands that may qualify as waters of the United States under the WOTUS Rule. Members are uncertain about the regulatory implications of the Rule, and have altered their behavior in response to the WOTUS Rule. 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 informs us 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.

3. The statements that I made in my declaration of November 1, 2016, which was filed in the U.S. Court of Appeals for the Sixth Circuit in support of the Business and Municipal Petitioners' brief, remain true and accurate.

4. When the Sixth Circuit's stay of the WOTUS Rule was in place, the NAM's members benefited from regulatory stability and predictability. Because of the impending dissolution of the Sixth Circuit's stay and the uncertainty that will follow, however, I anticipate that the NAM's members 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 status quo preserved by the Sixth Circuit's stay—to mitigate their risk that the WOTUS Rule might later come into effect. I anticipate

that these delays could impede the construction and operation of new facilities or expansions and could cost American jobs.

5. Although EPA's Applicability Date Rule has now been finalized, the fact that it is being challenged by States and environmental groups in new lawsuits arising under the Administrative Procedure Act means that the NAM's members will face the same uncertainty that the WOTUS Rule may, in some states, come into effect. Thus, the Applicability Date Rule does not resolve the uncertainty that is causing the NAM's members irreparable harm. Only a national injunction is capable of preventing these harms.

The foregoing is true and correct.

Dated: February 6, 2018

Ross Evan Eisenberg

TAB 3

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 HOWARD J. FELDMAN

I, Howard J. Feldman, declare based on personal knowledge as follows.

1. I am the Senior Director for Regulatory and Scientific Affairs at the American Petroleum Institute in Washington, D.C. Since 1987, I have worked on behalf of API's members, focusing on key regulatory and scientific issues, including the health and environment aspects of the oil and gas industry. At API, I oversee efforts addressing air, climate, water, waste, and health issues.

2. API is the only national trade association that represents all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy. API represents the oil and natural gas industry by advocating for legislation at the federal, state, and local level, by educating members of the general public about the benefits that oil and natural gas provides for human health, safety, convenience, and prosperity, by engaging with federal and state administrative agencies to promote policies on behalf of the oil and natural gas industry, and by engaging in litigation that could impact the oil and natural gas industry.

3. API's more than 625 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply films. API's members provide most of the nation's energy and are backed by a growing grassroots movement of more than 30 million Americans.

4. API's members are subject to close regulation under the Clean Water Act. They often must obtain Clean-Water-Act permits:

a. to construct "well pads," on which the equipment necessary to drill for and extract the oil or natural gas will be placed;

b. to extract crude oil from subsea formations in the Gulf of Mexico and other offshore areas;

c. to install and maintain pipelines throughout the United States; and

d. to withdraw and discharge cooling water as part of the refining process.

5. The statements that I made in my declaration of September 6, 2016, which was filed in the U.S. Court of Appeals for the Sixth Circuit in support of the Business and Municipal Petitioners' brief, remain true and accurate.

6. When the Sixth Circuit's stay of the WOTUS Rule was in place, API's members benefited from regulatory stability and predictability. Because of the impending dissolution of the Sixth Circuit's stay and the uncertainty that will follow, however, I anticipate that the API's members 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 status quo preserved by the Sixth Circuit's stay—to mitigate their risk that the WOTUS Rule might later come into effect. I anticipate that these delays will impede the construction and operation of new facilities or expansions and will probably cost American jobs.

7. Although EPA's Applicability Date Rule has now been finalized, the fact that it is being challenged by States and environmental groups in new APA lawsuits means that API's members will face the same uncertainty that the WOTUS Rule may, in some states, come into effect. Thus, the Applicability Date Rule does not resolve the uncertainty that is causing API's members irreparable harm. Only a national injunction is capable of preventing these harms.

The foregoing is true and correct.

February 5, 2018

Howard J. Feldman

TAB 4

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