EXHIBIT A

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

AMERICAN FARM BUREAU FEDERATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)	)	No._____
Defendants	)	

DECLARATIONS IN SUPPORT OF COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF PAUL BREDWELL

I, Paul Bredwell, declare based on personal knowledge as follows.

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

2. I am the Executive Vice President – Regulatory Programs at the U. S. Poultry & Egg Association ("USPOULTRY"). I offer this Declaration based on my 15 years working on behalf of USPOULTRY's members focusing on Clean Water Act issues

3. USPOULTRY is the world's largest and most active poultry organization. We represent the entire industry as an "All Feather" association. Membership includes producers and processors of broilers, turkeys, ducks, eggs, and breeding stock, including members who are directly and adversely impacted by the rule challenged in this case. USPOULTRY members are based in and/or operate in many states, including Texas.

4. USPOULTRY strives to be the leading technical resource and voice for the feather industries by progressively serving its poultry and egg members through research, education, communications, and technical services.

5. As a technical resource for farmers and processors of broilers, turkeys, ducks, eggs, and breeding stock USPOULTRY seeks to promote the development of reasonable and lawful environmental regulations and regulatory policies that affect the use and development of agricultural land.

6. USPOULTRY prepared and submitted extensive comments on the U.S. EPA and U.S. Army Corps of Engineers Proposed Rule to Define "Waters of the United States" Under the Clean Water Act Docket ID No. EPA–HQ–OW–2011–0880. The U.S. EPA and the U.S. Army

Corps of Engineers signed the "Revised Definition of 'Waters of the United States'" rule in December 2022 (the "Rule").[1]

7. USPOULTRY joined a coalition of agricultural organizations which submitted comments addressing the U.S. EPA and U.S. Army Corps of Engineers Proposed Rule to revise the definition of "Waters of the United States," on February 7, 2022.[2]

8. USPOULTRY expended resources to provide extensive education of its members on the complexities and uncertainties of the U.S. EPA and the U.S. Army Corps of Engineers Proposed Rule to Define "Waters of the United States" under the Clean Water Act. Docket ID No. EPA-HQ-OW-2021-0602.

9. Many USPOULTRY members across the country (including in Texas) will be directly affected by the Rule. Poultry and egg production often coincide with the farming of row crops and forage. Agricultural operations like these exist in rural, largely undeveloped open areas. The Rule would assert jurisdictional authority over countless dry creeks, ditches, swales and low spots that are wet because it rains. Regulation of these features would require farmers to expend time and money to ascertain if the features or land in question are "Waters of the United States." Depending on the outcome of this determination, a farmer would have to modify their operation to ensure compliance. Alternately, a farmer would have to take their farm out of agricultural production to avoid a potential unlawful discharge.

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

[1] *Available at https://www.epa.gov/system/files/documents/2022-12/Pre-Publication%20Final%20Rule%20Notice.pdf.*
[2] *Comments of the American Farm Bureau Federation on the Revised Definition of "Waters of the United States" 86 Fed. Reg. 69,372 (Dec. 7, 2021)*, Dkt. No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022).

Executed this 18th day of January 2023.

Paul Bredwell

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

Declaration of Courtney Briggs

I, Courtney Briggs, declare based upon personal knowledge that:

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

2. I offer this Declaration based on my 12 years working primarily on Clean Water Act ("CWA") issues on behalf of home builders, developers, farmers, ranchers, and industry groups in a wide variety of business areas.

American Farm Bureau Federation and Waters Advocacy Coalition

3. I joined the American Farm Bureau Federation ("AFBF") in 2021, and currently serve as the Senior Director of Government Affairs at AFBF. AFBF is a voluntary general farm organization formed in 1919, representing about 6 million member families through Farm Bureau organizations in all 50 states plus Puerto Rico. Each state Farm Bureau is an independent entity, affiliated with AFBF through a membership agreement. Generally, state Farm Bureaus (such as Texas Farm Bureau) share the same structure with respect to their county Farm Bureaus (such as the Matagorda County Farm Bureau). The state organizations are members of AFBF, and their individual members are also associate members of AFBF. A number of AFBF's county affiliates, members, and associate members are based in and/or operate in Texas, including Matagorda County Farm Bureau.

4. Prior to joining AFBF, I worked on environmental issues as a Senior Director of Government Affairs for the National Association of Home Builders ("NAHB"). For eleven years, I managed the public policy advocacy for all water issues facing the home building industry—including the definition of "waters of the United States."

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

States, including in Texas. AFBF seeks to promote the development of reasonable and lawful environmental regulations and regulatory policies that affect the use and development of agricultural land.

6. AFBF has a dedicated staff and expends a great amount of resources to advocate on many issues before Congress, the Executive Branch and federal courts to serve the interests of farmers and ranchers. AFBF routinely lobbies the federal government to improve the regulatory climate for farmers and ranchers and to protect their ability to make productive use of their land.

7. The scope of federal jurisdiction under the Clean Water Act—and the definition of Waters of the United States ("WOTUS")—is of key importance to AFBF and its members. AFBF has expended great resources over many years to promote a lawful and reasonable interpretation of CWA jurisdiction.

8. AFBF has a long history of involvement with WOTUS and the CWA. AFBF advocated (i) against the 2008 Guidance[1] issued following the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006),[2] (ii) against the 2015 Rule's expansion of the definition of jurisdictional WOTUS,[3] (iii) in favor of the repeal of the 2015 Rule,[4] (iv) in favor of a more certain and narrower definition of WOTUS like that adopted in the 2020 Navigable Waters Protection Rule,[5] and (v) against the 2022 Rule's[6] expansion of the definition of jurisdictional

[1] *See Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* ("2008 Guidance"), *available at* https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos 120208.pdf.

[2] *See Comment by American Farm Bureau Federation et al. regarding Comments on the U.S. EPA and U.S. Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after Rapanos,* Docket No. EPA-HQ-OW-2007-0282, Dkt. No. EPA-HQ-OW-2007-0282 (Jan. 22, 2008).

[3] *See* 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule").

[4] Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) ("Repeal Rule").

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

[6] Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372 (Dec. 7, 2021) ("Proposed Rule").

WOTUS.[7] AFBF's advocacy throughout has reflected the great harm to its member farmers and ranchers that results from broad and uncertain federal jurisdiction beyond what Congress intended in the CWA.

9. In addition to my role at AFBF, I serve as the Chair of the Waters Advocacy Coalition ("WAC"), a position which I have held since 2021. My duties as Chair of the WAC include holding weekly meetings, responding to requests for information from the government and the general public, providing information on government regulations to WAC's members, assisting the members with participation in legislation and rulemaking processes, and ensuring WAC's members are able to express their interests to government entities. Previously, I participated in WAC, as a representative of NAHB, since 2010.

10. WAC represents a large cross-section of the Nation's construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much-needed jobs. WAC's members—which include most of the plaintiffs in this case—are committed to a successful American economy, the success of the respective industries that they represent, and the protection and preservation of America's wetlands and waters, and believe that clear CWA regulation will help further these goals.

11. Among other organizations, WAC members include plaintiffs AFBF, American Petroleum Institute ("API"), American Road & Transportation Builders Association ("ARTBA"), Associated General Contractors of America ("AGC"), Leading Builders of America ("LBA"), NAHB, National Association of REALTORS® ("NAR"), National Corn Growers Association ("NCGA"), National Mining Association ("NMA"), National Pork Producers Council ("NPPC"), and the National Stone, Sand and Gravel Association ("NSSGA"). From my experience working

[7] *Comments of the American Farm Bureau Federation on the Revised Definition of "Waters of the United States,"* 86 Fed. Reg. 69,372 (Dec. 7, 2021), Dkt. No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022).

with these organizations on CWA issues at WAC, I am aware that each of these organizations has for years devoted substantial resources toward lobbying and other efforts to advocate for a reasonable scope of federal jurisdiction under the CWA, because the members that they represent are the directly regulated parties that stand to be significantly harmed by an overly-broad and vague definition of WOTUS. WAC submitted comments against the 2022 Rule.[8]

12. Since its inception in 2007, WAC and its members, including AFBF, have been involved in every permutation of CWA regulation. The definition of "WOTUS" under the CWA is of paramount interest to WAC members because the ability of their members to plan projects and organize their affairs is highly sensitive to the scope of the agencies' regulatory jurisdiction. Members' operations are irreparably disrupted by an overly broad or ambiguous assertion of CWA jurisdiction. Even before 2010, many WAC members were involved in the scope of WOTUS.

AFBF's and WAC's Member Plaintiffs Long And Deep History With WOTUS

13. The "Revised Definition of 'Waters of the United States'" signed by the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") (collectively "the Agencies") in December 2022 (the "Rule" or "2022 Rule"),[9] challenged here, would cause great harm to AFBF's and WAC's members. I submit this declaration to describe some of the harms that arose from prior, broader definitions of WOTUS that will be perpetuated and made worse by the Rule.

14. Allowing the 2022 Rule to go into effect would expose AFBF's and WAC's members to an extremely vague, burdensome and illegal regime that fails to guide the discretion of the EPA and the Corps, and threatens those members with substantial criminal and civil liability for the ordinary use of their land.

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[8] *Comments of the Waters Advocacy Coalition (WAC) on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Revised Definition of "Waters of the United States,"* Dkt. No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022) (corrected Feb. 9, 2022).

[9] *Available at* https://www.epa.gov/system/files/documents/2022-12/Pre-Publication%20Final%20Rule%20Notice.pdf.

2008 Guidance

15. On January 22, 2008, AFBF, along with the AGC, NAHB, NAR, and the NMA, among others, submitted comments to the Agencies' 2008 Guidance.[10] The 2008 Guidance was intended to address the uncertainty and confusion that had abounded since the *Rapanos* case was decided. Instead, the 2008 Guidance caused further confusion and added delays in an already burdened and strained permit decision-making process. As stated in AFBF's comments to the 2008 Guidance, the Agencies through the 2008 Guidance, among other issues, (i) incorrectly interpreted the *Rapanos* decision, (ii) added confusion regarding key concepts such as "significant nexus" and "relatively permanent waters," (iii) improperly reclassified certain waters as "traditionally navigable waters," and (iv) improperly expanded jurisdiction over certain water bodies.[11] AFBF's comments advocated for clarity and for policies that would eliminate or, at a minimum, reduce confusion, delays, and costs, and create more predictability and certainty with regard to permitting.

2015 Rule and the Repeal Rule

16. WAC was formed in 2007 when some members of Congress introduced an amendment to the CWA that would result in the removal of the word "navigable" from the CWA. This was deeply concerning to WAC's members, including AFBF, because removal of the word "navigable" from the CWA could result in expanding federal jurisdiction under the CWA.

17. WAC and its members were at the center of efforts to convince Congress not to undertake this change in CWA jurisdiction because it could infringe landowners' use of their land and increase costs and regulatory burden on nearly every aspect of ordinary business operations across the American economy. WAC demonstrated to Congress that this change in the definition of WOTUS could unreasonably expand federal permitting requirements, increase exposure of WAC's members to civil penalties, potential criminal liability, and private lawsuits over alleged

[10] *See* n.2, *supra*.

[11] *See* n.2, *supra*.

violations of the CWA, result in job losses and business closures, and cause delays and add costs for services, such as construction of roads, schools, and homes, and growing our nation's food, that ordinary people depend upon every day. Congress decided not to proceed with the removal of the word "navigable" from the CWA.

18. The Obama Administration apparently did not agree with Congress's decision not to remove the word "navigable," and sought to accomplish through regulatory action what proponents of broader federal jurisdiction could not accomplish through legislation. The Agencies promulgated a sweeping regulatory definition of WOTUS in the mis-labelled "Clean Water Rule" (i.e. the "2015 Rule"), which effectively wrote the word "navigable" out of the CWA.

19. WAC and its members, including AFBF, vigorously opposed the 2015 Rule, for much the same reasons they objected to amending the CWA.[12] Historically, permits come at great cost: as the Supreme Court has noted, "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 725 (plurality) (quoting Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,

[12] WAC and WAC members which are plaintiffs here filed extensive comments regarding the proposed 2015 Rule and how it would harm their membership. *See, e.g.*, WAC, *Comment Letter on 2015 Rule* (Nov. 13, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14568; AFBF, *Comment on the 2015 Rule* (Dec. 4, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-18005; API, *Comment Letter on 2015 Rule* (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15115; ARTBA, *Comment Letter on 2015 Rule* (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-17359; NAHB, *Comment Letter on 2015 Rule* (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-19540; NCBA & PLC, *Comment Letter on 2015 Rule* (Oct. 28, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-10183; NCGA, *Comment Letter on 2015 Rule* (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14968; NMA, *Comment Letter on 2015 Rule* (Nov. 14, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15169; NSSGA, *Comment Letter on 2015 Rule* (Nov. 13, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14412; U.S. Poultry & Egg Ass'n, *et al., Comment Letter on 2015 Rule* (Nov. 5, 2014), https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14469. The Texas Farm Bureau also commented on the proposed 2015 Rule. *See* Texas Farm Bureau, *Comment on 2015 Rule* (Nov. 11, 2014), https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-14129.

42 Natural Resources J. 59, 74–76 (2002)). The additional costs associated with the delay further compound the problem.

20. The scope of federal jurisdiction under the CWA certainly had not been clear under the prior regime, which is why the regulated community had supported rulemaking. But the 2015 Rule exacerbated the problem still more. It required jurisdictional determinations and permits over a sweeping array of activities that had never previously been covered. This sweeping coverage over desiccated features remote from waterways only served to add more confusion.

21. The Agencies promulgated the final 2015 Rule in June 2015. From its inception, the 2015 Rule was vigorously contested in various district courts by States, industry interests, and NGO groups. AFBF and other WAC members remained at the center of these efforts. Several members filed a suit challenging the 2015 Rule in the Southern District of Texas,[13] and also participated in litigation contesting the jurisdiction of the Sixth Circuit Court of Appeals to hear challenges to the 2015 Rule.[14] Many members also participated as intervenors in suits challenging various aspects of the 2015 Rule before the Southern District of Georgia[15] and the Western District of Washington,[16] and as *amicus curiae* before the District of North Dakota and the Tenth Circuit Court of Appeals.[17]

22. Simultaneously with this ongoing litigation, the Agencies recognized that the 2015 Rule was likely unlawful, and promulgated a so-called Applicability Date Rule to delay the effective date of the 2015 Rule while they engaged in a two-step rulemaking process to first repeal, and second replace, the 2015 Rule.[18] WAC members participated extensively in discussions with

[13] *American Farm Bureau Federation v. EPA*, No. 15-cv-165 (S.D. Tex. Sept. 12, 2018).

[14] *In re EPA,* 803 F.3d 804, 807 (6th Cir. 2015), vacated, 713 Fed. App'x 489 (6th Cir. 2018).

[15] *Georgia v. Wheeler,* 2:15-cv-0079 (S.D. Ga. 2015).

[16] *Puget Soundkeeper Alliance v. McCarthy,* 2:15-cv-1342 (W.D. Wash. 2015).

[17] *North Dakota v. EPA,* 3:15-cv-00059 (D.N.D. 2015).

[18] Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) ("Repeal Rule").

the Agencies during this ongoing rulemaking and submitted detailed comments, both individually and as a group.[19] Many of the plaintiffs here also participated in litigation challenging these later regulatory efforts as intervenor-defendants before the Southern District of New York, the District of Colorado, the Western District of Washington, and the District of South Carolina.[20]

23. I am aware that with these proceedings, AFBF and many plaintiffs here submitted declarations explaining how the regulatory definition of WOTUS is important to their organizational missions, and further that many members submitted declarations describing the significant harms caused to them by an expansion of jurisdiction under the CWA and by an overly-broad, uncertain WOTUS Rule. *See* Excerpts of Addendum to the Opening Br. of Municipal Pet'rs, *In Re EPA*, No. 15-3751 (6th Cir. Nov. 1, 2016) (Dkt. 129-2) (Ex. D) (compiling declarations filed before the Sixth Circuit Court of Appeals); *Georgia v. Wheeler*, No. 2:15-cv-79 (S.D. Ga. Sept. 26, 2018) (Dkt. 208) (Ex. E) (compiling 7 member declarations).

24. Several courts agreed that the 2015 Rule was likely unlawful, and issued regional preliminary injunctions guarding against its enforcement in more than half of the States. And in cases initiated by many of the plaintiffs here, the federal district courts in Texas and Georgia held the 2015 Rule to be unlawful and remanded it to the Agencies, while keeping their regional preliminary injunctions in place.[21]

The NWPR or 2020 Rule

25. Following significant efforts on the part of plaintiffs and other WAC members, including AFBF, to advocate for a clear, reasonable definition of WOTUS, and following the

[19] WAC, *Comment Letter on Applicability Date Rule* (Dec. 13, 2017), https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0644-0375; WAC, *Comment Letter on Repeal Rule* (Sept. 27, 2017), https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-11027.

[20] *New York v. Regan,* 1:19-cv-11673 (S.D.N.Y. 2019); *South Carolina Coastal Conservation League v. Regan,* 2:19-cv-03006 (D.S.C. 2019).

[21] *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1344 (S.D. Ga. 2019); *Tex. v. United States Envtl. Prot. Agency*, 389 F. Supp. 3d 497, 499 (S.D. Tex. 2019).

culmination of the Agencies' efforts to repeal and replace the 2015 Rule, the Agencies published the 2020 Navigable Waters Protection Rule ("NWPR" or "2020 Rule") in April 2020.[22]

26. The NWPR became effective on June 22, 2020, except in the State of Colorado, where it entered effect on April 26, 2021 after the Tenth Circuit reversed and vacated a preliminary injunction against it taking effect within that State. *See* Mandate issued, *Colorado v. EPA*, No. 20-1238 (10th Cir. Apr. 26, 2021); *see also* Order, *Colorado v. EPA*, No. 20-1238 (10th Cir. Mar. 2, 2021).

27. I believe the NWPR achieved what the 2015 Rule and 2008 Guidance failed to do by addressing the lack of clarity under those regulatory regimes. The NWPR provided increased regulatory clarity and consistency for the business community and eliminated the unnecessary costs and burdens imposed upon businesses by prior unlawful expansion of the CWA and the uncertainty of jurisdictional criteria.

28. I believe that the NWPR provided greater clarity to the regulated community and resulted in less overreach by the Agencies (who, under broader or less clear standards, had exercised jurisdiction over land far removed from water features). Under the NWPR, farmers were much more certain regarding when they do and do not need to consult the Corps.

29. Among its most critical features, the NWPR clearly excluded ephemeral features that flow only in direct response to precipitation. That exclusion was critical for the plaintiffs'

[22] *See, e.g.*, AFBF, *Comment Letter on NWPR* (April 18, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-11394; API, *Comment Letter on NWPR* (April 15, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5456; ARTBA, *Comment Letter on NWPR* (April 15, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4366; NAHB, *Comment Letter on NWPR* (April 15, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4623; NCBA & PLC, *Comment Letter on NWPR* (April 15, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4673; NCGA, *Comment Letter on NWPR* (April 15, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4707; NMA, *Comment Letter on NWPR* (April 15, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4608; NSSGA, *Comment Letter on NWPR* (April 15, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4541; U.S. Poultry & Egg Association, *Comment Letter on NWPR* (April 15, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-5441; WAC, *Comment Letter on NWPR* (Apr. 29, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-684.

members. A standard that reaches such ephemerals sweeps in many features that look just like land; property owners are stunned to learn that these features are treated as waters. The NWPR also provided clear definitions of what waters qualify as jurisdictional "adjacent" waters and as "tributaries." These features of the NWPR were essential to the ability of WAC members to determine what is and is not jurisdictional, to avoid lengthy delays and exorbitant permitting costs, and to avoid the loss of productivity that results from a broad and unclear definition of WOTUS.

30. Another critical feature, the NWPR allowed farmers to maintain their prior converted cropland as exempt from CWA requirements with haying or grazing instead of having to plant crop every five years. The NWPR maintained an exclusion for "prior converted cropland" so long as it has not been reverted to wetlands and abandoned. 85 Fed. Reg. 22,320. Cropland is considered abandoned if not used in support of agricultural purposes in the immediately preceding five years, but the NWPR clarified that agricultural land use *includes* grazing and haying. *Id.* Farmers greatly benefit from not having to interrupt their livestock operations every five years and operate and maintain agronomic equipment solely to maintain their prior converted cropland status. Indeed, not forcing the farmers to plow and work the soil may improve soil characteristics.

31. The brighter line definitions offered in the NWPR would have allowed construction, building, mining, farming, and other business to go forward without the delays, costs, and uncertainties that existed under the 2015 Rule and 2008 Guidance. And the NWPR provided a more appropriate federal-state balance in regulating our Nation's waters. Based on my experience, state and local officials are the more appropriate, and more efficient, parties to determine if and how to regulate ephemeral, remote features in any given State. It is local conservation districts that provide the true backbone of natural resource and water preservation. Both States and federal agencies depend on them in implementing conservation programs, and farmers, ranchers, and other local businesses are more familiar with these local officials who are more involved in their ordinary operations.

The 2022 Rule

32. Rather than defend the NWPR on appeal after it was vacated by two district courts,[23] the Agencies have replaced that rule with the 2022 Rule, which fails to respect statutory language or precedent, or appropriately to balance the objective, goals, and policies of the CWA. The new Rule causes significant harm to plaintiffs' members, subjecting them to an even more harmful and difficult to predict significant nexus standard.

33. Similar to the 2015 Rule, the 2022 Rule will dramatically expand the scope of CWA jurisdiction as it applies to land in use for farming, ranching, mining, and construction. As explained in AFBF's and WAC's comments[24] to the Proposed Rule, the 2022 Rule will not, as promised, provide regulatory clarity and consistency. Rather, it will continue to prove very difficult for individual farmers and business owners to determine whether a feature on their property would be considered a WOTUS.

34. The sweeping 2022 Rule considers countless, only sometimes-wet landscape features that are ubiquitous in and around farmland to be WOTUS. These common features include drains carrying rainfall away from farm fields, ordinary farm ditches, drainage ditches along roadsides, retention ponds, and low areas in fields where water channels or temporarily pools after heavy rains.

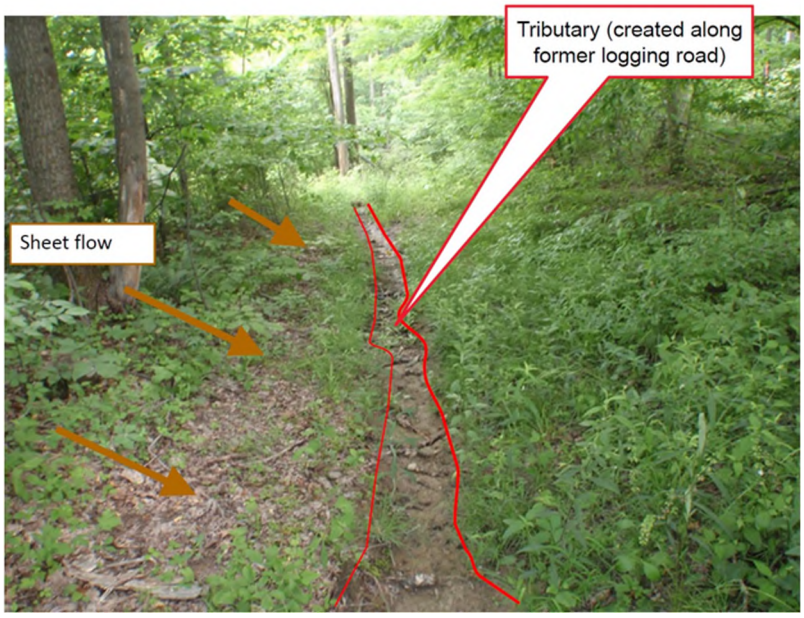
35. America's farm and ranch lands are an intricate maze of ditches, ponds, wetlands, "ephemeral" drainages, and other water features, that may be considered jurisdictional under the Rule. Below are a few examples.

[23] *Pascua Yaqui Tribe v. United States Envtl. Prot. Agency*, 557 F. Supp. 3d 949, 956 (D. Ariz. 2021), appeal dismissed sub nom. *Pasqua Yaqui Tribe v. U.S. Envtl. Prot. Agency*, No. 21-16791, 2022 WL 1259088 (9th Cir. Feb. 3, 2022); *Navajo Nation v. Regan,* 2:20-cv-00602 (D.N.M. 2020).

[24] *See* n.7, 8, *supra.*

36. Figure 1 below depicts the type of sometimes-wet low areas, otherwise known as "puddles," that the Rule may consider jurisdictional as a depressional wetland.

37. The feature in Figure 2 below depicts a former logging road. Under the Rule, this type of feature may be deemed to be a "tributary" to a "navigable water."



38. Figure 3 shows features that are dry most of the year and only contain water during periods of heavy rain, which may or may not occur in a given year. These features often reflect one-time extreme water events and are not reliable indicators of regular flow. In the desert, rainfall occurs infrequently; and sandy, lightly vegetated soils are highly erodible. Thus washes, arroyos,

and other erosional features often reflect physical indicators that trigger the assertion of jurisdiction under the Rule, even if they were formed by a long-past and short-lived flood event, and the topography has persisted for years or even decades without again experiencing flow.

39. Figure 4 depicts additional farmland that may contain a "water" under the 2022 Rule.

40. Typically, farmers would consider these types of features to be *land*, not water. When ephemeral features such as those depicted above are treated as jurisdictional, it creates a huge issue to communicate to our farmers that such features are actually treated as water.

41. The devaluation of commercial value of land on a farm—or for any other business—has collateral effects beyond simply the cost of applying for permits. It amounts to a

reduction in the business's capital, which has significant effects on the terms and availability of loans and other forms of financing that businesses depend upon to operate.

42. Considering drains, ditches, stock ponds, and other low spots on farmlands and pastures similar to those depicted above as jurisdictional "waters" also opens up the potential for regulation of activities on those lands that move dirt or apply products to the land. Everyday activities such as plowing, planting, or fence building in or near ephemeral drainages, ditches, or low spots could trigger the CWA's harsh civil or even criminal penalties unless a permit is obtained.

43. Many family and small business farm and ranch owners, including in Texas and Matagorda County, can ill afford the tens of thousands of dollars in additional costs for federal permitting of ordinary farming activities. Even those who can afford the permitting should not have to wait months, or even years, for a federal permit to plow, plant, fertilize, or carry out any of the other ordinary farming and ranching activities on their lands. Yet this is what could occur under the Rule.

44. Additionally, the Rule resurrects and expands upon variations on the broad and confusing "significant nexus" standard that was the foundation for the 2008 Guidance and 2015 Rule. As defined in the 2022 Rule, that test can be used to assert jurisdiction over tributaries, adjacent wetlands, and basically any other "water" because the Rule uses undefined, amorphous terms like "similarly situated" and "material influence" that will leave farmers and ranchers guessing about whether waters on their lands are WOTUS. *See* 2022 Rule; *see also* 86 Fed. Reg. at 69,449-50 (Proposed Rule).

45. This broad, vague, unclear standard allows the Agencies to assert jurisdiction over any sometimes-wet feature which, taken together with other sometimes-wet features in the region (broadly defined), "significantly affect" the "chemical, physical, or biological integrity of" a

traditional navigable water, the territorial seas, or interstate waters—or, in the case of wetlands, significantly affect those types of waters or tributaries and impoundments.

46. The term "significant nexus" generated significant confusion and inconsistent results under the pre- and post- 2015 regime, but the 2022 Rule will only make things worse. The Rule all but guarantees that the Agencies can reach whatever outcome they wish, and that regulators' assessments are bound to vary from field-office to field-office and case to case. This approach is in stark contrast to the certainty provided under the NWPR, and does not give ordinary farmers and ranchers fair notice of when the CWA actually applies to their lands or conduct, nor does it provide any assurance against arbitrary or discriminatory enforcement. As a result, farmers and ranchers may not know the jurisdictional outcomes until they are already exposed to civil and criminal liability, including devastating penalties.

47. The Rule also will deem a vast array of other "waters" to be jurisdictional if they "significantly affect" traditional navigable waters, territorial seas, or interstate waters (regardless of their navigability). *See* 2022 Rule; *see also* 86 Fed. Reg. at 69,450 (Proposed Rule). Applying the standard to other "waters" allows the Agencies to aggregate all similarly situated "waters" (*e.g.,* prairie potholes or ponds that are not part of a tributary system) across an entire watershed and claim jurisdiction over *all* such features based on a finding that they collectively perform a single important function for a downstream "foundational" water. With this change, the Agencies threaten to sweep in massive amounts of features that previously were not jurisdictional. For example, prairie potholes across the Midwest that previously were not jurisdictional may become regulated by the Agencies.

48. The Rule also permits the Agencies to rely on "remote sensing and mapping information" to determine if a farmer's land contains a "water feature." 2022 Rule. This means that a regulator can claim it can identify a WOTUS remotely from their desk using satellite images and estimation software unavailable to the average farmer or rancher without ever visiting the

property and regardless of whether the purported "water feature" is in fact observable or even present in the field.

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

50. These broad jurisdictional definitions of a WOTUS may result in the Agencies deeming land features like those depicted in Figures 1-4 as jurisdictional and subject to regulation under the Rule. Moreover, the outcome of the case-specific, highly subjective significant nexus determination for features like the ones in Figures 1-4 can depend on the Corps district in which the land is located. It is my understanding that different Corps districts would apply the standard differently, potentially reaching different results for identical features based on the happenstance of where they are located. That means that whether a landowner is forced to bear the costs and burdens as well as the potential liabilities of having a jurisdictional feature depends not on the nature of the feature, but the arbitrary boundaries of the Corps district in which his or her land is located. This random, unjust, and inconsistent application of the "significant nexus" standard will add to the already significant harms suffered by farmers and business owners prior to the most recent regulatory action.

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

52. While it is extremely difficult or impossible for a farmer to determine what features are covered under the 2022 Rule, the price of making a mistake is steep. Violations expose farmers and business owners, including owners of small and medium-sized operations, to potentially millions of dollars in civil penalties as well as the risk of criminal liability.

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

Executed: 1/17/23 Courtney F. Briggs

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF CINDY CHETTI

I, Cindy Chetti, declare based on personal knowledge as follows.

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

2. I am the Senior Vice President for Government Affairs at the National Multifamily Housing Council ("NMHC"), where my role is to advocate on behalf of the developers, owners and operators of multifamily rental housing.

3. Based in Washington, D.C., NMHC is a national nonprofit association that represents the leadership of the apartment industry. NMHC members are based and/or operate nationwide, including Texas. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, who help create thriving communities by providing apartment homes for 38.9 million Americans, contributing $3.4 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Over one-third of American households rent, and over 20 million U.S. households live in an apartment home (buildings with five or more units).

4. NMHC has a long history of advocating for clear and consistent regulations under the Clean Water Act ("CWA") and has expended considerable time and resources to secure a definition of Waters of the U.S. ("WOTUS") that properly categorizes federal waters under the CWA.

5. NMHC is a founding member of the Waters Advocacy Coalition ("WAC"), which is a broad coalition of industry stakeholders with interest in federal efforts to establish a WOTUS Rule.

6. NMHC has a history of contributing to industry regulatory efforts related to WOTUS. On March 26, 2012, NMHC joined a coalition letter to the Office of Information and Regulatory Affairs within the Office of Management and Budget "to express serious concerns" about the then-"Final Guidance on Identifying Waters Protected by the Clean Water Act."

7. On November 13, 2014, NMHC joined WAC in submitting detailed comments on the then-proposed WOTUS Rule recommending "that the agencies withdraw the proposed rule; engage in meaningful dialogue with the regulated community and States about more reasonable, focused, and clear changes to existing regulations; and initiate a replacement advanced notice of proposed rulemaking or notice of proposed rulemaking that reflects those consultations and is supported by science and case law." On August 8, 2014, NMHC submitted comments with a coalition raising real estate-specific concerns with the then-proposed WOTUS Rule.

8. On November 28, 2017, NMHC joined coalition comments to the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Army Corps") responding to a request for written recommendations on the definition of WOTUS under the CWA.

9. On February 7, 2022, NMHC joined detailed industry coalition comments concluding the "Proposed Rule suffers from numerous flaws in its attempts to expand the Agencies' authority beyond the limits set by Congress in the CWA and recognized by the Supreme Court."

10. NMHC has a long history of advocating for appropriate congressional oversight and legislative action related to the development of a WOTUS Rule and has urged Congress to clarify jurisdictional matters under the CWA. On April 14, 2015, NMHC joined an industry coalition letter to the leadership of the U.S. House of Representatives Transportation and Infrastructure Committee asserting "substantial and significant disagreement between the federal

agencies, the states, local governments, and the regulated community about the scope and effect of the rulemaking … [and] urged EPA and the Corps to withdraw the proposed rule and work with state and local officials and stakeholders to develop a proposal that respects the jurisdictional limitations imposed by Congress and affirmed by the U.S. Supreme Court." On April 27, 2015, NMHC sent an apartment industry-specific letter to the U.S. House of Representatives stating our concern "that the rule to redefine 'waters of the U.S.' that has been jointly proposed by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers would create additional confusion for the regulated community rather than provide regulatory certainty."

11. NMHC has previously taken action on lawsuits related to the CWA and jurisdictional uncertainty pertaining to WOTUS. On January 30, 2004, NMHC submitted an amici curiae brief to the U.S. Supreme Court urging the court to grant certiorari in *James S. Deaton v. United States of America*, No. 03-701. The submitting coalition argued that: (1) the Army Corps' sweeping theory of federal jurisdiction will have a substantial adverse impact on small businesses, property owners and contractors nationwide; and (2) the Supreme Court should grant Deaton's petition to resolve a split among federal circuit courts regarding the scope of federal jurisdiction under the CWA.

12. The recent WOTUS Rule, signed by the EPA and the Army Corps in December 2022 (the "Rule")[1] will have a direct adverse impact on NMHC members who develop and build apartment housing. The U.S. faces a critical shortage of apartment housing and research shows that the U.S. needs to build 4.3 million more apartments by 2035 to meet the demand for rental housing. Hoyt Advisory Services, "Estimating the Total U.S. Demand for Rental Housing by 2035." (2022).

[1] Available at *https://www.epa.gov/system/files/documents/2022-12/Pre-Publication%20Final%20Rule%20Notice.pdf.*

13. Research further shows that government regulation accounts for an average of 40.6 percent of multifamily development costs. NMHC-NAHB Cost of Regulations Report (2022).

14. The additional hurdles created by the Rule will likely cause permitting delays, add development costs and create additional legal risks that will depress NMHC members' ability to produce new or redevelop existing apartment housing and exacerbate critical housing shortages. Uncertainties created by the Rule will cause apartment firms to expend time and resources to simply determine whether a property needs a federal permit. Implementing the Rule now will further require apartment businesses to spend significant time and resources to understand and comply with a rule that may be inconsistent with the Supreme Court's *Sackett* decision expected in a matter of months.

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

Executed this 18th day of January, 2023.

Cindy Chetti 01/18/2023

Cindy Chetti

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF CIANBRO CORPORATION

CIANBRO CORPORATION OF PITTSFIELD MAINE, declare based on professional knowledge as follows:

1. Cianbro Corporation, founded in 1949, is one of the United States' largest 100% employee-owned construction and construction services companies. Cianbro presently operates in more than 40 states, including Texas, and employs more than 4,000 team members. Cianbro manages and self-performs all elements of construction. Throughout its 70-year history, Cianbro has safely and efficiently planned, managed, and constructed many technically complex, historic, and environmentally sensitive projects for a wide variety of public and private clients.

2. Cianbro Corporation is an active member of Associated General Contractors of America.

3. Cianbro Corporation is aware the proposed 'Waters of the United States" Rule (the "Rule") and Executive Order 13990 *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* (Jan. 20, 2021) which provided the review criteria to develop the proposed rule. Executive Order 13990 also includes intent to "reduce greenhouse gas emissions; to bolster resistance to the impacts of climate change".

4. Cianbro Corporation constructs and develop projects across the United States, working with private and federal clients on infrastructure and renewable energy projects designed to improve resilience to climate change and reduce carbon footprint.

5. Not all projects that benefit resiliency and reduce the overall carbon footprint can be constructed in brownfield or urban impacted areas. Nor are these developments only needed in urban and previously developed areas. Rural regions of our country, such as Northern New England often include small developments that repurpose agricultural operations that are no longer suitable for farming due to PFAS contamination. Those farms include field drainages and farm ponds that will now be jurisdictional and subject to federal permitting review.

6. Those same rural communities look to repurpose paper and textile mills which include impoundments and historically culverted, ditched or buried stream channels which could now be jurisdictional.

7. It is understood that the proposed rule if implemented to include all waters as defined through the significant nexus and relatively permanent criteria, could trigger the following potentially unintended consequences.

i. Maintenance work in and around man made impoundment areas, such as those related to hydroelectric generating stations, could require permitting and or agency review beyond following the facility FERC license requirements. As operator of the

Activity – contractors could be required to gain Federal 404 permits for temporary impacts within the waterway. This process could trigger federal Endangered Species and Habitat consult process. Time, cost of study, delay in construction or maintenance activity.

ii. Project sites in review for development for renewable energy projects could require additional studies to satisfy the federal permitting requirements. Permitting timeline will be extended significantly due to multi agency coordination efforts and exacerbate the current lack of staffing at the agency level to accommodate project workloads. Additional time, cost of studies to support the permit applications, and risk of delays will cause project developers to abandon renewable projects with otherwise large societal benefits.

iii. Time, cost of studies will be a factor for the project; review and response cost a factor for agencies.

iv. With expanded WOTUS, projects will be required to pay more in resource impact compensation fees for impacts to areas previously non jurisdictional (ditches/drainages/ephemeral streams/impoundments). There is already a limited supply of mitigation banks for wetlands and species habitat compensation. Projects that could benefit the environment overall by providing more resilient infrastructure or renewable energy source could be delayed or derailed due to lack of ability to compensate for resource impacts.

8. In summary, the existing backlog of environmentally beneficial projects held up with prolonged permit reviews and accompanying legal disputes and delays is in direct conflict with the urgency required to meet the existential threat of climate change. The negative affect of the uncertainty of the existing process is greater than the delays to the projects currently proposed. The greater threat is to the projects of scale that can truly move the needle that are NOT proposed because of the cost, time and uncertain outcomes of the process.

The above statements are impacts to our industry and company based on our understanding of the proposed rule revision.

Michael W. Bennett	Vice President
Name	Title
Michael V Bennett	January 12, 2023
Signature	Date

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

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 Public Lands Council. As owner of Chilton Ranch, I oversee all aspects of the operation including compliance with the Clean Water Act and other County, State and National regulatory requirements.

3. Private land on Chilton Ranch has multiple dry washes on private land that we previously understood not to be subject to regulation under the Clean Water Act. Some of these features may constitute "waters of the United States" under EPA's recently promulgated WOTUS Rule, signed in December 2022, although it is unclear which specific ones because the Rule is vague. These dry washes rarely convey even ephemeral water.

4. The Chilton Ranch private land has several dry washes with roughly twenty-four inch-wide (or more) bottoms (washes are highly variable width; they are not ditches) that may meet the definition of "tributary" under the Rule. At one time the dry wash over which we had hoped to put a better crossing (the project) was considered a Water of the United States even though the wash leads to a larger dry wash called the Yellow Jacket which then leads to Arivaca Wash which in turn leads to Brawley Wash, which are all dry about 99% of the time. Infrequent hard rains carrying ephemeral water reaching Brawley Wash terminate with that water spreading out into the desert about sixty miles from Arivaca Wash and never reach the Santa Cruz River. The Santa Cruz River itself north of Eloy, Arizona only has water flow from extremely unusual precipitation events. The dry Santa Cruz River leads to the Gila River which is intermittent, but generally dry west of Gila Bend, Arizona for over 100 miles. The Gila leads to the Colorado River. The navigable Colorado River is approximately 265 miles from the dry wash on which we wanted to construct a simple crossing project.

5. Chilton Ranch retained an Environmental firm which concluded the Ranch would be required to obtain a 404 dredge and fill permit prior to constructing the planned simple wash crossing intended to facilitate driving a ranch pickup along the 2-track dirt road across the tiny steep-sided dry wash in order to be able to check cattle, ranch wells and drinkers and feed usage. The costs of obtaining the permit for the project were mounting and the process was time-consuming, so Chilton Ranch decided to abandon the crossing project.

6. After reading the U. S. Supreme Court *Rapanos* Decision, Chilton Ranch concluded that the aforementioned project did not involve a Water of the United States since there was no significant nexus with the navigable Colorado River about 265 miles away. However, after the promulgation of the 2015 Rule, once again there was an issue as to whether the 2015 Rule would result in the project being considered a Water of the United States. Once the 2015 Rule was amended by the Navigable Waters Protection Rule, it was clear that the project site was no longer deemed a Water of the United States. Because of the new (2023) Rule, Chilton Ranch is once again concerned that any new projects, like the aforementioned, would be subject to the new Rule and therefore be considered Waters of the United States and require 404 permits.

7. The possibility that features like dry washes on the Chilton Ranch would be treated as waters of the United States under the Rule creates uncertainty about whether and how Chilton Ranch can use its land and what regulatory requirements for particular uses apply. The Rule would have direct effects on the use of Chilton Ranch private land and may require permits or changes in ranching practices.

8. 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 is no stay of the Rule.

9. 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: 01/06/2023

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF EMILY COYNER

I, Emily W. Coyner, submit this declaration based upon my personal knowledge.

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

2. I have been the Environmental Policy Director at the National Stone, Sand and Gravel Association ("NSSGA") since 2010, and have significant experience in the industry and understand the issues members face, in particular the impacts of the Waters of the United States ("WOTUS") rule and its frequent changes.

3. 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. These materials are known as aggregates. The industry employs about 100,000 men and women nationally. NSSGA and its predecessor organizations have represented the industry for over 100 years. NSSGA members are based in and/or operate in all 50 states, including Texas. There are over 10,000 aggregates operations in the US, and they are located in every state and nearly every congressional district. Because these are heavy materials, operations need to be local to minimize transportation costs and impacts.

4. 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.

5. NSSGA submitted comments on the 2021 proposed WOTUS Rule ("Proposed Rule") on February 7, 2022, as well as signed onto comments submitted by the Waters Advocacy Coalition ("WAC"), of which NSSGA is a member. *See* Re: Revised Definition of Waters of the

United States Comments; EPA-HQ-OW-2021-0602; submitted via regulations.gov. NSSGA's comments included numerous examples of how the Proposed Rule would make the process for obtaining "fill" permits under Section 404 of the Clean Water Act ("CWA") more difficult and expensive due to its inclusion of dry stream beds as WOTUS and its lack of clear exemptions. For safety and efficiency reasons, aggregate operations cover large areas of land. Dry stream beds or ephemerals are common features, and an increased extent of what is considered a WOTUS can increase the cost of mitigation by millions of dollars at a single operation. The Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") signed the "Revised Definition of 'Waters of the United States'" rule in December 2022 (the "Rule").[1]

6. NSSGA also participated in EPA roundtables to explain how the lack of clarity in the Rule would add costs and impact the ability of the industry to provide materials needed for infrastructure improvements.

7. NSSGA met with OMB to discuss the technical problems such as unclear definitions and an increased extent of waters considered WOTUS the Rule would impose on a typical aggregates operation.

8. NSSGA has expended resources to inform its members about the Rule via presentations and articles.

9. NSSGA has worked with its members on CWA jurisdictional issues for decades, and is expending resources to defend its members' interests in opposing the Rule.

10. Because aggregates are often created by water, they are located near water, and therefore jurisdictional definitions are of primary importance. In order to be economically viable,

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[1] *Available at https://www.epa.gov/system/files/documents/2022-12/Pre-Publication%20Final%20Rule%20Notice.pdf.*

aggregates operations are also typically on very large properties, so that the likelihood that dry stream beds and other questionably jurisdictional features may be present is high.

11. 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 and adds considerable confusion, those reserves will become increasingly difficult to use 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.

12. 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, conventional and renewable energy projects, and the repair of existing bridges and highways at a time when federal funding for these projects will be available. Ultimately these increased infrastructure costs will be borne by taxpayers.

13. 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 Rule is unclear and vague, member companies will have to expend even more time and money hiring consultants and lawyers to evaluate the effect the Rule (compared to the extent of prior rules) 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.

14. Allowing the Rule to go into effect for even a short time will have a damaging effect on the aggregates industry. An NSSGA member has explained to me the impacts of fluctuating

CWA jurisdictional rules (including the new Rule which may only be in effect for a short time, followed quickly by another based on the possible outcome of *Sackett v EPA*): Our business is very capital-intensive and typically viable only if in operation for many decades. Aggregate companies invest in land for future operations based on the quality of the reserves and the proximity to areas of expected population growth. Therefore, changes in the regulations during the permitting process greatly influence the ability to obtain the necessary permits. Finalizing a new WOTUS rule prior to the Supreme Court's decision on the *Sackett* case will create unnecessary hardships for our industry and further delays our ability to supply the much-needed aggregates for our Country's infrastructure. For just one of our properties, we have been trying to get a permit for over 6 years, and this new Rule will just add to the delay, probably by years if this Rule is allowed to go into effect. The Corps issued the original Jurisdictional Determination (JD) in late 2016. The cost of evaluating the site and the JD approval was approximately $330,000 and took over 2 years to complete. Various other environmental studies were being performed and finalized as well during this time period. The updated JD was obtained under the 2020 WOTUS Rule in 2021 at a cost of $30,000. This revised JD process took approximately 9 months before a decision was issued. An additional study was also conducted to evaluate the quality and type of each wetland on the site to re-evaluate this site in light of the Corps policy of not accepting decisions made under the 2020 rule. This additional effort costs approximately $180,000. Total costs to date is $540,000 in the Section 404 permit process alone. With the uncertainty surrounding this new Rule and a possible SCOTUS decision that could require yet another rule, we could be looking at tens of thousands of dollars of additional cost and further delay to account for additional study and permitting. Mitigation costs of this site will be in the millions, but we cannot proceed given the uncertainties of the regulatory framework. Any new proposals or changes in the Section 404 requirements will slow down the permitting process and require additional costs and delays.

15. 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: January 17, 2023

Emily W. Coyner

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF KENNETH GEAR

I, Kenneth Gear, declare based on personal knowledge as follows.

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

2. I am the Chief Executive Officer at Leading Builders of America ("LBA"). I offer this declaration based upon my 14 years of working on behalf of LBA's members on a number of issues including the Clean Water Act.

3. LBA is a trade association representing 21 of the largest home builders in the United States. It's members, 90% of which operate in Texas, build single family homes across the country in virtually all segments of the market including entry level homes, move-up homes, luxury homes, 55 and older communities and second homes. Collectively, LBA members build approximately 38% of all new homes sold in the United States in every major housing market. In 2021, LBA members built over 71,000 homes in Texas.

4. LBA's primary mission is to represent the homebuilding industry on public policy initiatives and to advocate for policies that encourage home affordability for home buyers at all income levels with a particular focus on attainable workforce housing for middle-class families.

5. LBA dedicates a significant amount of time and resources advocating for homebuilders before Congress, the Executive Branch, state legislatures, and in state and federal courts to serve the interests of LBA members. LBA seeks to promote the development of reasonable and lawful environmental and housing regulations that both protect the environment and allow for affordable housing opportunities for middle-class families.

6. LBA has expended significant resources promoting a lawful and reasonable interpretation of the Clean Water Act's jurisdiction over land available for development into lots to build attainable workforce housing.

7. LBA is a member of the Waters Advocacy Coalition (WAC), which has submitted comments on behalf of a large coalition of industry groups and coalition members including comments on the Environmental Protection Agency's and U.S Army Corp of Engineers' the proposed rule to define the definition of the "Waters of The United States" under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880 (Nov. 14, 2014).

8. Many LBA members will be directly affected by the rule. LBA members own or control large amount of land for potential future development. Such land typically includes features such as ditches, depressional areas and ephemeral drains, which would be characterized as "Waters of the United States" under the rule challenged in this case. Regulation of these features will require LBA members to avoid any "discharges" of "pollutants" to those waters characterized as "Waters of the United States" under the rule. LBA members will have to expend resources to take certain land out of production or obtain and comply with Clean Water Act permits covering such lands. In many cases, such permits will be denied or unavailable to LBA members.

9. Many LBA members will be unsure of how the vague language of the rule applies to land features in and around their land. To avoid the risk of unlawful discharge, members will need to expend resources to determine whether land and water features on their land constitute "Waters of the United States." Such costs could substantially increase the costs of homes built on those lots reducing affordability for middle class home buyers.

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

Executed this 6th day of January, 2023.

Kenneth Gear

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

Declaration of Kaitlynn Glover

I, Kaitlynn Glover, declare based upon personal knowledge that:

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

2. I am the Executive Director for the Public Lands Council ("PLC"), a trade association that represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. PLC membership consists of state and national cattle, sheep, and grasslands associations.

3. PLC works to maintain a stable business environment for ranchers in the West, where roughly half the land is federally owned and many operations have, for generations, depended on public lands for forage.

4. PLC is committed to proving assistance to its members by disseminating information to its members and the public, meeting with legislators and agencies, drafting and commenting on legislation and agency rules, and, when necessary, participating in litigation in both state and federal courts.

5. PLC met 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 Cattlemen's Beef Association, Public Lands Council, and Affiliate Livestock Associations on The Environmental Protection Agency and U.S. Army Corps of Engineers' Proposed Rule Revising the Definition of Waters of the U.S. 86 F.R. 69372, Dkt. No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022).

6. PLC members often graze their livestock on federal land, which has features that may qualify as waters of the United States under the Rule that generally require analysis to determine the applicability of the Rule. This creates uncertainty about the regulatory implications of the Rule and

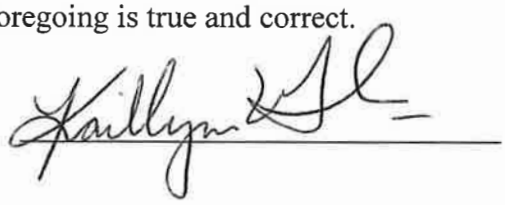
members may have to alter their behavior in response to the Rule and/or to expend resources to determine applicability of, and compliance with, the Rule.

7. PLC is able to defend its members' interests without the participation of the PLC members in this suit.

8. PLC has expanded resources in assisting its members in complying with the Clean Water Act.

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

Executed: 1/5/23



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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF NICK GOLDSTEIN

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

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

2. I am the Vice President of Regulatory Affairs and Legal Issues 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.

3. 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 8,000 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 $580 billion annually in U.S. economic activity and sustains more than 4 million American jobs.

4. 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.

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

6. 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 https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0684 and identify significant policy, legal, and procedural flaws in the agencies' Rule. The economic effects of federal jurisdiction over waters and landscape features are of great concern to ARTBA because such jurisdiction impacts ARTBA's members' (including its members in Texas) 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 U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (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. Most recently, the bipartisan Infrastructure Investment and Jobs Act, passed in 2021, recognized the need to reduce unnecessary delays in the project delivery process by setting a two-year goal for its completion. Adding more layers of review for unproven benefits—will only lengthen this process and make that bipartisan goal harder to attain. 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, including those in Texas, 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 cost hundreds of thousands of dollars and take 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 declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of January, 2023.

Nick Goldstein

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF TOM HAAG

I, Tom Haag, declare based on personal knowledge as follows.

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

2. I am currently serving as President of the National Corn Growers Association ("NCGA").

3. Founded in 1957, the NCGA represents nearly 40,000 dues-paying corn farmers nationwide and the interests of more than 300,000 growers, including farmers in Texas, who contribute through corn checkoff programs in their states. NCGA and its 50 affiliated state associations and checkoff organizations work together to create and increase opportunities for their members and their industry.

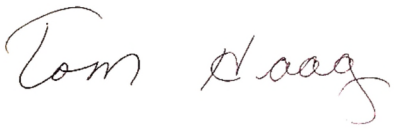
4. NCGA and its farmer members are committed to the objectives of the Clean Water Act and the protection of water quality around our agricultural operations and downstream.

5. The definition of WOTUS is critically important to corn farmers across the country, which is why NCGA has participated in numerous rulemaking and legislative proceedings and in litigation on this issue and has expended significant resources related to promoting a lawful and reasonable interpretation of the Clean Water Act's jurisdiction over agricultural lands.

6. The regulation of low spots on farmlands and pastures as jurisdictional "waters" means that any activity on those lands that moves dirt or applies any product to that land could be subject to regulation. Everyday activities such as tillage, planting, or fence building in or near ephemeral drainages, ditches, or low spots could trigger the CWA's harsh civil or even criminal penalties unless a permit is obtained.

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

Executed this day of January 17, 2023.



Tom Haag

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

Declaration of Mary-Thomas Hart

I, Mary-Thomas Hart, 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 Chief Counsel for the National Cattlemen's Beef Association ("NCBA"), a trade association that represents U.S. cattle producers, with more than 30,000 individual members and several industry organization members. NCBA represents more than 175,000 of America's farmers, ranchers, and cattlemen who provide a significant portion of the nation's supply of food. NCBA members are based in and/or operate in all 50 states, including Texas.

3. NCBA works to advance the economic, political, and social interests of the U.S. cattle business, including in Texas, and to be an advocate for the cattle industry's policy positions and economic interests.

4. NCBA is committed to providing assistance to its members by disseminating information to its members and the public, meeting with legislators and agencies, drafting and commenting on legislation and agency rules, and, when necessary, participating in litigation in both state and federal courts, including those in Texas.

5. NCBA met 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 Cattlemen's Beef Association, Public Lands Council, and Affiliate Livestock Associations on The Environmental Protection Agency and U.S. Army Corps of Engineers' Proposed Rule Revising the Definition of Waters of the U.S. 86 F.R. 69372, Dkt. No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022).

6. NCBA 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.

7. For example, as it relates to "tributaries" under the Rule, many features trickle (with no flow significant enough to create physical indicators) or remain dry for most of the year though physical indicators exist. The two images below show an ephemeral feature in the Rocky Mountain Region with no physical indicators. The Rule provides the agencies authority to assert jurisdiction over features like this. To prevent the expansion of jurisdiction to features that do not significantly contribute to downstream water quality, NCBA urged the required satisfaction of *both* the significant nexus and relative permanence tests.

8. NCBA is able to defend its members' interests without the participation of the NCBA members in this suit.

9. NCBA has expended resources in assisting its members in complying with the Clean Water Act.

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

Executed: 1/17/2023

Mary-Thomas Hart

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	Civil Action No. _____

DECLARATION OF N. REBECCA MCGREW

I, N. Rebecca McGrew, declare as follows:

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

2. My name is N. Rebecca McGrew and I am the Director, Environmental and Regulatory Affairs for The North American Coal Corporation ("NACoal"). I have personal knowledge of the facts in this declaration and they are true and correct to the best of my knowledge.

3. Through a wholly-owned subsidiary, NACoal operates the Freedom Mine, a surface lignite mine in Mercer County, North Dakota. The Freedom Mine is located about 90 miles northwest of Bismarck, North Dakota, and has been delivering coal since 1983.

4. NACoal, through another subsidiary, also operates the Falkirk Mine, a surface lignite mine in McLean County, North Dakota. The Falkirk Mine has been delivering coal since 1978 and is located approximately 50 miles north of Bismarck, North Dakota.

5. NACoal, through another subsidiary, also operates the Coyote Creek Mine, a surface lignite mine in Mercer County, North Dakota. The Coyote Creek Mine has been delivering coal since 2016.

6. NACoal, through another subsidiary, also owns and operates the Mississippi Lignite Mining Company ("MLMC"), a surface lignite mine in Choctaw County, Mississippi. MLMC has been delivering coal since 2002 and is located approximately four miles north of Ackerman, Mississippi.

7. NACoal, through another subsidiary, operates the Five Forks Mine ("FFM"). FFM is a surface lignite mine in Bienville Parish, Louisiana. Demery has been delivering coal since 2012 and is located approximately 25 miles east of Coushatta, Louisiana.

8. NACoal, through another subsidiary, operates Sabine Mining Company ("Sabine"). Sabine is a surface lignite mine in Marshall County, Texas. Sabine has been delivering coal since 1985 and is located approximately 15 miles southwest of Marshall, Texas.

9. NACoal, through another subsidiary, has operated the Little River Mine in Little River County, Arkansas and Rosser Sand and Gravel in Kaufman County, Texas since 2021. Both operations are surface sand and gravel mines.

10. The Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("COE") new definition of the term "waters of the United States," ("WOTUS") as that term is used in the Clean Water Act, may be interpreted to include isolated prairie potholes. The Freedom, Falkirk, and Coyote Creek Mines each include isolated prairie potholes.

11. Furthermore, the new definition reintroduces ephemeral streams as WOTUS. The Demery Mine, Sabine Mine, and MLMC each potentially contain thousands of linear feet of ephemeral streams within the permitted mine area.

12. Based on the EPA's and COE's new WOTUS definition, NACoal will have to retain and pay an environmental consultant to conduct jurisdictional determinations of various geographic features at our mining operations in order to assess whether previous unregulated features are subject to the new definition. If they are, NACoal will be required to modify permits or mine plans and secure very costly additional compensatory mitigation.

13. Based solely on the EPA's and COE's new WOTUS definition, NACoal will incur increased permitting, administrative, and mitigation costs.

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

Rebecca McGrew

N. Rebecca McGrew

Executed on January 13, 2022

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF LEAH PILCONIS

I, Leah Pilconis, declare as follows:

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

2. I am the Vice President and Counsel of Risk Management for the Associated General Contractors of America ("AGC"), Inc., which is located at 2300 Wilson Boulevard, Suite 300, Arlington, VA, 22201.

3. I oversee AGC's work to monitor, summarize, and routinely comment on federal legislation, regulations, and other guidance that may implicate either the scope or nature of the construction industry's obligations to the environment. I also manage AGC's participation in federal litigation that may affect those obligations. On behalf of AGC, I help to maintain liaison with the U.S. Environmental Protection Agency ("EPA"), the U.S. Army Corps of Engineers ("Corps"), and other federal agencies that interpret and enforce federal environmental laws.

4. In a proactive effort to help construction contractors meet environmental requirements, I also oversee the development and dissemination of practical "compliance tools" for the construction industry and help to organize and hold environmental seminars, forums, and other programs for contractors – covering Clean Water Act ("CWA") programs and permitting requirements and other complex compliance issues that impact the industry.

5. In addition, I support AGC's environmental committee and task forces that provide an avenue for AGC member firms' employees to engage with one another as well as with lawmakers and regulators on policy issues and provide their valuable perspective that comes from on-the-job experience implementing environmental protections on construction projects.

ABOUT AGC

6. AGC is the nation's leading construction trade association. It dates to 1918 and represents more than 27,000 member firms representing construction contractor firms, suppliers, and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states (including 11 chapters in Texas), D.C., and Puerto Rico, AGC contractors are engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers.

7. AGC's members, including its members in Texas, perform construction activities that require compliance with the CWA and are directly involved in the federal CWA permitting process. As part of the commercial construction process, AGC members are actively involved in the restoration and preservation of wetlands and other aquatic features.

8. AGC has worked closely with the federal environmental agencies to balance the complementary goals of improving our nation's infrastructure and protecting essential water and other natural resources. This includes supporting the development and ongoing operation of EPA's Construction Industry Assistance Center and engaging in EPA's Smart Sectors and Sector Strategies partnership programs to find solutions to compliance challenges.

9. AGC also tracks and summarizes data on the size and scope of the construction industry and its numerous segments, including the variety of economic and policy influences on each one. The association also advises lawmakers, regulators, and the media of the impact that various economic forces and policy choices are likely to have on the construction industry.

10. The construction industry has played a powerful role in sustaining economic growth and helping economic recovery. Construction spending totaled $1.8 trillion at a seasonally adjusted annual rate in October 2022, according to the Census Bureau. As of November 2022, the construction industry

employed 7.8 million individuals, seasonally adjusted, according to the Bureau of Labor Statistics (BLS). Hourly earnings for production and nonsupervisory employees in construction averaged $32.94 per hour in November, seasonally adjusted, 17% higher than the average for all such employees in the private sector, according to BLS.

11. Moreover, construction is a major buyer of U.S.-made materials and machinery. Construction machinery accounted for 10% of manufacturers' shipments of machinery in the first nine months of 2022 and grew by 25% compared to the same period in 2021.[1] Shipments of construction materials and supplies accounted for 12% of total shipments and grew at an 11% rate. The rapid increase in both types of shipments contributed significantly to the recent upturn in manufacturing employment.

AGC MEMBERS RELY ON CWA SECTION 404 PERMITS TO BUILD THE NATION'S INFRASTRUCTURE

12. The precise definition of "Waters of the United States" ("WOTUS")—which dictates the scope of the federal control and CWA permitting responsibility as well as enforcement jurisdiction—is of fundamental importance to the construction industry. AGC members perform many construction activities on land and water that often require a jurisdictional determination from the Corps before proceeding. Construction work that involves the discharge of dredged material or the placement of fill material in a WOTUS cannot legally commence without authorization from the federal government, which takes the form of a CWA Section 404 permit (and may require additional permissions and reporting duties under other CWA programs).

13. Thousands of the association's members, including members in Texas, currently have and will seek coverage under a CWA section 404 individual or general (nationwide) permit for dredge and fill activities in and around WOTUS. AGC members rely on these permits to determine the nature and scope

[1] U.S. Bureau of the Census' website, available at https://www.census.gov/manufacturing/m3/index.html (last visited November 22, 2022).

of their environmental obligations under the CWA. The uncertainty of the precise definition of WOTUS has become a great burden for contractors to bear. The uncertainty adds to the cost and delays the completion of the private and public infrastructure that forms the foundation of our nation's economy.

14. At the same time, the penalties for failing to obtain and comply with a necessary CWA permit can be severe—and can include imprisonment for a knowing and willful violation. Operations and improvements that are lawful on property that does not contain jurisdictional waters become subject to severe criminal and civil penalties[2] and a potential target of third-party litigation if jurisdictional waters are impacted without a CWA permit.

15. As the "operators" of construction sites, both property owners and their construction contractors risk such fines and penalties for any failure to obtain a necessary permit. Courts have found both the owner and the constructor of a project to be responsible for compliance, at least where the contractor has control over the discharge activity, and whether or not the contractor reasonably relied on the owner to obtain a necessary permit.

16. AGC and its members are directly affected by the issues currently before this Court. Rulemakings related to these permits can cause significant disruption to the construction industry, adversely affecting not only the members of the association but also the health and welfare of the public through the many public infrastructure projects constructed by AGC members.

[2] Landowners and operators who discharge dredged or fill material without a permit may incur substantial civil penalties, including civil fines of up to $59,973 per violation per day. 33 U.S.C. 1319(d); 87 Fed. Reg. 1,676, Jan. 12, 2022. Negligent violations of the CWA carry prison terms of up to one year. 33 U.S.C. § 1319(c)(1). Penalties increase for multiple negligent violations, see id., and for "[k]nowing" violations, to include fines of up to $100,000 per day and six years' imprisonment. 33 U.S.C. § 1319(c)(2).

THE CHANGING REGULATORY LANDSCAPE

17. AGC has long been engaged in the agencies' efforts to define what WOTUS means under the CWA, including submitting written comments on EPA's and the Corps' (jointly, the "agencies") proposals and related efforts to redefine federal jurisdiction over construction work in waters and wet areas, including letters in response to:

- An advanced notice of proposed rulemaking in 2003;
- Draft agency guidance following a series of court cases in the early 2000s;
- Draft guidance in 2011;[3]
- Proposed rule in 2014;[4]
- Proposed recodification of pre-existing rules in 2017;[5]
- Request for preliminary feedback in 2017;[6]
- Proposed rule in 2019;[7]

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[3] Waters Advocacy Coalition, Comments on the Draft Guidance on Identifying Waters Protected by the Clean Water Act, (July 29, 2011), Docket ID No. EPA-HQ-OW-2011-0409 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0409-3514.

[4] Waters Advocacy Coalition, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 13, 2014, corrected November 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-17921; Federal Stormwater Association, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-15161; and the Coalition of Real Estate Associations, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (August 8, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-5175. And construction-specific comments: AGC of America, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 13, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-14602.

[5] AGC of America, Comments on the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules, (September 27, 2017), Docket ID No. EPA-HQ-OW-2017-0203 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2017-0203-10460; and Waters Advocacy Coalition comments (September 27, 2017) on the same online at: https://www.regulations.gov/comment/EPA-HQ-OW-2017-0203-11027.

[6] AGC of America, Response to request for recommendations to revise the definition of "Waters of the United States" under the Clean Water Act, (Nov. 28, 2017) Docket ID No. EPA–HQ–OW–2017–0480 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2017-0480-0632.

[7] AGC of America, Response to Proposed Revisions to the Definition of Waters of the United States, (April 15, 2019); Docket ID No. EPA-HQ-OW-2018-0149 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-6859; the Waters Advocacy Coalition comments (April 15, 2019) on the same online at: https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-6849; and Federal StormWater Association comments (April 15, 2019) online at: https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-6877.

- Request for preliminary feedback in 2021;[8]
- Proposed rule in 2021.[9]

18. In the final rule signed by EPA and the Corps in December 2022,[10] the agencies expand the scope of jurisdictional waters that would require federal permits. For example, the agencies expand the use of the "significant nexus test" (for federal jurisdiction) under this rule so that all tributaries and adjacent wetlands within the watershed (i.e., catchment area) of the tributary of interest will be analyzed as part of the significant nexus analysis to determine the cumulative impacts on traditional navigable waters, the territorial seas, or interstate waters. The agencies also establish a new joint agency review of some jurisdictional determinations.[11] Furthermore, the rule creates a situation where each ditch (e.g., roadside ditches) will need to be evaluated separately through the extent of its reach. The practical implications of these changes will be that most permit applications will choose to concede jurisdiction and secure a federal CWA section 404 permit on top of meeting their state and local rules/permits. The necessity of obtaining a federal CWA permit will increase the regulated community's compliance burden and cost for needed projects within the community and it will have a significant economic impact on small businesses that make up the bulk of the construction industry.

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[8] AGC of America provided verbal remarks at the public hearing (August 31, 2021) on Pre-Proposal Recommendations on the Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2021-0328; and Waters Advocacy Coalition comments (September 3, 2021) on the same online at: https://www.regulations.gov/comment/EPA-HQ-OW-2021-0328-0316.

[9] AGC of America, Response to Proposed Revisions to the Definition of Waters of the United States, 86 Federal Register, 69,372 (Dec. 7, 2021); Docket ID No. EPA-HQ-OW-2021-0602 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0820; the Waters Advocacy Coalition comments (February 7, 2022) on the same online at: https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0268; and Federal StormWater Association comments (February 7, 2022) online at: https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0613.

[10] Final Rule: Revised Definition of "Waters of the United States," 88 Federal Register, 3,004 (Jan. 18, 2023); available online at https://www.epa.gov/wotus/revising-definition-waters-united-states.

[11] Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S Army Corps of Engineers, and the U.S. Environmental Protection Agency ("2022 Coordination Memo") online at https://www.epa.gov/system/files/documents/2022-12/Waters%20of%20the%20United%20States_Coordination%20Memorandum.pdf.

19. The regulatory see-saw with the definition of WOTUS has created an environment of uncertainty. Instead of going back to the pre-2015 regulatory regime (understood as the status quo), the current administration has chosen to finalize a unique rule—representing the sixth or seventh change in the law since 2015, depending on the state in which the project is located. (The agencies finalized the 2015 rule [change #1], which was almost immediately subject to a nationwide injunction reverting back to the pre-2015 requirements [change #2] only to have the 2015 rule reinstated briefly [change #3] and only in some states swiftly followed by a return to the pre-2015 status quo [change #4] by the Trump Administration and then the Navigable Waters Protection Rule [change #5], which was then subject to a preliminary injunction without addressing the merits bringing the pre-2015 requirements [change #6] back into effect. Now the agencies have provided a temporary and unique definition [change #7]—which they intend to change yet again for another new rule that they posit will provide a more "durable" definition.)

REGULATORY UNCERTAINTY AND OVERREACH WILL CHILL PRIVATE INVESTMENT, DELAY INFRASTRUCTURE IMPROVEMENTS, AND NEGATIVELY IMPACT THE ECONOMY

20. Regulatory uncertainty deters and delays the necessary efforts to repair, replace and upgrade public infrastructure; it also drives up construction costs.

21. Any entity that acts as the owner, contractor, lender, investor, insured or surety for any construction project that may require a section 404 permit is facing continued legal and financial risk.

22. Project proponents may not be able to obtain the necessary financing, funding, or approvals to construct new projects or maintain existing infrastructure and facilities across the nation. Investors in both public and private infrastructure require certainty to invest in construction, which is a major contributor to employment, gross domestic product, and manufacturing. Reduced levels of investment in projects requiring section 404 authorization translate directly into lost jobs and lost economic activity across the whole economy.

23. The debt rating agencies account for this risk through lowered bond ratings, resulting in increased underwriting fees and interest rates, the cost of which could be quite sizable.

24. Businesses routinely incorporate section 404 permit application and approval processes into their strategic planning. Ensuring compliance with environmental, preservation, zoning, and building permit requirements at the federal, state, and local levels is an extremely costly and time-consuming process. If any part of a project's footprint falls under federal CWA jurisdiction, the project owner/operator will need to conduct cultural and species surveys and evaluate viable mitigation options. The window to perform such reviews is often time limited. Businesses need to account for regulatory stability in their financial forecasting and plan their business activities accordingly.

25. The time and resources to obtain coverage under a CWA section 404 permit are great. Individual permits can take up to two years and several hundreds of thousands of dollars in expert fees to obtain. Mitigation alone can be a significant expense and banks are not available in every region where a project may be located.

26. An increase in requirements for 404 permits, or the lack of financial support for section 404 projects, could result in intolerable delays to the renovation and improvement of public infrastructure, including several projects necessary to modernize and improve the safety of our nation's infrastructure as well as improve its energy performance and resilience to extreme weather—such projects as highway and transit construction, bridge construction and repairs, dam repairs, and energy.

BUILDING A BETTER ENVIRONMENT

27. The construction industry is the project delivery system for a greener future. Regulatory uncertainty and overreach only serve to make that future more costly and time-consuming to deliver and thereby less effective.

28. Disrepair in our transportation system introduces inefficiencies that add hours and dollars to commuting and freight shipping through wasted fuel—at a cost to human safety, the economy, and the environment. Traffic congestion wasted 3.3 billion gallons of fuel in 2017—adding 8.8 billion hours to travel times in urban areas.[12]

29. Our nation's dams, levees and pumping stations are an important source of energy generation, water storage for drinking and irrigation, and flood control; yet they are increasingly unsafe and unreliable.[13] Even without the current political focus on climate change and adapting communities to withstand extreme weather patterns—from droughts to monsoons, blizzards to heat waves—as well as severe storms, this infrastructure is vital to sustaining our communities.

30. There is a vast need and interest in diversifying and expanding our energy portfolio to maximize other energy sources such as hydropower, biomass, nuclear, wind, solar and geothermal energy. Permits for new plants, upgrades to existing plants, and the necessary support infrastructure need to be prioritized and streamlined to reduce delays.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Dated this 18 day of January, 2023.

Leah Pilconis

Leah Pilconis

[12] Texas Transportation Institute, Texas A&M University, 2019 Urban Mobility Report, August 2019, available online at: https://static.tti.tamu.edu/tti.tamu.edu/documents/mobility-report-2019.pdf.

[13] The American Society of Civil Engineers, 2021 Report Card for America's Infrastructure has given dams, levees, and stormwater infrastructure D grades, available online at https://infrastructurereportcard.org/.

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AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF ROBERT E. REED

I, Robert E. Reed, declare based on personal knowledge as follows.

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

2. I farm about 3,000 acres of land near Bay City, Matagorda 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 familiar with the recent "Waters of the United States" ("WOTUS") Rule (the "Rule")[1] and have followed the changes to the definition of WOTUS over the last several years. I have thought about which features on my farm may be regulated as a "water" under 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.

[1] The Rule was signed by the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") in December 2022. It is available at *https://www.epa.gov/system/files/documents/2022-12/Pre-Publication%20Final%20Rule%20Notice.pdf.*

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 a 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 a 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, government regulators may consider my drainage ditches to meet the definition of "tributaries" and are therefore categorically considered to be "waters of the United States." I also understand that my drainage ditches may 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 may 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 may constitute "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 Rule will soon enter 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 Rule, and risk that the costs I expend preparing the land for planting will be lost if the 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 Rule is later invalidated. In either case, I face an unrecoverable loss of revenue. As a result, I am directly and adversely impacted by the Rule.

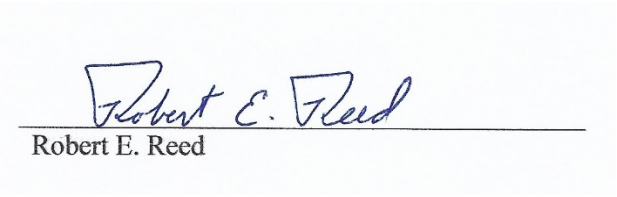
16. I have traditionally used aerial applications of pesticides and fertilizers for my rice fields. Based on my understanding of my new legal obligations, I will no 1onger be able to use aerial applications of pesticides or fertilizers on my rice fields unless I can be sure that there is absolutely no 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 U.S. Army Corps of Engineers, 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 to the 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 declare under penalty of perjury that the foregoing is true and correct. Executed this 18 day of January, 2023.



Robert E. Reed

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AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF RUSSELL W. RIGGS

I, Russell W. Riggs, 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 Director of Environmental and Sustainability Policy for the National Association of Realtors® ("NAR"). I offer this Declaration based on my 25 years working on behalf of NAR's members, focusing primarily on federal regulatory matters, including implementation of the Clean Water Act ("CWA").

3. NAR is the United States' largest trade association, representing over 1.5 million members in all 50 states, Guam, Puerto Rico, and the Virgin Islands, and includes, over 1,200 local, state, and territorial associations, and various real estate institutes, societies, and councils. NAR's members, including its members in Texas, are involved in all aspects of the real estate industry and include residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the industry. NAR's members are committed to the development and preservation of the nation's housing stock, along with its availability to the widest range of potential homebuyers.

4. NAR extensively advocates on behalf of its members to protect private property rights and to promote the highest and best use of the land. NAR advances public policies that build strong communities, support a vibrant business environment, and strengthen the ability of Americans to own, buy and sell real property. NAR has a team of staff dedicated to advocacy issues and expends a great number of resources to champion many issues before Congress, the Executive Branch, and federal courts to support the interests of its members, the real estate industry, and consumers.

5. NAR submitted extensive legal, policy and economic comments on a proposed rule to define "Waters of the United States" in 2014. *Comments of the National Association of Realtors® on the U.S. EPA 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). NAR also joined the Waters Advocacy Coalition submitted comments on behalf of industry groups. *Comments of the Waters Advocacy Coalition on the Envt'l Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act*, Dkt. No. EPA-HQ-OW-2011-0880 (Nov. 13, 2014) (corrected Nov. 14, 2014).

6. NAR submitted extensive legal, policy and economic comments on a proposed rule to define "Waters of the United States" in 2019. *Comments of the National Association of Realtors® on the U.S. EPA and U.S. Army Corps of Engineers Proposed Rule to Revise the Definition of "Waters of the United States" Under the Clean Water Act*, Dkt. No. EPA-HQ-OW-2018-0149 (Apr. 15, 2019). NAR also joined comments submitted by the Waters Advocacy Coalition, which were made on behalf of a coalition of industry groups. *Comments of the Waters Advocacy Coalition on the U.S. EPA and U.S. Army Corps of Engineers Proposed Rule to Revise the Definition of "Waters of the United States" Under the Clean Water Act*, Dkt. No. EPA-HQ-OW-2018-0149 (Apr. 29, 2019).

7. NAR submitted extensive legal, policy and economic comments on the latest proposed Rule to define "Waters of the United States" in 2022. *Comments of the National Association of Realtors® on the U.S. EPA 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-2021-0602 (Feb. 7, 2022). NAR also joined the Waters Advocacy Coalition, which, on behalf of a

coalition of industry groups, submitted comments on the Environment Protection Agency's and the U.S. Army Corps of Engineers' (the "Agencies") latest proposed rule (the "Proposed Rule") to define and expand the meaning of the phrase "Waters of the United States". *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-2021-0602 (Feb. 7, 2022). The Agencies signed the Proposed Rule in December 2022 (the "Rule").

8. NAR's members and the property buyers and sellers they represent will be directly affected by the Rule, which defines "Waters of the United States" ("WOTUS") in a manner that will have a detrimental impact on real estate development and private property rights. The Rule prohibits residential or commercial development on or near a WOTUS without necessary regulatory approvals from the Agencies, forcing property owners or potential buyers to undertake expensive and time-consuming analysis and mitigation measures that may ultimately prove cost-prohibitive for the project. The Rule will unlawfully hinder NAR members' clients' constructive improvement and enjoyment of land and water features while also causing economic and non-economic harm. The criteria set forth in the Rule for determining whether a property is on or near a WOTUS are subjective and may result in inconsistent determinations by the Agencies, causing confusion and rendering it nearly impossible for property owners and potential buyers to make informed decisions about the operation, logistics, and finances related to a project possibly on or near a WOTUS. The CWA also prohibits unauthorized "discharges" into any areas that are ultimately deemed within the Agencies' jurisdiction, and the proposed definition could substantially expand that jurisdiction in an unlawful and inconsistent manner as applied in communities across the country. Moreover, the Rule could dramatically decrease a

property's value if it is now considered on or near a WOTUS under the proposed Rule whereas previously it was not.

9. NAR is affiliated with a network of specialized organizations including the REALTORS® Land Institute ("RLI"), whose members specialize in the transaction of all types and uses of land, with an emphasis on large tracts including farms and ranches, timberland and other resource lands. RLI promotes a nuanced understanding of large tract management, fosters nationwide collaboration amongst members, and facilitates education on industry trends. RLI's members' clients rely heavily on the land for their operations, and the Rule would severely restrict these business owners' abilities to improve or adapt their land as needed to meet their unique business demands. Sweeping more waters under the regulatory and permitting regime of the CWA will render more land across the country less valuable, adversely impacting the livelihoods of RLI members and their clients.

10. The housing industry comprises nearly 20% of the U.S. economy, and real estate has been, and remains, the foundation of wealth building and a critical link in the flow of goods, services, and income for millions of Americans. Protecting residential and commercial real estate development from unreasonable and uncertain regulatory encumbrances is critical to supporting economic growth.

11. Vacatur of the final issued Rule and a declaration that the final Rule is unlawful would remedy these ongoing costs and uncertainties.

Executed this 17th day of January, 2023.

DocuSigned by:
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Russell W. Riggs

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF ROBIN RORICK

I, Robin Rorick, declare based on personal knowledge as follows.

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

2. My name is Robin Rorick. I am Vice President of Midstream at the American Petroleum Institute ("API"). My business address is 200 Massachusetts Ave., NW, Washington, DC 20001.

3. I am offering this declaration in support of the "Complaint for Declaratory and Injunctive Relief" by Plaintiffs in the above captioned case.

4. API is a nationwide, non-profit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's nearly 600 members are based in and/or operate in all 50 states, including Texas, and include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. API's members provide most of the nation's energy. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.

5. API's members provide most of the nation's energy and are backed by a growing grassroots movement of more than 30 million Americans. API has members located throughout Texas, including Galveston and surrounding counties.

5. 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 provide 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.

6. Together with its member companies, including its members in Texas, API is committed to ensuring a strong, viable U.S. oil and natural gas industry capable of meeting the energy needs of the Nation in an efficient and environmentally responsible manner. Representation of the interests of the oil and gas industry in litigation is part of API's overall purpose, and API has on numerous occasions become involved as a party in litigation affecting those interests.

7. The interests at stake in this litigation are germane to API's mission and purpose. While API's members would have standing to bring suit in this case individually, their participation is not indispensable here, and they are relying instead on API to represent their interests before this Court.

8. API's members are directly and adversely impacted by the final "Waters of the United States" ("WOTUS") Rule (the "Rule"), signed by the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") (collectively "the Agencies") in December 2022.[1] In light of the significant potential impacts of the Rule on API and our members, API, along with the American Exploration and Production Council and the Independent Petroleum Association of America, submitted joint comments on the Proposed Rule[2] on February 7, 2022.[3] These 92-page comments identify the policy, legal, and economic flaws in the Rule and advocate for a jurisdictional test that complies with the Clean Water Act as interpreted by U.S. Supreme

[1] *Available at https://www.epa.gov/system/files/documents/2022-12/Pre-Publication%20Final%20Rule%20Notice.pdf.*
[2] Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372 (Dec. 7, 2021) ("Proposed Rule").
[3] *Comments of the American Petroleum Institute, the American Exploration and Production Council, and the Independent Petroleum Association of America regarding The Associations' Response to the Environmental Protection Agency's and Army Corps of Engineers' Proposed Rule to Revise the Definition of "Waters of the United States;" 86 Fed. Reg. 69,372 (Dec. 7, 2021)/EPA-HQ-OW-2021-0602)*, Dkt. No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022).

Court, and which application would have been far clearer than the final Rule that the EPA and the Corps ultimately adopted. API also joined the comments of the Waters Advocacy Coalition ("WAC"), submitted on behalf of a coalition of industry groups. WAC submitted it comments on the Proposed Rule on February 7, 2022, and corrective comments on February 9, 2022.[4]

9. API also submitted comments to the earlier 2015 and 2020 iterations of the proposed WOTUS definition and has engaged in previous rounds of litigation addressing prior WOTUS rules, including as a plaintiff and plaintiff-intervenor challenging the 2015 Rule and as an intervenor-defendant defending the 2020 Rule.[5] API, along with two other trade associations, submitted briefs amicus curiae to the Supreme Court in *Sackett v. EPA*.[6]

10. The economic effects of federal jurisdiction over waters and landscape features are of great concern to API because such jurisdiction impacts API's members' ability to explore for, develop, transport, refine, and distribute crude oil, natural gas, natural gas liquids, chemicals, and refined products throughout the United States.

11. API's members, including its members in Texas, are subject to close regulation under the Clean Water Act. They must obtain Clean Water Act permits:

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

[4] *Comments of the Waters Advocacy Coalition (WAC) on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Revised Definition of "Waters of the United States,"* Dkt. No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022) (corrected Feb. 9, 2022).

[5] For example, API was an intervenor-plaintiff and a plaintiff, respectively, in two suits in which courts held unlawful the 2015 WOTUS rule, 80 Fed. Reg. 37,054 (June 29, 2015) (2015 Rule): *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *American Farm Bureau Federation v. EPA*, No. 15-cv-165 (S.D. Tex. Sept. 12, 2018), Dkt. 87 (AFBF), and was an intervenor-defendant in suits challenging the 2020 Navigable Waters Protection Rule, 85 Fed. Reg. 22,250 (Apr. 21, 2020) (NWPR). *See e.g.*, *Colorado v. U.S. EPA*, No. 20-1238 (10th Cir. Mar. 2, 2021) (reversing preliminary injunction against NWPR); *South Carolina Coastal Conservation League v. Regan*, No. 20- cv-01687 (D.S.C. July 15, 2021), Dkt. 147 (remanding NWPR to Agencies without vacatur).

[6] *See, e.g.*, Amicus Br. for API, filed in *Sackett v. EPA*, No. 21-454 (U.S. Sup. Ct).

- to extract crude oil from subsea formations in the Gulf of Mexico and other offshore areas,
- to install and maintain pipelines throughout the United States, and
- to withdraw and discharge cooling water as part of the refining process.

12. The Rule is vague, expansive, and ambiguous, and uncertainty as to which features are jurisdictional under the broad terms of the Rule (including "significantly affect," "tributary," "adjacent wetlands," and "interstate waters") will cause API's members 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 are subject to the Rule's requirements. For example, to determine whether a wetland located a quarter mile from an ephemeral tributary that after infrequent heavy rains ultimately contributes flow to a permanent river used for interstate commerce located 40 miles away has a "significant nexus" with that permanent river, an API member company would be required to undertake expensive and time-consuming efforts to determine the existence of a "significant nexus" between the wetland and the permanent river. These efforts often include hiring engineers and consultants at considerable expense and delay.

13. Even assuming after all of this that the company determines the wetland is not jurisdictional, moreover, the vagueness and malleability of the Rule's "significant nexus" definition means that the Corps or EPA may later challenge the company's findings of no significant nexus and bring an enforcement action against the company for failure to comply with the Clean Water Act, possibly leading to civil fines, criminal penalties, and the termination of the extractive activity. The Rule's vagueness and ambiguities are thus likely to cause API's members to forego oil and natural gas development in some areas out of concern that the federal government may later deem that area a jurisdictional water.

14. The Rule purports to establish the Agencies' jurisdiction over a wide range of dry land and water features—whether large or small; permanent, intermittent, or ephemeral; flowing or stagnant; natural or manmade; interstate or intrastate; and no matter how remote from or lacking in a physical connection to actual navigable water. The Rule's treatment of dry features as jurisdictional would likely require API's members to obtain permits under Sections 404 and 402 of the CWA for disturbances to those features or for discharges into those features, often at significant costs.

I, Robin Rorick, declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of January, 2023.

Robin Rorick
Vice President, Midstream
American Petroleum Institute
200 Massachusetts Ave., NW
Washington, DC 20001

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF KATIE SWEENEY

I, Katie Sweeney, declare as follows:

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

2. I am General Counsel and Executive Vice President for the National Mining Association ("NMA"), which is a petitioner in this matter. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness I could and would testify competently to their truth.

3. NMA is a national trade association that represents the interests of the mining industry including the producers of most of America's metals, coal, and industrial and agricultural minerals before Congress, the administration, federal agencies, the courts, and the media. NMA has more than 250 members across all 50 states, including members in Texas.

4. NMA's members include, among others, North American Coal Corporation, which is submitting a declaration in support of NMA's standing.

5. The Rule[1] expands the scope of federal jurisdiction under the Clean Water Act ("CWA") by redefining the term "waters of the United States." NMA's members often conduct operations over large tracts of land. In light of the extensive nature of and uncertainty surrounding the language contained in the Rule, many of NMA's members have features on their lands that do or may constitute "waters of the United States" under the Rule, and therefore may or will be subject to the requirements of the CWA.

[1] The Rule was signed by the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") in December 2022. It is available at *https://www.epa.gov/system/files/documents/2022-12/Pre-Publication%20Final%20Rule%20Notice.pdf.*

6. In particular, uncertainties surrounding the Rule's broad definitions and reliance on the "significant nexus test" have the potential to define previously non-jurisdictional ephemeral features on NMA members' lands as "waters of the United States."

7. NMA filed substantive comments on the Rule during the public comment period detailing numerous legal, technical, policy, and scientific concerns with the proposal. *See* Comments of the National Mining Association on the Proposed Revised Definition of "Waters of the United States," submitted Feb. 7, 2021; Comments of the Waters Advocacy Coalition on Proposed Revised Definition of "Waters of the United States;" GEI Consultants Technical Comments on Proposed Revised Definition of "Waters of the United States," submitted Feb. 7, 2021; and Dr. David Sunding and Dr. Gina Waterfield, The Brattle Group, Review of the 2021 Economic Analysis for the Proposed Revised Definition of "Waters of the United States," submitted Feb. 7, 2021.

8. NMA also held multiple meetings with the U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, and Office of Management and Budget to discuss NMA's concerns with the potential impacts of the Rule on NMA's members and advocate for proposed changes; utilized multiple forums to educate its members, Members of Congress, and the public about the potential impacts of the Rule; and advocated on behalf of several legislative efforts intended to address the Rule.

9. Many of NMA's members have expended or will expend resources to ascertain the extent of their potential new liability under the Rule, including hiring outside consultants and attorneys.

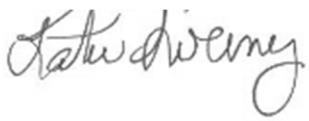
10. NMA members whose operations will impact a feature defined as a "water of the United States" under the Rule will have to undergo the time-consuming and costly CWA

permitting process(es) or will have to design or alter their operations so as to avoid the feature(s) in question. Such alteration could result in stranded mineral reserves and lost production.

11. NMA is able to defend its members' interests without the participation of the members in this suit.

12. If the Rule is upheld by the courts, as stated in the declarations by North American Coal Corporation, it will necessarily have a direct impact on NMA's members. NMA's members thus have a direct and substantial interest in the rule. Representation of its members' interests in this matter is germane to NMA's purposes as set forth above.

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



Katie Sweeney

Executed on January 17, 2023

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

AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, LEADING BUILDERS OF AMERICA, MATAGORDA COUNTY FARM BUREAU, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL CORN GROWERS ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, PUBLIC LANDS COUNCIL, TEXAS FARM BUREAU, and U.S. POULTRY AND EGG ASSOCIATION Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as ADMINISTRATOR OF U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as CHIEF OF ENGINEERS AND COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS; and MICHAEL L. CONNOR, in his official capacity as ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) Defendants.	)	Civil Action No. _____

DECLARATION OF THOMAS J. WARD

I, THOMAS J. WARD, declare and state under penalty of perjury as follows:

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

2. I am the Vice President of Legal Advocacy for the National Association of Home Builders ("NAHB"). I have worked as an attorney for NAHB for over 20 years, and I am familiar with the mission and goals of NAHB in the administrative, legislative and judicial areas. I am also familiar with the challenges that NAHB's members must overcome to develop land and build homes.

3. NAHB is a 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 700 state and local associations that operate in all 50 states. About one-third of NAHB's 120,000 members are home builders and/or remodelers. The remaining members are associates working in closely related fields within the housing industry, such as the environmental consulting, mortgage finance and building products and services industries. NAHB is affiliated with 27 builder associations in Texas and has over 9,000 builder and associate members who are based in and/or operate in Texas. NAHB's existence depends on funding from its members.

5. NAHB obtains its operating capital from two main sources; dues paid by its members, and revenues from the annual International Builder's Show. NAHB serves its members by ensuring that the laws and regulations protecting and governing the building industry are fairly and legally applied. One of the services that NAHB members' dues support is the association's involvement in the federal Administrative Procedure Act's notice and comment process. 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. The association also represents the industry's interests on Capitol Hill and strives to ensure that housing remains a national priority when laws are made, and policies are established. When necessary, NAHB becomes involved in litigation to protect its members' interests. Simply stated, NAHB works diligently to ensure a balanced national legislative, regulatory and judicial policy that is sensitive to the needs of the industry.

7. On June 6, 2019, NAHB reaffirmed a policy to urge the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") (collectively the "Agencies") to:

> To adopt regulations, guidance and policies asserting that "navigability" is the guiding factor to determine the geographic reach of the Clean Water Act (CWA), consistent with congressional intent.

The policy also provides that NAHB will urge Congress:

> To support legislative efforts maintaining that the statutory intent of the CWA is for "navigability" to be the guiding factor in jurisdictional decisions.

To advance this policy, NAHB has been actively involved with many of the issues that relate to Clean Water Act ("CWA") navigability at all levels of government.

8. One of the regulatory programs that directly affects NAHB, and its members is the CWA Section 404 permit program administered by the Corps and the EPA. Forty-four percent of NAHB builder/developers report that they have obtained a Section 404 permit to place dredged or fill material into watercourses and other areas considered by the Corps to be "waters of the United States" or associated "wetlands." The Corps has thereby conditioned and regulated the building activities of those members. Based on repeated experience with the Corps' attempts to regulate NAHB members beyond the scope of the Agencies' statutory authority over "navigable waters," NAHB has participated in virtually every rulemaking and numerous lawsuits involving the Section 404 regulatory program.

9. In addition, many construction activities that involve grading, clearing, excavation or other earth moving actions must comply with CWA Section 402 due to additions of storm water to navigable waters. These members comply with the CWA by obtaining a National Pollutant Discharge Elimination System ("NPDES") permit issued by either the EPA or their respective state. Often, theses members operate under what is commonly referred to as a Construction General Permit. Therefore, those members have been and continue to be regulated under the CWA.

10. Under the Revised Definition of "Waters of the United States," signed by the EPA and the Corps in December 2022 ("Rule"),[1] more geographic features will fall under the jurisdiction of the CWA (and thus the Corps and EPA) than under the Navigable Waters Protection Rule or the 2008 non-binding Guidance.[2] Therefore, more NAHB members will need to obtain CWA section 404 and 402 permits. Thus, NAHB members are directly regulated by the Rule.

11. As the Vice President of Legal Advocacy, I often receive calls from members concerning issues they are having under the Clean Water Act.

12. I have spoken with members who are environmental consultants that have explained to me that jurisdictional determination conducted under the "significant nexus" analysis are both time consuming and costly for developers. To determine if a feature is jurisdictional, the consultant must analyze the feature in question, and all similarly situated features in the region. This can require the consultant to review dozens of additional features. The costs are borne by the developer. In addition, consultants have explained to me that many more features are considered jurisdictional under the significant nexus test. This translates into more mitigation costs for the developer.

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[1] *Available at https://www.epa.gov/system/files/documents/2022-12/Pre-Publication%20Final%20Rule%20Notice.pdf.*

[2] Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*, *Available at https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos 120208.pdf.*

13. As an example, I spoke with a member in Ohio that had received an approved jurisdictional determination from the Corps of Engineers under the Navigable Waters Protection Rule on a residential project. That member designed its project based on that determination. Under the Rule much more of their property will be considered jurisdictional. The member estimates that the changes in the engineering and mitigation caused by the Rule, in addition to the increased time, will increase the cost of the project over $500,000. Those costs make the project no longer feasible.

14. Due to the enormous impacts that the Section 402 and Section 404 programs have on land development activities and, therefore, on the housing industry generally, NAHB is particularly concerned with all federal government decisions that affect how those programs are administered and applied to its members.

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

EXECUTED ON January 18, 2023, in Washington, D.C.

THOMAS J. WARD