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

STATE OF NORTH DAKOTA, *et al.*, *Plaintiffs*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Defendants*.	)	Case No. 3:15-cv-59-DLH-ARS

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION; AMERICAN FOREST & PAPER ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION; LEADING BUILDERS OF AMERICA; 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; NATIONAL STONE, SAND, AND GRAVEL ASSOCIATION; PUBLIC LANDS COUNCIL; AND U.S. POULTRY & EGG ASSOCIATION SUPPORTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

June 8, 2018

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INTRODUCTION & INTEREST OF THE *AMICI CURIAE*

This is a challenge to the Environmental Protection Agency's and U.S. Army Corps of Engineers' regulation defining "waters of the United States" (the Rule) within the meaning of the Clean Water Act (CWA). As the States explain at length in their opening brief, the agencies disregarded the statutory and constitutional limits on their authority in both the process leading to the Rule's promulgation and the substance of the Rule.

Amici file this brief to focus on those issues that are of particular relevance to the business community. *Amici* each submitted comments on the proposed Rule. And for years now, they have been involved in the various challenges to the Rule, including as challengers in their own right before the U.S. Court of Appeals for the Sixth Circuit and the U.S. District Court for the Southern District of Texas. Their goal in filing this brief is not to repeat arguments already ably made by the States; it is instead to highlight the procedural and substantive defects with the Rule that are most important to the regulated community, and to explain the tremendous practical harms that would result if the Rule were allowed to come into effect.

Under the 2015 Rule, *amici*'s members will have either to obtain permits for discharges into mostly-dry land features that are not actually "waters of the United States" (at a costs of tens or hundreds of thousands of dollars per permit), or otherwise assume the risk of crushing fines and possible criminal penalties if the agencies later determine that the dry land features were "waters of the United States" after all. This will depress economic activity across the board.

That is no small matter. *Amici* represent a major cross-section of the nation's construction, real estate, mining, manufacturing, forestry, agriculture, and energy sectors, all of which are vital to a thriving national economy. WAC Comments 2, ID-14568.[1] Many of *amici*'s members construct residential developments, commercial buildings, shopping centers, factories, warehouses, water-

[1] All citations to materials in the administrative record follow the following citation format: [Short Title] [pin cite], ID-[last digits of docket number]. We include the docket identifier only the first time a material is cited.

works, and other utility facilities. *Id.* From March 2010 to March 2011, investment in construction of such structures alone totaled over $300 billion. *Id.* Every $1 billion of residential construction generates around 16,000 jobs. *Id*. Spending on commercial and institutional facilities has an even larger job creation effect, at around 18,000 jobs per $1 billion of spending. *Id*.

Many of *amici*'s members construct and maintain critical infrastructure: highways; bridges; railroads; tunnels; airports; facilities for electric generation, transmission, and distribution; and pipeline facilities. *Id*. at 2. Research has shown that infrastructure investments can increase economic growth, productivity, and land values. *Id.* Not only are investments in infrastructure critical to quality of life throughout the nation, but every $1 billion in transportation and water infrastructure construction creates approximately 18,000 jobs. *Id.* What is more, "every $1 of spending on residential construction, utility, and transportation infrastructure or commercial construction generates roughly $3 of economic activity throughout the economy." *Id*. (quoting David Sunding, *Economic Incentive Effects of EPA's After the Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal*, Brattle Grp. 3 (May 30, 2011)).

Amici's agricultural members grow virtually every agricultural commodity produced in the United States, including significant portions of the U.S. milk, corn, sugar, egg, pork, and beef supply. WAC Comments 2. Agriculture and agriculture-related industries contributed $775.8 billion to the U.S. gross domestic product (GDP) in 2012, a 4.8 percent share. *Id.* (citing U.S. Dep't of Agric., *Economic Research Service, Ag and Food Statistics: Charting the Essentials* (2014)).

Additionally, *amici* represent producers of most of America's coal, metals, and industrial and construction minerals. WAC Comments 2. In 2012, U.S. mining activities directly and indirectly generated over 1.9 million U.S. jobs and $118 billion in U.S. labor income, and $225.1 billion in contribution to U.S. GDP. *Id.* (citing Nat'l Mining Ass'n, *The Economic Contributions of U.S. Mining (2012),* at E-1 (Sept. 2014)). They also represent the energy industry that generates, transmits, transports, and distributes the nation's energy to residential, commercial, industrial, and institutional customers. *Id.* The electric power industry is an $880 billion industry that employs more

than 500,000 workers. *Id*. Together, oil and natural gas supply more than 60 percent of our nation's energy. *Id.* at 2-3. Overall, as of 2011, the oil and natural gas industry supported 9.8 million U.S. jobs and 8 percent of the U.S. economy. *Id*.

Individually and collectively, the *amici*'s members are of critical importance to the nation's economy. WAC Comments 3. Their experience, planning, and operations make them expert in the CWA and the practical consequences of the Rule's definition of "waters of the United States."

As the Sixth Circuit recognized in entering its stay of the Rule back in 2015, "the sheer breadth of the ripple effects caused by the Rule's definitional changes," the "pervasive nationwide impact of the 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" together call for particularly close scrutiny of the Rule. *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 806-08 (6th Cir. 2015). As *amici* explain below, the Rule does not survive the required scrutiny.

BACKGROUND

The States' brief aptly describes the legal and factual background leading up to the Rule, which we do not repeat here. But it bears additional emphasis that, during the public comment period, EPA undertook an unprecedented public relations campaign to defend and promote its proposed Rule. The agencies' advocacy campaign aimed to discredit public concerns and marginalize opposition to the proposed Rule. While on a public road show to promote the proposed Rule, for example, EPA Administrator Gina McCarthy belittled the concerns expressed by agriculture groups as "myths," "ludicrous" and "silly." *EPA's McCarthy: Ditch the Myths, Not the Waters of the U.S. Rule*, Farm Futures (July 9, 2014), perma.cc/8F4P-XTAP. Those comments were consistent with the agencies' unprecedented #DitchtheMyth Twitter campaign (B-326944, 2015 WL 8618591, at *4 (Comp. Gen. Dec. 14, 2015)), which further attempted to discredit farmers' and ranchers' concerns with the Rule.

Another objective of the agencies' social media campaign was to defeat bills pending in the House and Senate seeking to block the Rule. *See* B-326944, 2015 WL 8618591, at *5 (Comp. Gen.

Dec. 14, 2015). EPA sought to influence public perception of the Rule and motivate individuals to contact members of Congress to encourage them to oppose legislation that would block the Rule. *Id.* To do this, EPA used its blog, Twitter account, and Facebook page to solicit supporters for a "crowdspeaking" message that supported the proposed Rule. *Id.* at *3. The message was broadcast on September 29, 2014, reaching an audience of nearly two million people over social media platforms. *See id.* The message—presented to appear as though it was coming from third parties and not EPA—read: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community. *http://thndr.it/1sLh51M*." *Id.*

EPA also launched a #CleanWaterRules Twitter campaign, which disseminated a message that hyperlinked to external third-party websites, which had an associated "form letter for submission" opposing the legislation to the users' congressional representatives. B-326944, 2015 WL 8618591, at *4-5. A second hyperlink publicized by EPA took visitors to a page on the Natural Resources Defense Council's website, which included a button marked "Add Your Voice." *Id.* at *5. When clicked, the button took the user to an "action page" similarly criticizing proposed legislation to block the Rule and providing a form for readers to send to their senators in opposition to the pending bills. *Id.* at *5-6.

After the Rule was promulgated, and at the request of the Chairman of the Senate Committee on Environment and Public Works, the GAO investigated whether EPA's advocacy activities violated anti-propaganda and anti-lobbying provisions contained in federal appropriations acts. *See generally* B-326944, 2015 WL 8618591. The GAO's December 14, 2015 report concluded that EPA had violated those provisions. *Id.* at *19. First, the report concluded that EPA's "crowdspeaking" campaign constituted unlawful "covert propaganda" because the messages posted to campaign supporters' social media accounts obscured EPA's role in authoring the messages. 2015 WL 8618591, at *6-10. Second, the report concluded that by hyperlinking to third-party websites, EPA engaged in unlawful "grassroots lobbying." *Id.* at *12-18. GAO found that EPA "associated itself" with the lobbying messages on these external websites (*id.* at *18) and thereby "appealed to the

public to contact Congress in opposition to pending legislation." *Id.* at *13.

SUMMARY OF ARGUMENT

As the States explain in their opening brief, the Rule suffers numerous fatal flaws, each independently sufficient for its vacatur. Among other things, the agencies failed to reopen the comment period after making substantial, unanticipated changes to the Rule, including the addition of arbitrary distance limits; they ignored critical factual differences between wet and dry climates; they denied the public the opportunity to comment on the final Connectivity Report, despite acknowledging that it is the key scientific underpinning of the Rule; and they failed to comply with the National Environmental Policy Act. The agencies also erred in making Justice Kennedy's single concurring *Rapanos* opinion the "touchstone" for the Rule, and—by purporting to extend CWA over land features with only the most distant and attenuated connection to anything resembling a navigable water—the agencies have exceeded their authority under the Commerce Clause.[2]

These points are all ably made by the States, however, so we do not reiterate them here. Instead, *amici* focus on three core points that are of particular concern to them as private participants in the notice-and-comment process and as members of the regulated community.

First, promulgation of the Rule was procedurally defective in ways that undermine the agencies' final Rule. The agencies engaged in an unprecedented propaganda campaign to promote the Rule and rebuke its critics; displayed a closed mind during the public comment period; lobbied against legislative efforts to stop the Rule, which the U.S. Government Accountability Office has concluded was illegal; refused to conduct a mandatory analysis of small business impacts and to consider less burdensome alternatives on the regulated public; and refused to respond to serious, substantive comments made by members of the regulated public.

[2] These and other "serious flaws in the rulemaking process" are detailed in a 181-page congressional report, which concludes that EPA "cut corners, disregarded statutes and executive orders, and ignored serious concerns voiced by experts, the states, and American citizens," "rush[ing] promulgation of the rule" to satisfy "political considerations" and appease "outside special interest groups." Staff of H. Comm. on Oversight and Gov't Reform, 114th Cong., *Politicization of the Waters of the United States Rulemaking* 180 (2016), perma.cc/LH2S-X87U.

Second, the Rule expands the agencies' jurisdiction well beyond what the CWA's text and structure allow. At bottom, the Rule reads the term *navigable* out of the CWA and asserts jurisdiction over remote and isolated features that bear no meaningful relationship to "navigable waters." As a consequence, if the Rule were allowed to come into effect, it would freeze up the use and development of agricultural and industrial lands as landowners assess whether every minor drainage ditch, dry arroyo, and nearby puddle is covered by the Clean Water Act. These concerns are compounded by the agencies' proposal to make jurisdictional determinations *remotely* using satellite and aerial imagery. In consequence, no agency personnel would have to visit or personally observe a site before declaring a "water of the United States," and landowners could not readily discern for themselves whether their property is jurisdictional.

Finally, the Rule is unconstitutional. The States explain at length how the Rule runs afoul the Commerce Clause and disrespects the federalist scheme inherent in the CWA. In addition, it offends the Due Process Clause by failing to put the regulated public on notice of what is prohibited and giving government agents unchecked discretion to enforce the law in arbitrary and discriminatory ways. For example, it opens regulated entities to severe civil and criminal penalties that rest on nebulous standards like "more than speculative or insubstantial," "similarly situated," and "in the region," and on ambiguous definitions of terms like "ordinary high water mark." These uncertain standards are impossible for the public to understand or the agencies to apply consistently.

ARGUMENT

I. THE RULE WAS PROMULGATED WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW

A. EPA's advocacy campaigns were unlawful

The heart of the APA rulemaking process is the notice-and-comment procedure. The process begins when an agency publishes a "notice of proposed rule making." 5 U.S.C. § 553(b). That notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* § (b)(3). After the notice is published, the agency must "give interested persons

an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c).

Notice-and-comment serves three purposes. "First, notice improves the quality of agency rulemaking by ensuring that agency regulations will be 'tested by exposure to diverse public comment.'" *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). "Second, notice and the opportunity to be heard are an essential component of 'fairness to affected parties.'" *Id.*; *accord Dismas Charities, Inc. v. DOJ*, 401 F.3d 666, 678 (6th Cir. 2005). "Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review." *Small Refiner*, 705 F.2d at 547.

As the States have explained (Br. 3-4, 41-46), the agencies gamed the APA at every turn: they made substantial changes to the Rule (including by introducing arbitrary distance criteria) between publication of the proposed Rule and promulgation of the final Rule without reopening the comment period; and they withheld the final version of the Connectivity Report until after the comment period closed, denying the public any opportunity to comment on it or its relevance to the proposed Rule. Those are fatal procedural flaws.

But the agencies procedural transgressions include yet more: They also engaged in an illegal lobbying campaign in support of the Rule and an illegal propaganda campaign against its critics. In this way, EPA violated federal anti-lobbying and anti-propaganda laws and the basic principles of administrative rulemaking.

1. The Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, which authorized funding for EPA during the relevant time, prohibits use of appropriations "for publicity or propaganda purposes." *Id.*, tit. 7, § 718; *accord* Consolidated and Furthering Continuing Appropriations Act, Pub. L. No. 113-235, tit. 7, § 718, 128 Stat. 2130, 2383 (2014).

EPA's social media campaign violated this law. The GAO has repeatedly held that "materials . . . prepared by an agency . . . and circulated as the ostensible position of parties outside the agency amount to [prohibited] covert propaganda." B-305368, 2005 WL 2416671, at *5 (Comp. Gen. Sept.

30, 2005). Yet EPA used Thunderclap (a "crowdspeaking" platform) to recruit supporters of the proposed Rule. B-326944, 2015 WL 8618591, at *2; *see* perma.cc/9CHN-87T8 (archived Thunderclap page). Once the campaign reached a minimum threshold of supporters, Thunderclap disseminated a message through each supporter's social media accounts. B-326944, 2015 WL 8618591, at *2. The message, to an audience of 1.8 million, read: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community." *Id*. at *3. The statement concluded with a hyperlink to EPA's webpage promoting the proposed Rule. *Id.* Nothing identified EPA as the author; to anyone reading the message, "it appeared that their friend independently shared a message of his or her support for EPA and clean water." *Id.* at *8.

According to the GAO, this is the very definition of covert propaganda. EPA "used supporters as conduits of an EPA message . . . intend[ing] to reach a much broader audience," without disclosing "that the message was prepared and disseminated by EPA." B-326944, 2015 WL 8618591, at *8. This sort of surreptitious messaging is "beyond the range of acceptable agency public information activities," "reasonably constitute[s] 'propaganda,'" and was accordingly unlawful. B-223098, 1986 WL 64325, at *1 (Comp. Gen. Oct. 10, 1986).

This alone is a basis for vacating the Rule. "Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect . . . regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation." *Iowa League of Cities v. EPA*, 711 F.3d 844, 871 (8th Cir. 2013). EPA's covert propaganda campaign, particularly when taken together with its other social media efforts, demonstrates a lack of such fairness and transparency and a closed-mindedness to criticism of the proposed Rule.

2. EPA also violated the anti-lobbying laws. Anti-lobbying provisions in appropriations statutes prohibit executive agencies from using appropriated funds "for the preparation" of materials "designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself." Pub. L. No. 113-235, tit. 7, § 715, 128 Stat. 2130, 2382-83. GAO has long held that these provisions prohibit an agency from engaging in "grassroots lobbying" by appealing "to the

public to contact Members of Congress in support of, or in opposition to, pending legislation" that the agency supports or opposes. B-326944, 2015 WL 8618591, at *12.

That is exactly what EPA did. Its blog post discussing the importance of clean water to surfers and brewers linked to two external webpages that the GAO concluded made a "clear appeal" to the public to contact members of Congress to oppose pending legislation that would have blocked the Rule. B-326944, 2015 WL 8618591, at *15. It was not a close call: after encouraging readers to "[u]rge your senators to defend Clean Water Act safeguards for critical streams and wetlands," the pages presented form letters for visitors to submit electronically to their senators. *See* perma.cc/-MB6B-QFCF. By linking to these external websites, "EPA associated itself with the messages conveyed by these self-described action groups." B-326944, 2015 WL 8618591, at *18. In doing so, EPA directed the public to engage in lobbying activities against efforts to block the Rule, and thereby engaged in illegal "grassroots lobbying."

In light of EPA's unlawful propaganda and lobbying campaigns, there can be no doubt that the Rule was promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Petitioners were entitled by law to be "treated with fairness and transparency," and the APA required the agencies to give their criticisms "due consideration." *Iowa League of Cities*, 711 F.3d at 871. Not only did the agencies provide commenters with an incomplete draft of the scientific report that underlies the Rule, refuse to engage serious concerns of regulated entities, and fail to reopen the comment period after major changes to the Rule, but EPA's extraordinary lobbying campaigns revealed that the agencies had closed minds throughout the rulemaking. The APA forbids that kind of close-minded approach.

B. The agencies failed to comply with the Regulatory Flexibility Act

In addition to these violations, the Rule failed to comply with the Regulatory Flexibility Act (RFA). Congress enacted the RFA because federal agencies were routinely finalizing rules without considering their impact on small businesses and on other governmental bodies. Proponents recognized that smaller entities usually lack the financial resources to comply with costly regulatory

mandates and often bear disproportionate compliance costs. The RFA amended the APA to require agencies to give consideration to the challenges facing small entities. *See* Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 Duke L.J. 213, 227-31 (1982).

1. The RFA requires an agency to perform a "regulatory flexibility analysis" that estimates the full impact of any proposed rule on small entities and determines whether less burdensome alternatives are available. 5 U.S.C. § 603(a)-(d). The agency must summarize an initial analysis in the Federal Register at the time the rule is proposed (*id.* § 603(a)) and publish a final analysis, taking account of public comments, with the final rule. *Id.* § 604(a). These procedures are mandatory unless the agency certifies that the rule will not "have a significant economic impact upon a substantial number of small entities." *Id.* § 610(a).

Despite clear indications that the Rule would impose widespread hardship on small businesses and small governmental entities (*see* SBA Letter 4, ID-7958), the agencies certified in the preamble to the proposed Rule that the Rule would *not* "have a significant economic impact on a substantial number of small entities." 79 Fed. Reg. at 22,220. That certification was premised on the absurd claim that the Rule *narrows* the agencies' jurisdiction under the CWA. 80 Fed. Reg. at 37,102. The analysis supporting that conclusion is deeply flawed.

The starting point for any comparative analysis, according to EPA, is the immediate status quo ante. EPA, *Guidelines for Preparing Economic Analyses* 5-1 (2010) (2014 update), perma.cc/8TWH-SMJX. That is consistent with OMB guidance, which requires that comparative economic analyses (including RFA analyses) take as the status quo ante "the best [possible] assessment of the way the world would look absent the proposed action." OMB, *Circular A-4* (2003), perma.cc/Q335-NPYA.

In conformity with that guidance, public commenters—relying on the regulatory landscape the day before the proposed Rule was published—explained that the agencies' RFA certification was wrong, and that the Rule would require small businesses and municipalities across the country to obtain countless new and costly CWA permits, forcing many to "forgo . . . development plans."

Nat'l Fed'n of Indep. Bus. Comments 7, ID-8319. The Small Business Administration—an independent federal agency created by Congress to assist and protect the interests of small business concerns—submitted similar comments urging the agencies to withdraw their certification. *See* SBA Comments 1.

But for purposes of their RFA certification, the agencies ignored these facts. Rather than basing their analysis on "the best [possible] assessment of the way the world would look absent the [Rule]" (OMB, *Circular A-4*), the agencies instead based their conclusion that "the rule will not have a significant economic impact on a substantial number of small entities" on an assertion that "fewer waters will be subject to the CWA under the rule" as compared with "historic practice." 80 Fed. Reg. at 37,096, 37,101. But the "historic practice" that the agencies selected was not the post-*Rapanos* guidance issued in 2008; it was instead the practice *before that*, which has since been superseded. *See* EPA, *2008 Rapanos Guidance and Related Documents*, perma.cc/6ZPF-PPME.

In support of that obviously mistaken approach, the agencies offered no explanation beyond the bald conclusion the 1986 practices "represent [an] appropriate baseline for comparison." 80 Fed. Reg. at 37,101. Not only is that wrong as a matter of common sense, but a "conclusory statement with no evidentiary support in the record does not prove compliance with the Regulatory Flexibility Act." *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 919 F.2d 1148, 1157 (6th Cir. 1990); *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency conclusions must be supported by reasoning and evidence).

The agencies should have compared the Rule's effects on small businesses against the immediately prior (then-extant) regulatory guidance. Their decision to use a long-outdated baseline "remove[d] from consideration the economic analysis required by statute." *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004).

2. The serious practical concerns underlying the RFA issue are not hypothetical and have been documented in earlier lawsuits. *See In re Clean Water Rule*, No. 15-3751, Dkt. 129-2 (6th Cir. Nov. 1, 2016) (hereinafter "Sixth Circuit Addendum"). For example, Michael Jacobs, a small-

business owner in Oklahoma, has an undeveloped 50-acre plot of land next to his home. *See* Sixth Circuit Addendum 74a-79a. Prior to the Rule, Mr. Jacobs had planned to clear his property for cattle grazing and farming, improvements that would "greatly increase the value of the property." *Id.* ¶¶ 7-9. But because the property contains a small creek bed—which is usually about 5 to 6 inches deep but "will often go dry"—the creek is likely to be deemed a "tributary" under the Rule. *Id.* ¶¶ 14, 20. As a result of the Rule, Mr. Jacobs has therefore been forced to halt all plans for improving his property because the new regulation, if allowed to go into effect, will require him to obtain a costly jurisdictional determination from the Corps and, depending on the outcome, an equally costly permit from EPA. *Id.* ¶ 22.

Mr. Jacobs is not alone. Robert Reed is a small business owner who farms and grazes 3,000 acres of land in Matagorda County, Texas. *See* Sixth Circuit Addendum 122a-124a. His lands have several previously nonjurisdictional drainage ditches that would also likely count as "tributaries" under the Rule if it were allowed to come into effect. *Id.* ¶ 10. As a consequence, Mr. Reed would have to take about 5 to 10 percent of his fields out of production, at a cost of tens of thousands of dollars (*id.* at ¶¶ 11-14)—an enormous burden for a small family farmer like him.

Indeed, the agencies have conceded that the Rule would result in a 2.84 to 4.65 percent *expansion* of jurisdiction when "[c]ompared to a baseline of recent practice." 80 Fed. Reg. at 37,101. And (using underinclusive estimates) they acknowledged that, as a result of the Rule, CWA permitting costs would increase by tens of millions of dollars, and mitigation costs by potentially over one hundred million dollars, throughout the nation each year. *Economic Analysis of Proposed Revised Definition of Waters of the United States* 13-18, ID-0003; *Economic Analysis of the EPA-Army Clean Water Rule* x-xi, ID-20866. Common sense and common experience suggest that the true numbers are far larger.

C. The agencies brushed aside important public comments without engaging their substance

The agencies' entire course of conduct—from springing major changes on the public without seeking additional comment to hiding the evidentiary underpinning of the Rule and campaigning against criticism—all indicate that the agencies never took the notice-and-comment process seriously. Making that all the more apparent, the agencies ignored important, substantive comments by members of the regulated public.

Under the most basic principles of the APA, the agencies bore a responsibility to "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Though an agency need not "respond to every comment" (*Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984)), it must adequately respond to significant comments that "cast doubt on the reasonableness of a position taken by the agency." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977).

Here, interested parties—including *amici* here—submitted numerous comments fitting this description. Many commenters expressed concern, for example, that the proposed Rule would unduly expand the area subject to federal regulatory jurisdiction, trenching on traditionally local land-use regulation. *See, e.g.*, WAC Comments 39; U.S. Chamber Comments 6, ID-19343. Rather than engage with these comments, the agencies brushed them aside.

1. Several members of the public with land holdings in the arid West commented that the proposed Rule's expansive definition of covered "tributaries" was vastly overinclusive. They explained that many lands in the West contain features that the agencies claim are excluded from jurisdiction (*e.g.*, desert washes, arroyos, gullies, rills, and channels), but which would in fact often be covered by the Rule any time they arguably exhibit a bed, banks, and an ordinary high water mark. *See, e.g.*, Freeport-McMoRan Comments 5, ID-14135; Ariz. Mining Ass'n Comments 7-8, ID-13951; N.M. Cattle Growers Ass'n Comments 12, ID-19595. Yet due to the erodible nature of the soil in the West, these features are often formed by a single rain event and rarely carry water.

Freeport-McMoRan Comments 5. Thus, the commenters explained, it made no sense to rely on physical characteristics that might indicate a tributary in a wet, humid climate for purposes of identifying tributaries in the arid West. *E.g.*, Ariz. Mining Ass'n Comments 7-8.

Despite the serious nature of these comments, the agencies declined to address how the Rule should apply in the arid West or why that application makes scientific sense. The preamble to the final Rule notes generically that commenters "suggested that the agencies should exclude ephemeral streams from the definition of tributary," and responds that ephemeral streams will lack sufficient flow to form "the physical indicators required" by the definition of "tributary." 80 Fed. Reg. at 37,079. But that assertion is not at all responsive to concerns about channels and gullies in the arid West, which *do* sometimes have the physical indicators the Rule requires.

2. Members of the farming community commented that the proposed Rule would eviscerate several statutory permit exemptions applicable to agricultural activities. Am. Farm Bureau Fed'n (AFBF) Comments 13-17, ID-18005. They explained, for example, that although farming activities such as plowing, seeding, harvesting and farm pond construction are exempt from Section 404 permitting requirements (*see* 33 U.S.C. § 1344(f)(1)), the CWA's "recapture" provision—which requires permitting for otherwise exempt activities when they "impair[]" the flow of navigable waters (*id.* § 1344(f)(2))—will frequently be triggered when common features on the farm, such as ephemeral drains and farm ditches, become "tributaries" under the Rule. Beyond that, the proposed Rule would override the Section 402 permit exemption for agricultural stormwater runoff and irrigation (*id.* § 1342(l)(1)) by regulating as "tributaries" the ditches and drainages that carry stormwater and irrigation water. AFBF Comments 16-17.

The agencies turned a blind eye to these serious comments in the final Rule, offering only a terse, unsubstantiated assertion that the Rule "does not affect any of the [statutory] exemptions" and "does not add any additional permitting requirements on agriculture." 80 Fed. Reg. at 37,055. "[A] dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds

to significant points raised by the public." *Home Box Office*, 567 F.2d at 35-36. A hollow *ipse dixit* that denies the premise of the comment without explanation is not sufficient to that task.

3. The agencies also demeaned certain comments and commenters, confirming their closed mind throughout the process. Administrator McCarthy, for example, publicly dismissed the concerns expressed by agricultural interests (many of the same concerns that appear in this brief) as "silly" and "ludicrous" and "myths." *Ditch the Myths*, Farm Futures (July 9, 2014), perma.cc/8F4P-XTAP. The APA requires agencies to listen to and answer comments and concerns on proposed rules; "these procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule." *Home Box Office*, 567 F.2d at 35. Congress, in enacting the APA, assuredly did not contemplate agencies engaging in publicly funded campaigns to discourage negative comments by publicly (and superficially) rejecting criticisms while the comment period or agency consideration of a rule remains open.

II. THE RULE IS INCONSISTENT WITH STATUTORY LANGUAGE, SUPREME COURT PRECEDENT, AND THE SCIENTIFIC EVIDENCE

The Rule asserts jurisdiction over vast tracts of the United States, including countless miles of man-made ditches and municipal stormwater systems, dry desert washes and arroyos in the arid West, "tributaries" from which water has long since disappeared and that are invisible from the ground, ponds on never-mapped 100-year floodplains, and virtually all land in the water-rich Southeast. Many of these land and water features bear little or no relation to the traditional definition of navigable waters that Congress had in mind when it enacted the CWA. Whatever leeway the Act may give the agencies to regulate "navigable waters" (33 U.S.C. § 1362(7)), the statutory text is not limitless and "does not authorize this 'Land is Waters' approach to federal jurisdiction." *Rapanos* v. *United States*, 547 U.S. 715, 734 (2006) (plurality). The agencies' approach to the Rule—like their approach to the Migratory Bird Rule rejected in *SWANCC* and the "any connection" theory rejected in *Rapanos*—is inconsistent with both the law and the scientific evidence. As with the RFA issue, the consequences are not academic. Land use and development would be disrupted all across the

country—at enormous expense and without any legal grounding—if the Rule were allowed to come into effect.

A. The Rule reads the word "navigable" out of the CWA

Assuming for the sake of argument that it were appropriate for the agencies to base jurisdiction over tributaries, adjacent waters, and isolated other waters solely on Justice Kennedy's significant-nexus test (*Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment)), the Rule stretches and distorts that test beyond recognition. It reaches countless features that lack the "volume of flow" and "proximity" necessary to ensure that effects on navigable waters are more than "insubstantial" or "speculative." *Id*. at 778-81.

"Statutory interpretation, as [the Supreme Court] always say[s], begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). And the text "must, if possible, be construed in such fashion that every word has some operative effect." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003). Here, the CWA grants the agencies jurisdiction over "navigable waters" (33 U.S.C. § 1311(a)), which in turn are defined as "the waters of the United States." *Id.* § 1362(7). "Congress' separate definitional use of the phrase 'waters of the United States' [does not] constitute[] a basis for reading the term 'navigable waters' out of the statute." *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). Although "the word 'navigable' in the statute" may have "limited effect," it does not have "no effect whatever." *Id*. at 172-73 (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985)). On the contrary, the phrase "navigable waters" demonstrates "what Congress had in mind as its authority for enacting the CWA": its "commerce power over navigation" and therefore "over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 168 n.3, 172 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940)); *see Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

Justice Kennedy agreed that "the word 'navigable'" must "be given some importance" and emphasized that if jurisdiction over wetlands is to be based on a "significant nexus" test, the nexus must be to "navigable waters *in the traditional sense*." *Rapanos*, 547 U.S. at 778-79 (emphasis

added). If the word "navigable" is to have any meaning, he explained, the CWA cannot be understood to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id*. at 778.

The Rule ignores this admonition. As public commenters explained, the Rule will allow the agencies to assert federal regulatory jurisdiction over desiccated ditches (as "tributaries") and any isolated water features that happen to be nearby (waters with a "significant nexus"). For example:

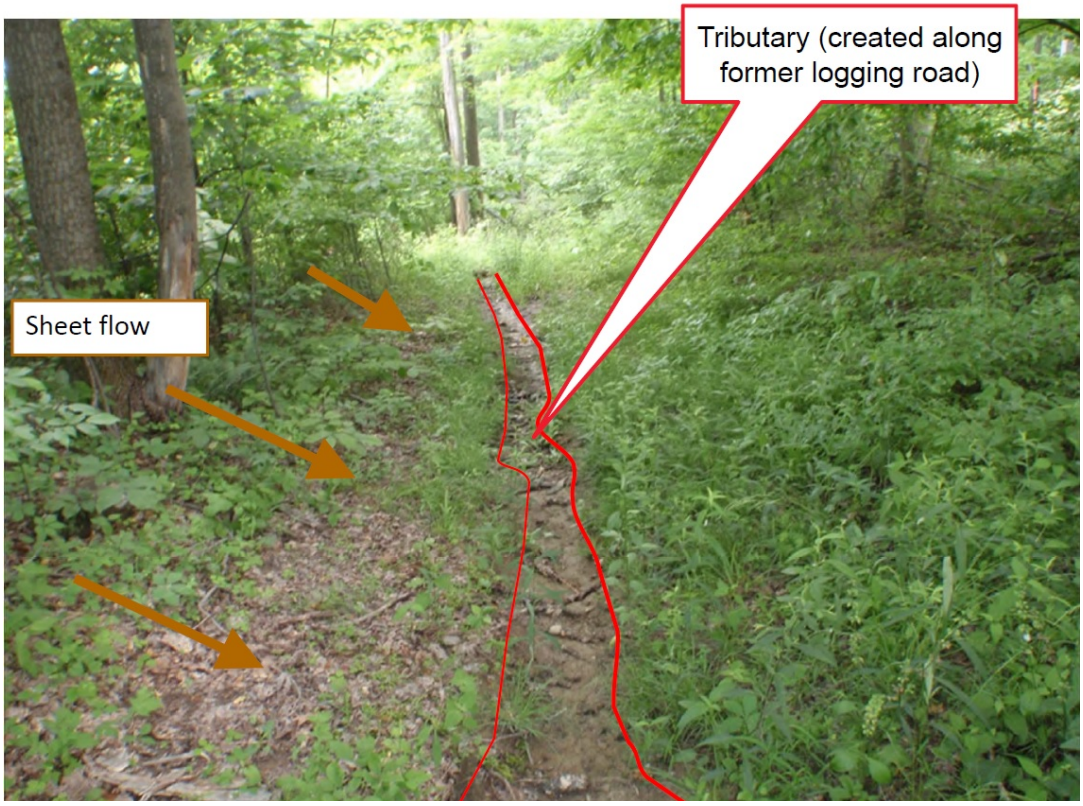

Figure 1: Because the red lines likely constitute an "ordinary high water mark" with a bed and banks between them, the feature depicted above is likely to be a "navigable water" under the Rule's definition of a tributary. Am. Petroleum Inst. Comments, ID-15115.

Figure 2: Dade City Canal in Florida is a man-made, mostly dry conveyance for flood control. Dade City Canal is not currently a water of the United States but would likely be deemed a "tributary" under the Rule. Fla. Stormwater Ass'n Comments 10, ID-7965.

Figure 3: This feature was deemed to be a "water of the United States" in 2014 after the Corps concluded that it exhibits an ordinary high water mark. AFBF Comments, App. A at 31. *See also* Laura Campbell, *The WOTUS Rule is Final, but the Fight Continues*, Mich. Farm Bureau (last visited Sept. 7, 2016), perma.cc/US3K-GKP3.

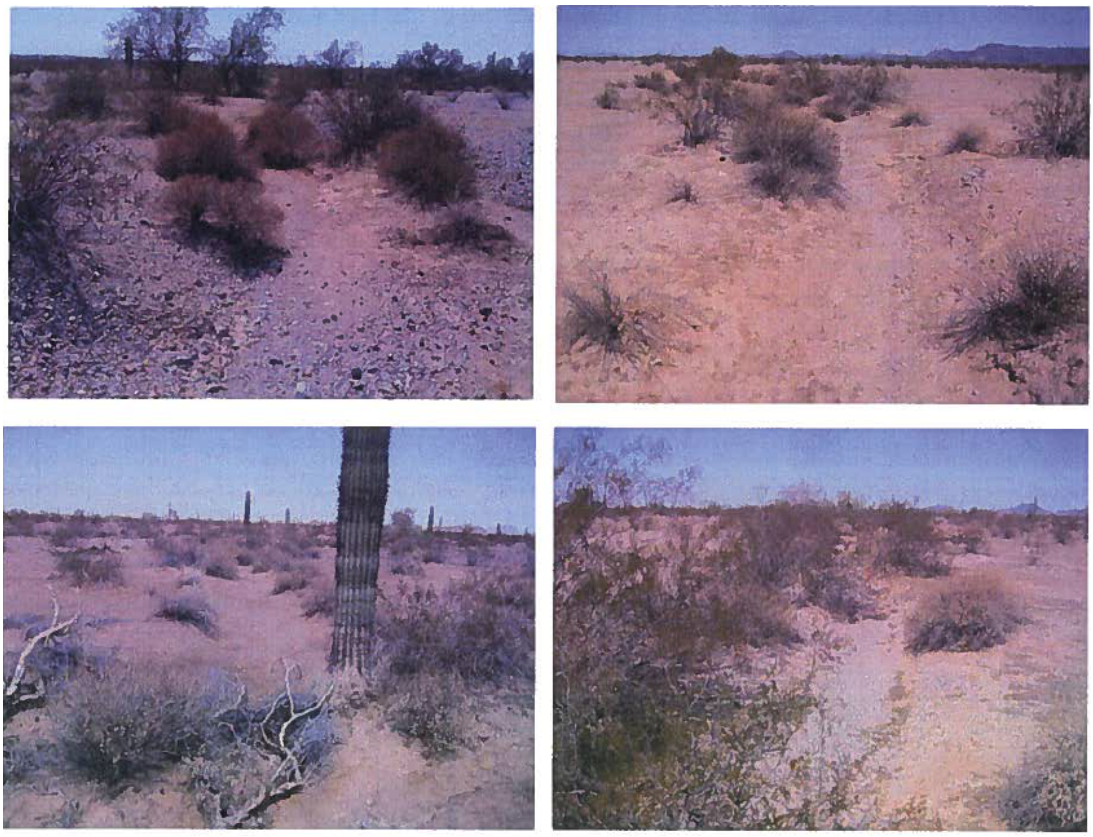

Figure 4: Typical ephemeral arid washes, likely to be deemed waters of the United States under the Rule. Freeport-McMoRan Comment 3, at 5.

As a matter of plain meaning, treating features like these as "tributaries" to "navigable waters"—and treating barely damp, isolated "wetlands" nearly a mile away as likewise "waters of the United States" because they are located within 4,000 feet of such "tributaries"—is impermissible.

The Rule's coverage of all "interstate waters" (33 C.F.R. § 328.3(a)(2)) likewise ignores the word "navigable," replacing it with the word "interstate," and ignores Congress's choice to *remove* the term "interstate waters" from the Act. *Compare* Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) ("interstate"), *with* Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) ("interstate or navigable"), with 33 U.S.C. § 1362(7) ("navigable"). The agencies purport to assert jurisdiction over all interstate water features, even when they "are not [traditional] navigable [waters]" and "do not connect to such waters." 80 Fed. Reg. at 37,074. An interstate water need not be navigable—an intermittent trickle or isolated pond is enough, so long as it crosses a state line. The agencies thus claim jurisdiction over features that are not navigable, cannot be made navigable, have no nexus

("significant" or otherwise) to a navigable water or commerce, are not adjacent to, and do not contribute flow to, a navigable water, simply because the feature "flow[s] across, or form[s] a part of, state boundaries." 80 Fed. Reg. at 37,074. And this overreach is compounded by the Rule's treatment of all "interstate waters" as if they were traditional navigable waters. As a result, any trickle that crosses a state line can be the starting point for the assertion of jurisdiction over its "tributaries" or "adjacent" wetlands.

The Rule accordingly cannot stand, for "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law," but "'the power to adopt regulations to carry into effect the will of Congress.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976).

B. The Rule's definition of "tributaries" is inconsistent with precedent and the evidence

Several other aspects of the Rule are irreconcilable with Supreme Court precedent, the scientific evidence, and (quite often) simple logic.

1. The Rule defines "tributary" to include any feature contributing any flow to a traditional navigable water or interstate feature, "either directly or through another water," and "characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark." 33 C.F.R. § 328.3(c)(3). Because flow may be "intermittent[] or ephemeral" (80 Fed. Reg. at 37,076), jurisdiction extends to minor creek beds, municipal stormwater systems, ephemeral drainages, and dry desert washes that are dry for months, years, or even decades at a time, as long as they exhibit a bed, banks, and "ordinary high water mark," or OHWM. A feature may qualify despite passing "through any number of [non-jurisdictional] downstream waters" or natural or man-made physical interruptions (*e.g.*, culverts, dams, debris piles, or underground features) *of any length*, so long as a bed, banks, and OHWM can be identified upstream of the break. *Id*; 33 C.F.R. § 328.3(c)(3). And the agencies need not use current facts; they may use historical information alone. *See, e.g.*, 80 Fed. Reg. at 37,081, 37,098.

The Rule defines OHWM to mean "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 80 Fed. Reg. at 37,106. That is the same definition that Justice Kennedy criticized in *Rapanos* as too uncertain and attenuated to serve as the "determinative measure" for identifying waters of the United States. 547 U.S. at 781. Because an OHWM is an uncertain indicator of "volume and regularity of flow," it brings within the agencies jurisdiction "remote" features with only "minor" connections to navigable waters—features that "in many cases" are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id*. at 781-82.

The definition's reach is thus vast, covering countless miles of previously unregulated features. And the definition is categorical, sweeping in many isolated, often dry land features regardless whether their "effects on water quality are speculative or insubstantial." *Rapanos*, 547 U.S. at 780 (Kennedy, J.). To be sure, Justice Kennedy contemplated that the Corps might, by rule, "identify categories of tributaries" (and adjacent wetlands) that, due to "volume of flow," "proximity to navigable waters," and other relevant considerations "are significant enough" to support federal jurisdiction. *Id.* at 780-81. But the Rule eschews consideration of frequency and volume of flow or proximity to navigable waters, proclaiming that the presence of "physical indicators" of bed and banks and OHWM guarantee there will be a significant nexus to navigable waters. *See* 80 Fed. Reg. at 37,076. That is wrong. For example, although many ephemeral washes in Maricopa County, Arizona experience flow infrequently (*e.g.*, less than once per year, with each flow event lasting less than 5 hours) and the Corps has previously found that many such washes *do not* have a significant nexus, these washes often exhibit physical indicators of an OHWM and therefore would be treated under the Rule as jurisdictional tributaries. *See* City of Scottsdale Comments 2-3, ID-18024.

Even if *some* features meeting the Rule's definition of tributary have a "significant nexus" with traditional navigable waters, "[i]n other instances" it is clear that they do not. *Rapanos*, 547

U.S. at 767 (Kennedy, J.). By treating all tributaries as categorically jurisdictional—even ones "carrying only minor water volumes toward" a "remote" navigable water (*id.* at 788, 781)—the Rule is inconsistent with Justice Kennedy's "significant nexus" approach, to say nothing of the plurality opinion.[3]

2. For similar reasons, the Rule's definition of "tributary" is inconsistent with the scientific evidence. The crux of that definition is the presence of a bed, banks, and OHWM. The underlying premise is that an "OHWM forms due to some regularity of flow and does not occur due to extraordinary events." Technical Support Document 239, ID-20869. When an OHWM is present, the reasoning goes, a water feature with relatively constant and significant water flow must also be present. But that key predicate of the Rule is demonstrably false.

In attempting to show that *all* "tributaries" nationwide have significant physical, biological, or chemical connections to navigable waters, the agencies focused on non-representative, water-rich systems. *See, e.g.*, 80 Fed. Reg. at 37,068-75. Yet the agencies concede that the jurisdictional status of some tributaries—especially "intermittent and ephemeral" features that may not experience flow for months and years at a time—had long been "called into question" (79 Fed. Reg. at 22,231) and that the evidence of connectivity for such features is "less abundant." 80 Fed. Reg. at 37,079.

Nowhere is that more apparent than in the arid West, where erosional features with beds, banks, and OHWMs often reflect one-time extreme water events, and are not reliable indicators of regular flow. *See* Ariz. Mining Ass'n Comments 7-11. In the desert, rainfall occurs infrequently, and sandy, lightly-vegetated soils are highly erodible. Thus washes, arroyos, and other erosional features

[3] *See, e.g.*, Nat'l Ass'n of Home Builders Comments 56-59, 121-23, ID-19574 (the Rule will extend jurisdiction over nearly 100,000 miles of intermittent and ephemeral drainages in each of Kansas and Missouri alone); Nat'l Stone, Sand and Gravel Ass'n Comments 21, ID-14412 (mountain-range watersheds in central California coastal region); Util. Water Act Grp. Comments 51-53, ID-15016 (drainage ditches in Southeastern coastal plains); Waters Working Grp. Comments 27, ID-19529 (water supply systems and municipal separate storm sewer systems); Delta Cty. Comments 3, ID-14405 ("artificial stock ponds west of the Mississippi"); Murray Energy Corp. Comments 11, ID-13954 (mine site drainage ditches and culvert conveyances); Ass'n of Am. R.R.s Comments 4, ID-15018 (rail ditches).

often reflect physical indicators of a bed, banks, and OHWM, even if they were formed by a long-past and short-lived flood event, and the topography has persisted for years or even decades without again experiencing flow. *See* Barrick Gold Comments 15-16, ID-16914. Because arid systems lack regular flow, the channels do not "heal" or return to an equilibrium state, as they do in wet, humid climates. Freeport-McMoRan Technical Comments 7.

The Corps' experience bears this out; their studies have found "no direct correlation" between the location of OHWM indicators and future water flow in arid regions. *See* Ariz. Mining Ass'n Comments 10-11 (quoting U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability* 14 (2006)). In fact, "OHWM indicators are distributed randomly throughout the [arid] landscape and are not related to specific channel characteristics." *Id*. at 11 (quoting U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns Across Arid West Landscapes* 17 (2013)). Needless to say, "randomly" distributed indicators cannot provide a rational basis for a blanket "significant nexus" finding.

Thus, in the arid West, dry channels deemed "tributaries" under the Rule are unlikely to have any impact (much less a significant one) on downstream jurisdictional waters. The agencies' categorical approach to jurisdictional tributaries is wholly unsupported by scientific evidence.

All of this is well reflected in the record. While it may make sense to assume that a defined "tributary" affects downstream "aquatic life" in water-rich environments, that assumption is out of place for intermittent and ephemeral channels that lack flow for months or years at a time. *See* Ariz. Mining Ass'n Comments 14. *See also* GEI Memo 3, ID-15059 ("[B]ecause the OWHM is a more demonstrated humid system criteria, its scientific reliability varies between regions depending on climatic and geomorphic conditions."). Similarly, chemical connectivity is "not relevant" in arid systems where "water moves quickly across the landscape" and "dissipates," because chemical processes require "a long residence time in channels." Freeport-McMoRan Comments 4-5. Evidence of actual transport distances in ephemeral "tributaries" likewise dooms any blanket finding of connectivity. *See* Ariz. Mining Ass'n Comments 12; Barrick Gold Comments 15-16.

In attempting to justify the Rule's effects in arid ecosystems, the agencies relied almost exclusively on a case study of the San Pedro River. *See* 79 Fed. Reg. at 22,231-32; Connectivity Report at B-37, B-42 to 48, ID-20858. But the San Pedro is demonstrably *un*representative of arid regions nationwide. *See*, *e.g.*, Sw. Developers Comments 2, ID-15362 (of "1,016 publications" in the Draft Connectivity Report, "only three include research on arid west headwaters in small watersheds"). And where the Connectivity Report briefly asserts that characteristics "similar to the San Pedro River" "have been observed in [three] other southwestern rivers," it acknowledges that each of those systems has *more* flow than the San Pedro. Connectivity Report B-48, B-49.

The difference is one of kind, not degree. The main stem San Pedro has surface flows 261 days a year because its tributaries generate large stormwater runoff, due to unusual soil composition that prevents water loss. *See* Freeport-McMoRan Comments 6. By contrast, the Santa Cruz River (a typical feature in arid regions) has a median annual flow of *zero* cubic feet per second, is dry 90% of the time, and is part of a system of "tributaries" that generally have less frequent surface flow than the main stem channel, "behave more like deep sandboxes than streams," and lack surface flow or a shallow subsurface connection to groundwater. *See id.*; Freeport-McMoRan Technical Comments 4, 12-15. By relying heavily on the San Pedro, the agencies arbitrarily overstated the connections between arid channels and downstream navigable waters. And an agency errs by relying "almost exclusively" on a sample of data but offering "no assurance" that it "was in any way representative" of the universe of regulated entities. *E.g.*, *Saint James Hosp. v. Heckler*, 760 F.2d 1460, 1466-67 (7th Cir. 1985).

3. The Rule also implausibly asserts that there is a significant hydrological nexus between every tributary and the nearest traditional navigable water or interstate feature, despite intervening man-made or natural breaks of literally "any length." 33 C.F.R. § 328.3(c)(3). As one authoritative report before the agencies explained, "the science does not support the Agencies' assertion that a significant nexus between a tributary and a traditional navigable water is not broken where the tributary

flows through a culvert or other structure." Water Advocacy Coal. Comments 36, ID-17921 (quoting Exhibit 6, GEI Report 6).

Indeed, EPA's own Science Advisory Board (SAB) noted that the Connectivity Report lacked sufficient information on the influence of human alterations on connectivity and "generally exclude[d] the many studies that have been conducted in human-modified stream ecosystems." SAB Report 31, ID-7531. It is often the entire *point* of such breaks to sever connectivity (GEI Report 5-6), as is sometimes the case with dams, for example. *Cf.* 79 Fed. Reg. at 22,235 (acknowledging that dams cut off flow and store water for flood control, irrigation water supply, and energy generation). It was arbitrary and capricious for the agencies to reach, on unexplained grounds, a result inconsistent with the SAB's conclusion.

C. The Rule's definition of "adjacent" is inconsistent with precedent and the evidence

The Rule's categorical approach to "adjacent" waters (33 C.F.R. § 328.3(a)(6)) runs into similar problems. The Rule defines "adjacent" as "bordering, contiguous, or neighboring." The term "neighboring" is defined to include, among other things, (i) waters within 100 feet of the OHWM of a navigable water or tributary and (ii) waters within the 100-year floodplain of such a water and within 1,500 feet of its OHWM. *Id.* § 328.3(c)(2). This definition is insupportable for four reasons.

First, the Rule conflicts with *Riverside Bayview*, *SWANCC*, and *Rapanos*, which consistently have given the word "adjacent" its ordinary meaning. The Court in *Riverside Bayview*, for example, described "wetlands adjacent to [jurisdictional] bodies of water" as wetlands "adjoining" and "actually abut[ting] on" a traditional "navigable waterway." 474 U.S. at 135 & n.9. Jurisdictional adjacent wetlands thus are those "inseparably bound up with the 'waters' of the United States" and not meaningfully distinguishable from them. *Id.* at 134-35 & n.9. For the same reason, the Court in *SWANCC* rejected the agencies' assertion of jurisdiction over *isolated* non-navigable waters "that [we]re *not* adjacent to open water" and thus not "inseparably bound up" with "navigable waters." 531 U.S. at 167-68, 171.

Rapanos continued this plain-language approach to adjacency. As the Sixth Circuit explained, *Rapanos* stands for the proposition that, regardless whether the word adjacent may be "ambiguous . . . in the abstract," it clearly includes "'physically abutting'" *and not* "merely 'nearby.'" *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 744 (6th Cir. 2012) (quoting *Rapanos*, 547 U.S. at 748 (plurality)). To conclude, as the Rule does, that the word "adjacent" covers merely "nearby" waters based on notions of "functional relatedness," rather than "physical and geographical" proximity (*id*. at 735) would "extend[]" the meaning of the word "beyond reason." *Id*. at 743.

Second, by asserting jurisdiction based on adjacency not only to traditional navigable waters, but to any traditional navigable water or interstate feature, the Rule violates Justice Kennedy's *Rapanos* concurrence. Justice Kennedy rejected the idea that a wetland's mere adjacency to a *tributary* could be "the determinative measure" of whether it was "likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." 547 U.S. at 781. "[W]etlands adjacent to [such] tributaries," Justice Kennedy explained, "might appear little more related to navigable-in-fact waters than were the isolated ponds [in *SWANCC*]." *Id.* at 781-82. On that understanding, Justice Kennedy voted to vacate the agencies' assertion of jurisdiction over wetlands supposedly "adjacent" to a ditch that indirectly fed into a navigable lake. *Id.* at 764; *accord id.* at 730 (plurality). In Justice Kennedy's view, "mere adjacency to a tributary of this sort is insufficient." *Id.* at 786. Similarly, Justice Kennedy disagreed with asserted jurisdiction over wetlands based on a mere surface water connection to a non-navigable tributary; some greater "measure of the significance of the connection for downstream water quality" was required. *Id.* at 784-85.

Yet the Rule doubles down on precisely this disfavored approach. It categorically asserts jurisdiction over "waters" (many of which are dry more often than wet) based on their "adjacency" to "tributaries" "however remote and insubstantial" (*Rapanos*, 547 U.S. at 779-80), including ephemeral features, drains, ditches, and streams remote from navigable waters. A blanket inclusion of adjacent "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and

the like" (33 C.F.R. § 328.3(c)(1)) improperly asserts jurisdiction over a feature isolated by a man-made barrier *whose precise aim and effect* is to interrupt any hydrologic connection to a jurisdictional water.

Third, the Rule improperly relies on adjacency to assert jurisdiction not only over "wetlands," but all other "waters." The Supreme Court has never approved such a sweeping approach. *See Riverside Bayview*, 474 U.S. at 139; *Rapanos*, 547 U.S. at 742 (plurality). According to the *Rapanos* plurality, *non-wetland* "waters"—especially those separated from traditional navigable waters by physical barriers or significant distances—"do not implicate the boundary-drawing problem" that justified deference to the agency's approach to adjacency in *Riverside Bayview.* 547 U.S. at 742.

For this reason, courts have rejected past attempts to assert "adjacency" jurisdiction over non-wetlands. In one such case, for instance, the Ninth Circuit rejected jurisdiction over an isolated pond located a mere 125 feet from a navigable tributary of San Francisco Bay, despite evidence that the tributary occasionally flowed into that pond (but not vice-versa) by overtopping a levee. *See S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 708 (9th Cir. 2007). That situation, in the court's view, "falls far short of the nexus that Justice Kennedy required in *Rapanos.*" *Id.* Yet under the Rule here, the agencies would assert jurisdiction over that feature and countless others like it. Such an approach is insupportable.

Fourth, the Rule improperly defines "adjacency" based on "the 100-year floodplain" (33 C.F.R. § 328.3(c)(2)(ii)), which is the region whose risk of flooding in any given year is 1 percent. Such infrequent contact with jurisdictional waters flouts the "*continuous* surface connection" required by the *Rapanos* plurality. *Id*. at 742. And under Justice Kennedy's test, a water that is "connected to [a] navigable water by flooding, on average, once every 100 years" (*Rapanos*, 547 U.S. at 728 (plurality)) cannot be said to "significantly affect the chemical, physical, and biological integrity of the other covered water[]." *Id*. at 780 (Kennedy, J., concurring). At most, such a water would have an "insubstantial" "effect[] on water quality" that "fall[s] outside the zone fairly encompassed by the

statutory term 'navigable waters.'" *Id.*

Within any given floodplain, moreover, the Rule applies unexplained distance criteria. 33 C.F.R. § 328.3(c)(2)(ii). As officials in the Corps acknowledged, longstanding agency guidance previously held that "it is not appropriate to determine significant nexus based solely on any specific threshold of distance." Moyer Memo 2, ID-20882. "Agencies are," of course, "free to change their existing policies," but if they do so, they "must at least 'display awareness that [they are] changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Here, the agencies did not do so. This "'[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Id.* (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

D. The Rule paradoxically treats some features as both "point sources" and jurisdictional waters

The Rule asserts jurisdiction over "man-altered or man-made water[s]" including "rivers, streams, canals, and ditches not excluded under [Section 328.3(b)]" and "channelized" waters and "piped streams," "even where used as part of a stormwater management system." 33 C.F.R. § 328.3(c)(3); 80 Fed. Reg. at 37,100. "Jurisdictional ditches" include those with "intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands," and those "regardless of flow, that are excavated in or relocate a tributary." 80 Fed. Reg. at 37,078.

The agencies concede that, under this definition, ditches and stormwater conveyances may be treated as "*both* a point source and a 'water of the United States.'" 80 Fed. Reg. at 37,098 (emphasis added). But the Act's structure and plain text "conceive of 'point sources' and 'navigable waters' as separate and distinct categories." *Rapanos*, 547 U.S. at 735 (plurality). That follows from the Act's definition of "discharge of a pollutant," which is "any addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. § 1362(12)(A) (emphases added). A point source is "any

discernible, confined and discrete conveyance," including any ditch, channel, tunnel, conduit, or fissure "from which pollutants are or may be discharged." *Id.* § 1362(14). Similarly, Section 402 of the Act, requires permits for "discharge *from* municipal storm sewers" "*into* the navigable waters." *Id.* § 1342(p)(3)(B), (a)(4) (emphasis added). Such point-source discharges are subject to extensive regulation, including permit-imposed effluent limitations. *E.g.*, 40 C.F.R. § 122.41-44; *id.* § 133.102. There is thus no need to designate these conveyances as waters of the United States, which could preclude their use for their intended water management purposes.

Under the Act, point sources (like storm sewers) are conveyances that collect pollutants and convey them for treatment before they are discharged to WOTUS. To require them to meet water quality standards intended by Congress to apply to WOTUS "make[s] little sense." *Rapanos*, 547 U.S. at 735 (plurality). Because Congress defined ditches and other wastewater and stormwater conveyances as "point sources" by statute (33 U.S.C. § 1362(14)), they cannot also be "waters" by regulation. Congress plainly understood such conveyances to be something *from* which pollutants are discharged, and not jurisdictional waters into which discharges are made. The agencies say that they must treat these conveyances as jurisdictional waters, lest wrongdoers attempt to avoid the permit requirement by introducing pollutants into upstream ditches and sewers. That is just wrong. The agencies (and States) closely regulate point sources using existing permitting programs.

E. The Rule's textual overreach would impose enormous costs on the American economy

The agencies' legal overreach is not a matter of mere abstractions. Consider some concrete examples. The question of whether ephemeral drainage ditches are regulated as "waters of the United States" under the WOTUS Rule has significant implications for the ability of mining and energy companies to utilize their property to extract resources that are essential to the American economy. See *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-cv-165, Dkt. 61-1 at 6a-8a, 46a-49a (S.D. Tex. Feb. 7, 2018) (hereinafter "Texas Addendum"). Mining and oil companies will be limited in their ability to engage in important new extraction projects if the projects' legality is in doubt, and in

certain cases, may be outright prevented from proceeding with projects. This will come at the cost not just of dollars, but of jobs. *See*, *e.g.*, *id.* at 143a-149a, Appendix Tabs 2-4. Several declarants in the Sixth Circuit litigation provided concrete examples of just these concerns. *E.g.*, Sixth Circuit Addendum 86a-104a, 138a-142a.

The question of how drainage ditches, too, are treated has enormous implications for agricultural interests. In light of the current uncertainty surrounding the WOTUS Rule, farmers and ranchers cannot tell which parts of their lands can be put to use, and which must be kept free of farming equipment, dirt and gravel, seed, and fertilizer. *See* Sixth Circuit Addendum 9a-10a, 50a-53a; Texas Addendum Tab 4. Because of the enormous risk associated with liability under the CWA, many of them will either (1) leave their lands fallow 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 (Sixth Circuit Addendum at 9a-12a, 50a-53a, 74a-79a, 122a-124a, 127a-129a), or otherwise (2) seek unnecessary permits at a cost of tens of thousands of dollars (*id.* at 16a-19a, 82a-83a, 173a-175a).

Foresters face similarly untenable choices. *See* Sixth Circuit Addendum at 31a-32a, 56a-57a, 84a-85a. Indeed, these concerns cut across all aspects of nearly every industry in the country, including not only energy and agriculture, but also infrastructure and transportation development, and homebuilding and construction. *Id.* at 61a-69a, 105a-106a, 135a-137a, 204a-208a.

The Rule's dual classification of some "point sources" as "waters" would also impose tremendous costs on municipal bodies (and businesses) that must manage sewage, wastewater, and stormwater. In just one example, Pinellas County, Florida estimates that it and its co-permittees will be forced to spend between $430 million and $2.72 billion in remediation if their stormwater conveyances and drainage ditches are made jurisdictional. The Rule would require them—counterproductively—to divert substantial resources from the protection of critical waterbodies, including Tampa Bay and other crucial, environmentally rich inlets along the Gulf of Mexico. *See* Pinellas Cty. Comments 4, ID-14426. The Rule will thus distort local priorities and allocations of limited resources to the detriment of water quality protection. *See* Fla. Stormwater Ass'n Comments 8-14.

III. THE RULE IS UNCONSTITUTIONALLY VAGUE

There is yet another reason for vacating the Rule: It is unconstitutionally vague. Not only does the Rule fail to give the public fair notice of when and where discharges are unlawful, but it gives malleable discretion to bureaucrats to determine which land features are jurisdictional "waters" and which are not. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application[] violates the first essential of due process of law." *Fox Television*, 567 U.S. 239 at 253 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). "This requirement of clarity in regulation is [therefore] essential to the protections provided by the Due Process Clause of the Fifth Amendment" and "requires the invalidation of laws that are impermissibly vague." *Id.* (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)).

"[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns." *Fox Television*, 567 U.S. at 253. The first concern is "to ensure fair notice to the citizenry" (*Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007)), so regulated individuals and entities "know what is required of them [and] may act accordingly" (*Fox Television*, 567 U.S. at 253). The second concern is "to provide standards for enforcement" (*Fire Fighters*, 502 F.3d at 551), "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television*, 567 U.S. at 253.

The second concern is the "more important aspect of [the] vagueness doctrine." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (citing *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). According to this strand of the law, a regulation is constitutionally invalid if it fails to establish objective guidelines for enforcement. *Id.* In the absence of such objective guidelines, the law "may permit 'a standardless sweep [that] allows [government agents] to pursue their personal predilections.'" *Id.* at 358. Invalidation is therefore necessary when a regulation "is so imprecise that [arbitrary or] discriminatory enforcement is a real possibility." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). That is the case here.

Ordinary high water mark. Take first the concept of an "ordinary high water mark" (33 C.F.R. § 328.3(c)(6))—the crux of a "tributary" (*id.* § 328.3(c)(3)) and the starting point for marking off the applicable distances for "adjacent" and "neighboring" waters (*id.* § 328.3(c)(1)-(2)) and waters with a "significant nexus." *Id.* § 328.3(a)(8).

As though "changes in the character of soil" and "presence of litter and debris" as indicators of an OHWM were not already sufficiently vague to permit arbitrary enforcement, the Rule expressly allows agency staff to rely on whatever "other . . . means" they deem "appropriate" in deciding when an OHWM is present and where it lies. 33 C.F.R. § 328.3(c)(6). In fact, "[t]here are no 'required' physical characteristics that must be present to make an OHWM determination." U.S. Army Corps of Eng'rs, *Regulatory Guidance Letter No. 05-05*, at 3 (Dec. 7, 2005). Regulators can reach any outcome they please, and regulated entities cannot know the outcome until they are already exposed to criminal liability, including crushing fines.

As scientific commentators observed during the rulemaking, "[t]here is ambiguity and uncertainty associated with all the primary indicators of OHWM. It is particularly difficult to differentiate between [non-jurisdictional] gullies and [jurisdictional] ephemeral channels with these types of ambiguous indicators. Delineating down to this scale significantly magnifies the degree of subjectivity that must be applied and the intensity of disputes that could arise." GEI Memo 7.

Matters are made worse by the methods prescribed for identifying an OHWM, which are standardless and cannot be replicated by the regulated public. Agency staff making an OHWM determination *do not even need to visit the site*. "Other evidence, besides direct field observation," can "establish" an OHWM. 80 Fed. Reg. at 37,076. Worse still, the preamble warns that regulators may use desktop computer models "independently to infer" jurisdiction where "physical characteristics" of bed and banks and OHWM "are *absent* in the field." *Id.* at 37,077 (emphasis added). That means not only that regulators won't need to visit a site, but that an OHWM will exist when they *say* it exists, even if it's not visible to the naked eye. Landowners will have to sleuth out the "prior existence" of an OHWM and "historical presence of tributaries"—with no limit to how far back they

must go—based on unclear criteria such as "lake and stream gage data, flood predictions, historic records of water flow, and statistical evidence." *Id*. at 37,077-78.

Among the "remote sensing or mapping information" the agencies may rely on to detect an invisible OHWM from afar are "local stream maps," "aerial photographs," "light detection and ranging" (also known as LiDAR, which means topographic maps drawn by lasers mounted on drones), and other unidentified "desktop tools that provide for the hydrologic estimation of a discharge." 80 Fed. Reg. at 37,076-77. The agencies will use these sources "independently to infer" and "to reasonably conclude the presence" of an OHWM. *Id*. at 37,077.

There is no mistaking what all of this means. Agency bureaucrats reviewing satellite images and other non-public surveillance data will determine from distant, government offices when and where OHWMs and tributaries lie without ever putting their eyes on the scene or putting their feet on the ground. And because the supposed standard for reaching these conclusions rests exclusively on the agencies' own "experience and expertise" (80 Fed. Reg. at 37,076), the term OHWM will simply come to mean whatever the agencies say it means, which will inevitably vary from field office to field office and case to case. *See Rapanos*, 547 U.S. at 781-82. (Kennedy J., concurring). *See also* U.S. Gov't Accountability Office, GAO-04-297, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 21-22 (2004) ("the difficulty and ambiguity associated with identifying the" OHWM means that "if [you] asked three different district staff to make a jurisdictional determination, [you] would probably get three different assessments"), perma.cc/8NZM-3W52. That is flatly inconsistent with the Fifth Amendment.

Significant nexus. The standardless discretion of the Rule is equally apparent with respect to the "case-by-case" significant nexus test. 80 Fed. Reg. at 37,058. At every stage, the test turns on subjective observations and opaque analyses.

Consider a landowner with a small, isolated pond on her property. To determine whether she needs a federal permit to discharge into the pond (for example, by building a swimming pier) the landowner must first identify all traditional navigable waters, interstate waters, and tributaries

anywhere within 4,000 feet—*nearly a mile*—of the pond. Setting aside the vagueness of what counts as a "tributary" in the first place, imagine the landowner finds a tributary within the 4,000-foot limit. She must then sort out whether regulators will conclude that the pond, together with "other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of the nearest traditional navigable water or interstate feature. 33 C.F.R. § 328.3(c)(5).

- Waters are "similarly situated" when "they function alike and are sufficiently close to function together in affecting downstream waters." 33 C.F.R. § 328.3(c)(5). But when does a pond function "alike" with other ponds, and when does it function distinctly and alone? And what does "sufficiently close" mean? Is a mile too far? 10 miles? 100 miles?
- These "similarly situated" waters must "significantly affect[]" the "biological integrity" of the nearest traditional navigable water or interstate feature, including its capacity for "[s]ediment trapping," "[n]utrient recycling," and "[p]rovision of life cycle dependent aquatic habitat," among other functions. 33 C.F.R. § 328.3(c)(5). But when is an effect on water integrity *significant*? The agencies' explanation—that an effect is significant when it is "more than speculative or insubstantial" (*id.*)—is no more clear than the nebulous word it purports to define.
- "[I]n the region" means in the "the watershed that drains to the nearest" traditional navigable water or interstate feature (33 C.F.R. § 328.3(c)(5)), unless of course the watershed is too big, in which case it "may be reasonable" to use instead a "typical 10-digit hydrologic unit" (80 Fed. Reg. at 37,092), which ranges between 40,000 and 250,000 acres in size. But how are regulated entities to know the boundaries of watersheds millions or hundreds of thousands of acres in size, and how are they to know when regulators will deem it "reasonable" to use hydrological sub-units instead? More fundamentally, how are landowners expected to identify all "similarly situated" waters within hundreds of thousands of acres (requiring them to trespass on others' land), and then determine if they, together with the waters on their own land, "substantially effect" a tributary's "water integrity"?

These so-called standards fail to put the regulated community on notice of when the Clean Water Act actually applies to their lands. On the face of it, the significant-nexus test permits arbitrary enforcement based on vague notions like "sufficiently close," "more than speculative or insubstantial," and "in the region." Who is to say what those words mean, until a government agent comes knocking on the door *saying* what they mean?

Categorical exemptions. Many of the Rule's categorical exemptions from jurisdiction are vague. For example, in apparent response to comments by agricultural groups (*e.g.*, AFBF Comments 2-3), the agencies inserted an exemption for "puddles." 33 C.F.R. § 328.3(b)(4)(vii). But

what is a puddle? The agencies use the significant nexus test to assert jurisdiction over "depressional wetlands" (80 Fed. Reg. at 37,093), without regard for size or permanence. But when does a recurring puddle become a small depressional wetland? For example:

Figure 5: Small "depressional wetland" or large puddle? AFBF Comments App. A at 38.

This is not a hypothetical concern. The Corps determined in 2007 that the following feature is a jurisdictional *wetland*. According to common experience, it's a *puddle*:

Figure 6: Delineated "Water Feature 21" in Project SPK 2002-00641. *See* Staff of S. Comm. on Env't & Pub. Works, 114th Cong., *Expansion of Jurisdiction Claimed Under the Clean Water Act* 21 & n.87 (2016), perma.cc/W6U3-583Y.

Similar ambiguity arises with respect to the Rule's categorical exemption for "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary." 33 C.F.R. § 328.3(b)(4)(vi). As we explained above, there is no way for the regulated public to know when the "volume, frequency, and duration of flow" of such erosional features is "sufficient to create a bed and banks and an ordinary high water mark" to qualify as a "tributary." *Id.* § 328.3(c)(3). The agencies' discretion in interpreting those provisions makes their applicability impossible to predict..

"Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). "Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce." *Id*. The Rule, including its approach to OHWM, significant nexus, and exemptions, "does not even begin to meet this constitutional requirement." *Id*.

Jurisdictional determinations. The Corps' jurisdictional determination (JD) process does not cure the problem. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1811-16 (2016). We are unaware of any other circumstance in which a citizen must obtain a case-specific government report, at great personal expense, to be informed of the limits of the law. *See Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) ("This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property."). A JD also does nothing to address the Rule's encouragement of arbitrary and discriminatory enforcement—it is merely another instance in which that arbitrariness can manifest itself.

Members of the Supreme Court have observed that "the reach and systemic consequences of the Clean Water Act remain a cause for concern" because "the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring) (quoting *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J.,

concurring)). JDs cannot solve that constitutional problem when they are guided by a vague rule; are available only in the Section 404 context, and not to determine the need for a Section 402 permit (*see* 33 C.F.R. § 331.2); and are not binding on environmental NGOs, who are free to bring civil enforcement actions under the Rule's nebulous standards.

* * *

At the same time that the Rule is "facially suspect," its "sheer breadth" threatens tremendous harm all across the country. *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 807-08 (6th Cir. 2015). No court should ever condone the administrative corner-cutting that the agencies engaged in here, and courts should be especially exacting with respect to so sweeping and so legally dubious a regulation as the Rule. It accordingly should be vacated.

CONCLUSION

The Rule should be vacated.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that that on June 8, 2018, the foregoing Brief for Business & Municipal Petitioners was served electronically via the Court's CM/ECF system on counsel of record for all parties.

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