

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

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STATE OF NORTH DAKOTA, *et al.*, )  
Plaintiffs, )  
v. )  
UNITED STATES ENVIRONMENTAL ) Civil Action No. 3:15-cv-00059  
PROTECTION AGENCY, *et al.*, )  
Defendants. )

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**BRIEF OF SMALL BUSINESS OWNERS/OPERATORS AS *AMICI  
CURIAE* IN SUPPORT OF DEFENDANTS UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY, ET AL.**

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## **IDENTITY AND INTEREST OF *AMICI CURIAE***

*Amici curiae* are 157 small business founders, owners, or operators (hereinafter “*Amici*”), most of whom depend on clean water for the success of their businesses. They include, among others, organic farmers and ranchers, outdoor and recreation outfitters, guides, and retailers, craft brewers, coffee shop owners, herbalists, and operators of camping resorts. A list of *Amici* is attached as an Addendum hereto. In this case involving the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (“Clean Water Act” or “Act”), *Amici* have strong interests in describing their support for upholding the final Clean Water Rule defining the term “waters of the United States.” 80 Fed. Reg. 37,054 (June 29, 2015) (“the Rule”). They respectfully ask this Court to reach the merits of the case and to uphold the Rule. The interests of *Amici* are further set forth in the accompanying Motion for Leave to File, and the specific interests of several of the *Amici* are set forth in detail in Section I of this brief.

## **ARGUMENT**

### **I. THE RULE AND ITS PROTECTIONS ARE VITAL TO SMALL BUSINESSES**

All 157 small business *amici* strongly support the Clean Water Rule and believe that its protection of intermittent and ephemeral waterways is important to

their businesses and livelihood. The following examples, drawn from the experiences of some of the *amici*, are representative of this support of, and interest in, the Rule.<sup>1</sup>

**A. The Rule Benefits Small Farmers and Ranchers Across the United States.**

Dave Anderson is the owner of A-T Ranch, LLD, an organic ranch near Belt, Montana. Clean water is an absolute necessity for his livestock and his family, and he supports the Clean Water Rule because it helps protect the sources of the water on which they rely. Also, as a sportsman, he enjoys fly fishing in unpolluted streams and lakes in rural Montana and enjoys seeing healthy wildlife in their natural environment while doing so. The protection of entire aquatic ecosystems, which the Clean Water Rule is designed to effectuate, is critical to this experience.

Cheyenne Zigmund is the co-owner of the Root N' Roost Farm in Livingston Manor, New York, an all-natural, organic, human-powered, human-scale permaculture-based farm. The farm is in the Southern Catskill Mountain Region, where several streams have been dammed to create reservoirs. A perpetual priority for Cheyenne, who runs the farm with her husband, is having a reliable source of clean water for their plants and livestock. Most of their water

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<sup>1</sup> The persons discussed in this section are among the small business *amici* on this brief.

comes from an unnamed seasonal creek. The seasonal creek feeds a larger creek, which feeds into Swan Lake. Cheyenne's farm is also surrounded by oil and gas operations that can lead to the discharge of damaging chemicals into small waterways. Supplies for her farm depend on clean water from these waterways, and the oil and gas facility pollution can reduce the quality and quantity of certain supplies, like feed for her livestock. Cheyenne strongly supports the Rule's clear protections for small waters such as her creek; clean water directly supports the health of her livestock and crops, and thus her farm's bottom line.

Michael Wong, the President of Loving Nature Pesticide-Free Farms in Clarksburg, California, runs an organic farm. As an organic farmer dedicated to healthy natural environments, he believes that clean water in any form, in any place, is vital not only to his own livelihood, but to the wellbeing of all people and life forms that coexist in in our fragile ecosystems. Mr. Wong supports the Clean Water Rule because he believes that preventing the pollution of our waterways, from the very large to the very small, is far less expensive and less difficult than trying to remove the pollution and remediate its effects once it has made its way to those waters.

**B. The Rule Benefits Outdoor Sports and Recreation Businesses Across the United States.**

Jeff Garnsey is the owner of Classic Island Cruises, a recreation and fishing charter boat company in Clayton, New York, along the St. Lawrence River. His

family has been chartering fishing expeditions for seven generations. Jeff and his family have a vital stake in the Clean Water Rule, because their business depends on the health and integrity of the streams, tributaries, and wetlands in the St. Lawrence River watershed. As he puts it, “These waters are, quite simply, the pumps through which the lifeblood of the river flows.” The St. Lawrence River has lost thousands of acres of wetlands over the past century, and the remaining wetlands are vital spawning grounds for fish. Without the remaining wetlands, the fish of the St. Lawrence would not be able to spawn. These wetlands are so important to Jeff’s business that he is not only a business owner, but also a volunteer board president of an organization known as Save the River, which has worked for decades to restore and protect the flow of the St. Lawrence River and to ensure adequate water flow into floodplains and wetland spawning grounds. Similarly, the smallest streams in the watershed are vital to Jeff’s business, as many of them are spawning areas for grey eels, a critical part of the ecosystem. Tributaries of the St. Lawrence are also critical habitats for other fish, such as walleye. Jeff’s business depends on the Rule’s protections for the streams, wetlands, and tributaries in the St. Lawrence watershed because without fish, Classic Island Cruises would cease to have customers.

The owner of Not a Clue Adventures in Tampa, Jeanene Arrington-Fisher, leads people on camping, kayaking, and fishing expeditions throughout Florida,

“teaching people the value of being outdoors.” Her trips are only as good as the water is, and some of her trips on Florida rivers have been marred by the ugly overpopulation of algae caused by upstream pollution. The Rule’s jurisdiction over intermittent streams and wetlands that flow into the Suwannee River and affect the biological integrity of the Floridan aquifer will have a direct impact on her business. Because it protects the upstream waters that flow into Florida’s rivers and aquifers, Jeanene believes the Rule is critical to small business owners, such as herself, who dedicate their lives to bringing people in touch with nature and the Nation’s waters.

Matt Helbig is the CEO of Big River Race Management in St, Louis, Missouri, a company that organizes and sponsors a variety of races that often take the runners in and around the waters of the St. Louis area. Many of the events his company sponsors take place in or near streams, creeks, and rivers. The cleanliness of those waterways is vital to the health and wellness of the people who participate in and/or attend these events. If these waterways were contaminated due to softening of rules that help keep them clean and safe, he believes, his business would suffer accordingly.

Similarly, Mary Gibson is manager of Blue Mountain Outfitters in Marysville, Pennsylvania. Blue Mountain rents kayaks, canoes, and standup paddleboards for use on the Susquehanna River. The Clean Water Rule is vital to

rivers like the Susquehanna because it protects the smaller streams that feed such rivers and wetlands that help filter out pollutants. Mary says her business “is highly dependent on clean water in order to survive” because “[p]eople simply have no interest in paddling canoes, kayaks, or stand up paddle boards in water that is not clean and safe.”

Noah Parker is a fly-fishing guide who owns Land of Enchantment Guides in Velarde, New Mexico. Noah’s small business employs eight full-time employees year-round, and their livelihood depends on the protection of the rivers and streams where they take their customers. In the West, clean and safe water has become a rare commodity, but Noah believes the Clean Water Rule attempts to remedy that. Noah and his employees take clients on the San Juan River, the Rio Grande, the Red River, the Chama River, Cow Creek, San Antonio Creek, and other small and large waterways (see LAND OF ENCHANTMENT GUIDES, <https://loeflyfishing.com/> (last visited 7/20/18), and many of these have adjacent riparian areas whose protection he believes is important. Further, the focus of Noah’s business is northern New Mexico and southern Colorado, at the southern end of the Rockies, and most of the waterways in which his clients fish originate as small trickles far up in the mountains. These waterways are primarily snow melt and spring fed: tiny streams that get bigger and bigger as they come out of the mountains.

Noah views the trout in the rivers and streams as the “canaries in the coal mine” for his business: when these waterways are not protected from pollution, the pollutants cause stress to the fish, the fish die, the ecosystem in the waterways crumble, and his customers no longer make their way to his door. Noah believes the Rule sets strong guidelines for environmental protection and sets an example for how conscious businesses and individuals should be about preserving the Nation’s waters.

**C. The Rule Benefits Craft Breweries Across the United States.**

According to the Brewers Association, out of the rapidly growing number of operating breweries in the U.S. (6,372 in 2017), 99 percent are small and independent breweries. As succinctly stated by Ryan Naylor, Marketing Manager at One World Brewing in Asheville, North Carolina, “We can’t make good beer without clean water!”

Brent Schwoerer is the owner and founder of Engrained Brewery & Restaurant in Springfield, Illinois. Engrained is a farm-to-table brew pub; in addition to brewing their own beer, they purchase food ingredients directly from local farmers. Engrained supports and buys from local farmers who grow food using regenerative agricultural practices. The quality of water on those farms is critical to their farming operation and the produce they grow and/or livestock they raise. Clean water is also the foundation of the beer Engrained produces. Brent

believes that high nitrate levels, or other pollutants and contaminants, in the water are detrimental to the quality of the products his farmers and he work hard to produce, and thus he strongly supports the Clean Water Rule for the “upstream” protection it provides.

Chris Ranson at Lake Front Brewery in Milwaukee, Wisconsin, supports the Rule because clean water is important both for the taste of beer that Lake Front produces and for the sanitization of the facilities used to produce its beer. Especially since more hours often need to be spent cleaning the brewery facilities than making the beer, an enormous amount of water is used in the process. And because of the delicate nature of beer recipes, it is essential that clean water be used in the sanitization process, lest impurities be allowed to diminish the quality of the final product. Because Lake Front’s water comes from Lake Michigan, it is important to Chris that the numerous smaller waterways that empty into Lake Michigan also be firmly protected under the Clean Water Act. Chris thus supports the Clean Water Rule, knowing full well that even the best recipe is ruined without clean water.

Steve Fechheimer is the CEO at New Belgium Brewing Company in Fort Collins, Colorado. Since water makes up over 90% of New Belgium’s beer, clean and abundant water supplies are critical to the brewery’s business and the livelihood of New Belgium’s 700 employee-owners. The company strives to be a

steward of the rivers in the communities in which they brew their beer: the Cache la Poudre River in Fort Collins, CO, and the French Broad River in Asheville, NC. New Belgium aims to take only what they need from the river, returning any excess water as clean as they received it. As much as New Belgium does to reduce the quantity and increase the quality of the water they use, the brewery recognizes the need for the Clean Water Rule to protect the various waters that feed these rivers, and to minimize further threats to the Nation's waterways generally.

Heather Sanborn is a co-owner of Rising Tide Brewery in Portland, Maine, a craft brewery whose success "is dependent on the purity and deliciousness of the water with which we brew." Rising Tide relies on water from the Portland Water District, which draws its water from Sebago Lake. Because Sebago Lake is so clean, Portland Water District treats the water only minimally, "providing us with delicious brew water that doesn't reek of chloramine and other chemicals that would impact the quality and flavor of our beers." Protecting Sebago Lake's cleanliness relies on protecting its entire watershed, which is what the Clean Water Rule strives to do.

## **II. THE RULE IS NOT UNCONSTITUTIONALLY VAGUE AND SATISFIES PRINCIPLES OF DUE PROCESS.**

A statute or regulation may be deemed impermissibly vague under the Due Process Clause only if it: 1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits;" or 2) "authorizes

or ...encourages arbitrary and discriminatory enforcement.” *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012) (internal quotations omitted)); *see Hill v. Colorado*, 530 U.S. 703, 732 (2000). “[R]egulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.” *Freeman United Coal Min. Co. v. Federal Mine Safety and Health Review Com’n*, 108 F.3d 358, 362 (D.C. Cir. 1997). Elimination of all uncertainty is not the benchmark, as “perfect clarity and precise guidance have never been required . . .” *United States v. Williams*, 553 U.S. 285, 304 (2008) (internal quotations omitted); *Green Party of Tennessee v. Hargett*, 700 F.3d 816, 825 (6th Cir. 2012) (holding that a state statute, “although certainly not a model of clarity,” was not unconstitutionally vague). The Clean Water Rule satisfies these standards of due process because it provides sufficient notice to potentially regulated entities and establishes clear standards and guidelines designed to prevent arbitrary or discriminatory enforcement.

**A. The Rule Provides Ordinary Persons With a Reasonable Opportunity to Understand Which Waters are Subject to Clean Water Act Jurisdiction.**

A regulation must provide a “person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned*

*v. City of Rockford*, 408 U.S. 104, 108 (1972); *see, e.g., U. S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 579 (1973) (applying this standard to a regulation); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1441 (6th Cir. 1991). Thus, a provision may be declared unconstitutionally vague when it specifies “no standard of conduct ...at all,” but not simply because “it requires a person to conform his conduct to an imprecise but comprehensible normative standard.” *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). “[A] regulation is not impermissibly vague because it is ‘marked by flexibility and reasonable breadth, rather than meticulous specificity.’” *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 737 (D.C. Cir. 2016) (internal quotations omitted). Here, as discussed more fully below, the Agencies have clarified which waters are subject to Clean Water Act jurisdiction by including comprehensible definitions and objective criteria in the Clean Water Rule. *See Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994) (holding that a statute setting forth “objective criteria” to determine whether objects are within its jurisdiction was not vague).

In fact, the Rule provides considerably more clarity to regulated entities on this topic than at any time since the modern Clean Water Act was passed in 1972, with definitions that are much more understandable than the previous definitions adopted in 1977, *see* 42 Fed. Reg. 37144 (July 19, 1977), and 1986, 51 Fed. Reg.

41,206 (Nov. 13, 1986). Additionally, the Clean Water Act’s “waters of the United States” language itself has never been found void for vagueness, *see Rapanos v. United States*, 547 U.S. 715 (2006), and the Clean Water Rule clarifies and narrows this language consistent with Supreme Court precedent. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Supreme Court held that a statute was not unconstitutionally vague where “Congress . . . took care to add narrowing definitions to the . . . statute over time,” which “increased the clarity of the statute’s terms.” *Id.* at 21. Similarly, the narrowing of the definition of “waters of the United States” over an extended period of time has provided potentially regulated entities extensive notice of the Clean Water Act’s jurisdictional reach.

Further, the Rule’s final language was adopted only after the Agencies received – and responded to – over one million public comments from a wide variety of commenters. *Clean Water Rule Response to Comments – Topic 1: General Comments* at 1. This process provided extensive notice of the Rule’s content to potentially regulated entities. In *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952), the Supreme Court held that an Interstate Commerce Commission regulation mandating that drivers transporting certain dangerous materials avoid driving in certain areas “so far as practicable” was not unconstitutionally vague, in part, because the regulation was “adopted only after more than three years of study and a number of drafts,” including extensive

participation by the regulated industry. *Id.* at 341-42 (“The trucking industry participated extensively in this process, making suggestions relating to drafts . . . submitted to carriers and their organizations, and taking part in several hearings.”).

Moreover, the Agencies here also made extensive efforts to inform the public about the scope and application of the Clean Water Rule through supplemental documents and public informational sessions.<sup>2</sup> “If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.” *Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1183 (D.C. Cir. 2014) (internal quotations omitted). The Clean Water Rule and the large volume of documents explaining its application provide the public with “ascertainable certainty” of the types of waters that are – and are not – subject to Clean Water Act regulation.

**B. The Rule Provides Clear Standards and Guidelines that Discourage Arbitrary or Discriminatory Enforcement of the Clean Water Act.**

Although a provision must not be “so standardless that it invites arbitrary

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<sup>2</sup> See *Documents Related to the Clean Water Rule*, <https://www.epa.gov/cleanwaterrule/documents-related-clean-water-rule> (last visited Jan. 19, 10:58 AM).

enforcement,” *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015), “the fact that a regulation requires the exercise of judgment, or that there is room for disagreement about the existence of a necessary factual predicate, is not a proper ground for a vagueness challenge.” *Pacific Ranger, LLC v. Pritzker*, 2016 WL 5676276, at \*14 (D.D.C. Sept. 30, 2016). The Supreme Court has suggested that providing “minimal guidelines” adequate to prevent arbitrary enforcement is the key to compliance with the vagueness doctrine. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal citation omitted). Here, rather than encouraging a “standardless sweep” of potentially regulated entities, *id.* (internal citation omitted), the Clean Water Rule provides clear and limited definitional scope to guide the Agencies’ enforcement—defining waters that are jurisdictional, waters that are not jurisdictional, and waters that are subject to case-by-case nexus determinations—without the use of subjective or ambiguous terms. The Rule delineates precise standards and guidelines designed to preclude arbitrary enforcement of the Clean Water Act.<sup>3</sup>

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<sup>3</sup> Additionally, this pre-enforcement facial challenge to the Clean Water Rule includes no allegation of evidence of discriminatory enforcement actions. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982) (finding an ordinance was not vague, in part, because “no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner” and because “[t]he language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness.”).

**1. The Rule’s Definition of Tributary is Not Vague and Includes Bright Line Standards.**

The Rule defines “tributary” as a “water that [a] contributes flow, either directly or through another water,” to a navigable or interstate water or the territorial seas, and “[b] is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.” 33 C.F.R. § 328.3(c)(3) (2015). The ordinary high water mark (“OHWM”) is, in turn, defined as:

that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

*Id.* § 328.3(e).

Courts have upheld very similar provisions as not impermissibly vague and not likely to cause arbitrary enforcement. For example, in *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207 (D.C. Cir. 2007), a trade association challenged an EPA regulation governing the permitting process for facilities that burn hazardous waste as fuel. The regulation laid out eight specific criteria for consideration, followed by a ninth criterion allowing the agency to consider “[s]uch other factors as may be appropriate.” *Id.* at 221. The D.C. Circuit held that “[a]lthough the challenged regulation may ‘not provide as much detail as petitioner wishes’” it was not impermissibly vague. *Id.* at 221-222 (internal citation and quotations omitted).

The court held that the “as may be appropriate” criterion, while “general,” did not “render the regulation standardless,” as the types of information specified in the preceding eight criteria provided sufficient context to help define the scope of the ninth. *Id.* at 221. Similarly, the “other appropriate means” indicator in the definition of OHWM is preceded by several enumerated physical characteristics that are sufficiently specific and familiar to guide petitioners and other entities in complying with the Rule. The Corps has also issued technical assistance documents to further standardize OHWM delineations for citizens and regulators.<sup>4</sup>

The Rule also makes clear that “breaks” in a waterway do not, in and of themselves, prevent the waterway from being a “tributary.” The Rule provides that tributary waters with “constructed breaks (such as bridges, culverts, pipes, or dams)” or “more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground),” remain tributaries “so long as a bed and banks and an ordinary high water mark can be identified upstream of the break.” 33 C.F.R. § 328.3(c)(3) (2015). *See also* U.S.

Environmental Protection Agency et al., *Technical Support Document for the*

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<sup>4</sup> *See, e.g.*, Robert W. Lichvar et al., U.S. Army Corps of Eng’rs, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual*. ERDC/CRREL TR-08-12 (2008); Matthew K. Mersel et al., U.S. Army Corps of Eng’rs, *A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States* ERDC/CRREL TR-14-13 (2014).

*Clean Water Rule: Definition of Waters of the United States* 57 (2015), [https://www.epa.gov/sites/production/files/2015-05/documents/technical\\_support\\_document\\_for\\_the\\_clean\\_water\\_rule\\_1.pdf](https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf) (hereinafter “Technical Support Document”). Finally, the preamble to the Rule includes extensive discussion of the tools and information available to clearly and consistently implement the definition of tributary. 80 Fed. Reg. at 37,076-77; *see also* Technical Support Document at 57.

In short, the definitions of tributary and OHWM set bright line standards that will enable regulators to enforce the Rule objectively. These guidelines provide a meaningful “physical characteristics” test that will allow agency personnel in all field offices to impartially determine whether a waterway constitutes a “tributary” within the jurisdiction of the Clean Water Act.

## **2. The Rule’s Inclusion of Certain Types of Ditches is Not Vague.**

The Rule continues the policy of regulating ditches and, for the first time, also explicitly defines the types of ditches that are *excluded* from jurisdiction. As summarized in the preamble:

Ditches protected by the rule must meet the definition of tributary, having a bed and banks and ordinary high water mark, and contributing flow directly or indirectly through another water to a traditional navigable water, interstate water, or the territorial seas.

80 Fed. Reg. at 37,078. Ditches excluded from the Rule are those: 1) with ephemeral flow that are not a relocated tributary or excavated in a tributary, 2) with

intermittent flow that are not a relocated tributary, are not excavated in a tributary, and do not drain wetlands, and 3) that do not flow into navigable or interstate waters or the territorial seas. 33 C.F.R. § 328.3(b)(3)(i)-(iii) (2015). These exclusions provide the regulated community with a clearer picture of what is covered than either the proposed rule or current policies. For example, it is now clear that ephemeral and intermittent ditches that flow only after precipitation are excluded from jurisdiction. Also, since the Rule focuses on the physical characteristics of excluded ditches, individuals will be able to more easily identify which ditches are exempt.

The many sources of data that the Rule references to help agencies and citizens identify OHWMs and tributaries are publicly available. 80 Fed. Reg. at 37036-37077 ("Among the types of remote sensing or mapping information that can assist in establishing the presence of water are USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as "LIDAR") data, and desktop tools [to identify] an [OHWM], such as a regional regression analysis or hydrologic modeling.").

Many of these sources of information are accessible in well-maintained and publicly available databases. For example, there are extensive USGS topographic

data publicly available on the USGS website, U.S. Department of the Interior et al., *The National Map: Data Download and Visualization Services*, <https://viewer.nationalmap.gov/launch/> (last visited Jan. 19, 2017, 12:55 PM), with current and historical topographic maps and extensive GIS data including elevation source data. The website is user-friendly with a “zoom-able” map feature, a “How To” guide, a “Quick Start Guide,” and a video guide to assist users in finding and downloading information. The USGS National Hydrography Data (“NHD”) and the National Resources Conservation Service (“NRCS”) Soil Surveys are also publicly available and easily searchable with zoom-able maps and guides on how to browse data. The Internet also has numerous public and private sources of aerial photography over large spans of time, as well as light detection and ranging (LIDAR) data.<sup>5</sup> The Army Corp of Engineers also provides easily downloadable desktop software to the public, along with user manuals. *See* <https://water.usgs.gov/nrp/software.php>.

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<sup>5</sup> *See, e.g.*, U.S. Department of the Interior et al., *Earth Explorer*, <https://earthexplorer.usgs.gov> (last visited Jan. 19, 12:58 PM); GeoSearch, *Historical Aerial Photographs*, <https://geo-search.com/historical-aerial-photos> (last visited Jan. 19, 1:00 PM); Nationwide Environmental Title Research, LLC, <http://www.historicaerials.com/?javascript=&> (last visited Jan 19, 1:02 PM); NOAA Office for Coastal Management, *DIGITALCOAST*, <https://coast.noaa.gov/digitalcoast/> (last visited Jan. 19, 1:04 PM); Commonwealth of Massachusetts Executive Office for Administration and Finance, *MassGIS Data - LiDAR Terrain Data*, <http://www.mass.gov/anf/research-and-tech/it-serv-and-support/application-serv/office-of-geographic-information-massgis/datalayers/lidar.html> (last visited Jan. 19, 1:07 PM).

In today's modern world, citizens are able to identify ditches, OHWMs, and tributaries using many of the same technologies used by our government agencies.

**3. The Rule's Case-Specific Analysis for Determining "Significant Nexus" is Not Vague.**

Definitions and regulations deemed vague are often broad in scope and short in length. In contrast, the Rule's definition of "significant nexus" is specific and detailed, and carefully outlines (and limits) how the case-specific test for determining significant nexus is to be conducted. *See* 33 C.F.R. § 328.3(c)(5) (2015).

The Rule provides that certain clearly-specified types of waters, and certain waters within clearly-specified distances from jurisdictional waters, are covered by the Clean Water Act if they are determined, on a case-by-case basis, to have a significant nexus to traditional navigable or interstate waters or the territorial seas. 33 C.F.R. § 328.3(a)(7)-(8). The Rule specifies that the requisite "significant nexus" exists when the subject waters "contribute[] significantly to the chemical, physical, or biological integrity" of the "nearest" traditional navigable water, interstate water, or territorial sea, and the Rule further specifies that the requisite contribution "must be more than speculative or insubstantial." *Id.* § 328.3(c)(5).

Moreover, the Rule is quite specific in detailing the analysis to be used to determine whether the waterway in question has the requisite effect on downstream

waters. The Rule specifies that the significant nexus analysis must be based on a consideration of whether, and to what extent, the subject water performs nine specifically-described functions related to the chemical, physical, and/or biological integrity of the downstream jurisdictional waterway. *Id.* § 328.3(c)(5)(i)-(ix). If it contributes significantly to the performance of any of those nine listed functions for the downstream waterway, it is covered by the Act. If it does not, it is outside of the Act’s jurisdiction (unless covered under a separate section of the Rule). Thus, rather than allowing agency personnel to impose their own concept of “significant nexus” in each new situation – an approach that clearly could result in disparate and unpredictable enforcement – the Rule provides clear and specific guidelines that must be applied in all situations. This satisfies the principles of due process.

## **CONCLUSION**

For the foregoing reasons, Amici respectfully request that this Court reach the merits and uphold the Clean Water Rule. If this Court holds the rule partially invalid, Amici respectfully request that the Court only strike down those portions of the Rule that it deems invalid. As a general rule, “[a] court would exceed its proper scope of review if it struck down the entirety of [a regulation], where only a part is invalid, and where the remaining portion may sensibly be given independent

life.” *Stupak-Thrall v. United States*, 89 F.3d 1269, 1288-89 (6th Cir. 1996)

(internal quotations omitted).

DATED: July 23, 2018

/s/ Charles C. Caldart  
CHARLES C. CALDART

## ADDENDUM

### LIST OF SMALL BUSINESS AMICI

<b>NAME</b>	<b>BUSINESS</b>	<b>CITY</b>	<b>STATE</b>
David Hirshman	The Flow Shop	Tempe	Arizona
Michael Loan III	Pueblo Life, LLC	Phoenix	Arizona
Michael Alexander	Conscious Living	Los Angeles	California
Katrina Child	Katrina Child, Marriage and Family Therapist	San Francisco	California
Danielle Cresswell	Klean Kanteen	Chico	California
Thatcher Davis	Design and Development Firm	South San Francisco	California
Deborah Gavrin Frangquist	Chosen Futures	San Francisco	California
Sarah Guerra	Communitas Financial Planning	Berkeley	California
Susan Harris	Leadership & Strategy for Sustainable Systems	Oakland	California
Andre Zinkevich and Eric Hough	Natural Systems Utilities	Napa	California
Kristin Hull	Nia Impact Capital	Oakland	California
David Jaber	inNative	Oakland	California
Alex Kahl	Kahl Consultants	San Rafael	California
Steve Kaye	Steve Kaye Photo	Placentia	California
Carl Kish	STOKE Certified	San Diego	California
Louanne Klein	Distance Learning Consulting	Lafayette	California
Matt Meier	Matthew Meier Photography	San Diego	California
Allan Moskowitz	Transformative Wealth Management, LLC	El Cerrito	California
Adam Ryznar	Intex Solutions, Inc.	Montebello	California
Paul Scott	TransPower	Escondido	California
Justin Sternberg	Continuum Industries, Inc.	Nevada City	California
Sandra Stewart	Thinkshift Communications	San Francisco	California
Kristine Waldren	Earth Friendly Products	Cypress	California
Brian Weissbuch	KW Botanicals, Inc.	San Anselmo	California
Michael Wong	Loving Nature Pesticide-Free Farms	Clarksburg	California

Jennifer Button	Jem Clean	Oak Creek	Colorado
Donna Childress	Childress Communications, LLC	Leadville	Colorado
Carol Cochran	Horse & Dragon Brewing Company	Fort Collins	Colorado
Natalie DiSanto	Turtle Mountain Fermentery	Fort Collins	Colorado
Steve Fechheimer	New Belgium Brewing Company	Fort Collins	Colorado
Tyler Lathrop	Down the Moon Tattoo	Fort Collins	Colorado
Greg Lessard	Aspen Leaf Partners	Golden	Colorado
Kirk Lombardi	Zwei Brewing Co.	Fort Collins	Colorado
Hunter Lovins	Equator Network	Longmont	Colorado
Lauren McNeill	Group14 Engineering	Denver	Colorado
Justin Serr	The Colorado Room	Fort Collins	Colorado
Kym Waugh	Waugh, Inc.	Denver	Colorado
Kris Coperine	Green Thread Consulting	Glastonbury	Connecticut
Hammad Atassi	American Sustainable Business Council	Washington	D.C.
Mike Englert	Eighty2degrees Design Studio	Washington	D.C.
Kimberley Jutze	Shifting Patterns Consulting	Washington	D.C.
Maya Rockeymoore	Center for Global Policy Solutions	Washington	D.C.
Jeanene Arrington-Fisher	Not a Clue Adventures	Kathleen	Florida
John Van Leer	University of Miami	Miami	Florida
Levi Algozino	Piano Tuner	Oak Park	Illinois
Stephen Blessman	Eastman Dryden Blessman Organization	Chicago	Illinois
Michael Cameron	Greenstar Brewing	Chicago	Illinois
Nicole Doucet	Green Sheep Water	Chicago	Illinois
Matthew Gallagher	Half Acre Brewing Company	Chicago	Illinois
Josh Gilbert and Emily Kwasny	Temperance Beer Company	Evanston	Illinois
Brent Schwoerer	Engrained Brewery & Restaurant	Springfield	Illinois
Dennis Scully	Essex Securities, LLC	Northfield	Illinois

Troy Van Beek	Ideal Energy, Inc.	Fairfield	Iowa
Mark Anastas	Liquid Dreams Surf Shop	Ogunquit	Maine
Daniel Kleban	Maine Beer Company	Freeport	Maine
Heather Sanborn	Rising Tide Brewing Company	Portland	Maine
Anna Tocci	Greenlight Studio	Portland	Maine
Jim Wellehan	Lamey-Wellehan	Auburn	Maine
Molly Hauck	Molly P. Hauck, Ph.D., LLC., Licensed Psychologist	Rockville	Maryland
Linda Katz	Love-Your-Planet	Silver Spring	Maryland
Abigail Rome	Tierra Vista	Silver Spring	Maryland
Aimee Schmidt	Silver Lining Institute	Silver Spring	Maryland
Gordon Deane	Palmer Management Corp.	Cohasset	Massachusetts
Bruce Douglas	Natural Systems Utilities	Fall River	Massachusetts
Dorie Stolley	Three Birds Consulting	Plymouth	Massachusetts
Matthew Thomas	Because Water Corp.	Boston	Massachusetts
Kim Birkle	Key Community Marketing	Ann Arbor	Michigan
Mary Ellen Gondeck	Congregations of St. Joseph	Nazareth	Michigan
Timothy Schacht	Jefferson Veterinary Center	Detroit	Michigan
Kris Spaulding	Brewery Vivant	Grand Rapids	Michigan
Timothy Suprise	Arcadia Brewing Company	Kalamazoo	Michigan
Elizabeth Greenbaum	ArtiCulture	Minneapolis	Minnesota
Peggy A. Grey	Mary Lue's Yarn & Ewe	Mankato	Minnesota
Henry Homburger	Mayo Clinic	Rochester	Minnesota
Tony Vavricka	Hard Water Sports	Sandstone	Minnesota
Rick Wagner and Shane Symmank	Natural Systems Utilities	Ham Lake	Minnesota
Matt Helbig	Big River Race Management	St. Louis	Missouri
Barbara Jennings	Midwest Coalition Responsible Investment	St. Louis	Missouri
Stanley Miller	Miller Chiropractic	Elsberry	Missouri
Hilary Noonan	Syntax Land Design, LLC	Kansas City	Missouri
Dave Anderson	A-T Ranch, LLC	Belt	Montana
Miranda Hickox	Divine Trash Vintage	Missoula	Montana
Kate McIvor	The Confident Stitch	Missoula	Montana
Donovan	Upcycled	Missoula	Montana

Peterson			
Amy Dishman	BVH Architecture	Lincoln	Nebraska
George Bald	Clean Tech Council	Somersworth	New Hampshire
Deirdre Fitzgerald	W.S. Badger Co.	Gilsum	New Hampshire
Zachary Gallagher, Kimberly Knight and Jens Riedel	Natural Systems Utilities	Hillsborough	New Jersey
Richard Lawton	New Jersey Sustainable Business Council	Point Pleasant Beach	New Jersey
Sally Malanga	Ecco Bella	West Orange	New Jersey
Gene Muller	Flying Fish Brewing Co.	Somerdale	New Jersey
Thomas Sereduk	Longview Flower Farm	Lumberton	New Jersey
Greg Flores	Espresso Fino	Albuquerque	New Mexico
Noah Parker	Land of Enchantment Guides	Velarde	New Mexico
Joseph Zupan	Amigos Bravos	Taos	New Mexico
Jesse Bennett	Culture House	Waverly	New York
Mary Cleaver	Cleaver Co.	New York	New York
Anthony Del Plato	A Stone's Throw B&B; Village of Interlaken Board of Trustees	Interlaken	New York
Jeffrey Garnsey	Classic Island Cruises	Clayton	New York
Ajax Greene	On Belay Business Advisors, Inc.	Gardiner	New York
Janice Kuhn	Impactualize	New York	New York
Tyler Merriam	Adirondack Lakes and Trails Outfitters	Saranac Lake	New York
Leon Miller-Out	Singlebrook Technology	Ithaca	New York
Nadira Narine	Interfaith Center on Corporate Responsibility	New York	New York
Joseph Nolan	Home Green Home	Ithaca	New York
Wilhelm Reinders	SULA NYC	Forest Hills	New York
M. Risa	Mid-Hudson Civic Center	New York	New York
Jerry Rivers	North American Climate, Conservation and Environment (NACCE)	Roosevelt	New York
Harvey Russack	The GreenShows, Inc.	Yonkers	New York

Miriam Senft	Global Women 4 Wellbeing (GW4W)	Blooming Grove	New York
Jack Slattery	Blue Point Brewing Company	Patchogue	New York
Alicia Tether	Hudson Valley Data Translators	Newburgh	New York
Mary Wagner	Inherent Good	Newburgh	New York
Cheyenne Zigmund	Root 'N Roost Farm	Livingston Manor	New York
Stuart T. Barnhart	Fiddlin' Fish Brewing Company	Winston-Salem	North Carolina
V.L. Brandt	Illuminating Manuscripts	Durham	North Carolina
Barbara Francis-Heckman	Beaufort Pet Provisions, Inc.	Beaufort	North Carolina
Lisa McDonald	Sanctuary Brewing Company	Hendersonville	North Carolina
Jason Schutz and Ryan Naylor	One World Brewing	Asheville	North Carolina
Michael Paul	Hot Wax Surf Shop	Wilmington	North Carolina
Amanda Robertson	The Farthest Pixel	Pittsboro	North Carolina
Jay Rosoff	JR Sales Corp.	Raleigh	North Carolina
Barry Cik	Naturepedic	Chagrin Falls	Ohio
Matthew Evans	One Line Coffee LTD	Columbus	Ohio
Elizabeth Holst	Online Marketplace	Beachwood	Ohio
Felicia Jimenez	Royal Factory	Columbus	Ohio
Emily Hamilton, Anand Kadambi, and Gavin Ursich	SplashLink, Inc.	Beachwood	Ohio
James Mosie	Rocket Fizz	Columbus	Ohio
Dana Weintraub	Evergreen Sustainability, LLC	Beaverton	Oregon
James Tyree II	Oregon Field & Brush Mowing	Portland	Oregon
Mary Vogel	PlanGreen	Portland	Oregon
Jared Barnes	Collusion Tap Works	York	Pennsylvania
Grace Cameron	Copenhagen Institute for Futures Studies	Pittsburgh	Pennsylvania
Alan Dececco	The Philadelphia Catering Co.	Philadelphia	Pennsylvania

Mary Gibson	Blue Mountain Outfitters	Marysville	Pennsylvania
Tim Herd	Pennsylvania Recreation and Park Society	State College	Pennsylvania
Fran Lawn	Sustainable Business Network of Greater Philadelphia	Philadelphia	Pennsylvania
Jana Mars	Aqua Vida	Philadelphia	Pennsylvania
Samuele Masotto	Bonn Place Brewing Co.	Bethlehem	Pennsylvania
Alan Peterson, MD	Lancaster General Health	Quarryville	Pennsylvania
Ryan Richards	Roy-Pitz Brewing Company	Chambersburg	Pennsylvania
Peggy Zwerver	Earth - Bread + Brewery LLC	Philadelphia	Pennsylvania
Tricia Pan	Narragansett Surf & Skate	Narragansett	Rhode Island
Kate Coffman and Stephanie Carlson	Alliance Brewing Company	Knoxville	Tennessee
M. Honer-Orton	Bunk House at ZION Bed & Breakfast	Rockville	Utah
Katherine DiMatteo	Sustainable Food Trade Association	New Castle	Virginia
Jim Epstein	Blue Ridge Produce	Elkwood	Virginia
James Ewell	GreenBlue Institute	Charlottesville	Virginia
Douglas Denu	University of Vermont	Burlington	Vermont
Pat Heffernan	Marketing Partners Inc.	Burlington	Vermont
Chris Amante	Friendly Foam Shop	Seattle	Washington
Heidi Siegelbaum	Calyx	Seattle	Washington
Ruth Battaglia	Congregation of Sisters of St. Agnes	Fond du Lac	Wisconsin
Christopher Cox	Seventh Generation Interfaith Coalition for Responsible Investment	Milwaukee	Wisconsin
Russ Klisch and Chris Ranson	Lakefront Brewery	Milwaukee	Wisconsin
Kurt Thomsen	KOT Environmental Consulting, Inc.	Racine	Wisconsin
Eric Uram	Headwater LLC	Madison	Wisconsin

## **CERTIFICATE OF SERVICE**

I hereby certify that on July 23, 2018, I filed the foregoing by emailing the same to the Clerk of the Court, who will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Charles C. Caldart  
CHARLES C. CALDART