

Hon. John C. Coughenour

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WASHINGTON CATTLEMEN'S  
ASSOCIATION,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY; ANDREW  
WHEELER, in his official capacity as  
acting administrator of the  
Environmental Protection Agency;  
UNITED STATES ARMY CORPS OF  
ENGINEERS; and R.D. JAMES, in his  
official capacity as Assistant Secretary  
for Civil Works, Department of the  
Army,

Defendants.

PUGET SOUNDKEEPER ALLIANCE,  
IDAHO CONSERVATION LEAGUE,  
and SIERRA CLUB,

Defendant-Intervenors

)  
) Civil Action No. 2:19-cv-00569-JCC  
)  
) **SECOND**  
) **SUPPLEMENTAL COMPLAINT**  
)

## INTRODUCTION

1  
2 1. This lawsuit is about the proper interpretation of the term “navigable waters” in  
3 the Clean Water Act, 33 U.S.C. 1362(12) and 1362(7). The Clean Water Act is a strict liability  
4 statute that imposes severe criminal penalties for unpermitted discharges to “navigable waters.”  
5 Permitting is onerous and expensive, costing years of time and hundreds of thousands of dollars  
6 on average. What “waters” are “navigable” is thus a major question. In 1986, the Environmental  
7 Protection Agency (EPA) and Army Corps of Engineers (Army) adopted joint regulations (the  
8 1986 Regulations) that interpreted the term broadly to include extensive non-navigable water  
9 bodies and features upstream of and even isolated from navigable-in-fact rivers and lakes. At  
10 various times, EPA and the Army issued guidance relating to the 1986 Regulations. In 2015, EPA  
11 and the Army replaced the 1986 Regulations with a new regulation that re-interpreted the term  
12 even more broadly (the 2015 Navigable Waters Definition) Federal courts have enjoined the 2015  
13 Navigable Waters Definition in roughly half of the country, but not in Washington. On  
14 October 22, 2019, after the filing of the original Complaint in this action, Federal Defendants  
15 published a final rule in the Federal Register (“Repeal and Recodify Rule”) that rescinds the 2015  
16 Navigable Waters Definition and purports to readopt the 1986 Regulations and related guidance  
17 memoranda. On April 21, 2020, EPA and the Army adopted yet a new regulation, the Navigable  
18 Waters Protection Rule, again redefining “navigable waters” under the Clean Water Act.  
19 Plaintiff’s members own or operate real property with aquatic features throughout Washington,  
20 ~~and~~ are potentially subject to EPA and Army permitting and enforcement, depending on the  
21 applicability and validity of the Navigable Waters Protection Rule, 1986 Regulations and related  
22 guidance and the 2015 Navigable Waters Definition. Plaintiff challenges several provisions of the  
23 Navigable Waters Protection Rule, 1986 Regulations, related guidance, and the 2015 Navigable  
24 Waters Definition, as either exceeding the agencies’ statutory authority under the Clean Water  
25 Act or Congress’ authority under the Commerce Clause, the Due Process Clause, the Non-  
26 Delegation Doctrine, and the Tenth Amendment. Plaintiff asks this Court to clarify which  
27 regulations are applicable to its members, and to determine which provisions of the Navigable

1 Waters Protection Rule, 1986 Regulations, related guidance, and the 2015 Navigable Waters  
2 Definition are statutorily or constitutionally invalid.

3 **JURISDICTION AND VENUE**

4 2. Jurisdiction is founded upon 28 U.S.C. § 1331 (federal question); § 1346(a)(2)  
5 (civil action against the United States); § 2201 (authorizing declaratory relief); § 2202  
6 (authorizing injunctive relief and any other “necessary and proper” relief); and 5 U.S.C. § 702  
7 (judicial review of agency action under the Administrative Procedure Act).

8 3. Plaintiff has exhausted all administrative remedies.

9 4. This action is timely. 28 U.S.C. § 2401(a).

10 5. The challenged rules are final agency actions, ripe for judicial review. 5 U.S.C.  
11 § 704.

12 6. Venue is proper in this District pursuant to 5 U.S.C. § 703 (venue for actions under  
13 the Administrative Procedure Act generally proper in “a court of competent jurisdiction”).

14 **PARTIES**

15 *Plaintiff*

16 7. The Washington Cattlemen’s Association (WCA) is a nonprofit trade organization  
17 dedicated to promoting and preserving the beef industry through producer and consumer  
18 education, legislative participation, regulatory scrutiny, and legal intervention related to  
19 environmental regulation, including the Clean Water Act. WCA represents over 1,300 cattlemen  
20 and landowners throughout the state of Washington, many of whom are subject to the Clean Water  
21 Act under the broader jurisdictional standards established in the 1986 Regulations, related  
22 guidance, and the 2015 Navigable Waters Definition. On behalf of these members, WCA  
23 submitted comments and congressional testimony opposing the Navigable Waters Protection  
24 Rule and 2015 Navigable Waters Rule and submitted comments objecting to the re-adoption of  
25 the 1986 Regulations and related guidance in the Repeal and Recodify Rule.

1 *Defendants*

2 8. The United States Environmental Protection Agency is a cabinet agency and has  
3 enforcement responsibility for portions of the Clean Water Act affected by the Navigable Waters  
4 Protection Rule, 1986 Regulations, related guidance, and the 2015 Navigable Waters Definition.  
5 The EPA jointly issued the regulations challenged in this action.

6 9. Andrew Wheeler is the Administrator of the EPA. His predecessor Gina McCarthy  
7 signed the 2015 Navigable Waters Definition on behalf of EPA on June 29, 2015. He signed the  
8 Repeal and Recodify Rule on behalf of EPA on September 12, 2019. He signed the Navigable  
9 Waters Protection Rule on January 23, 2020.

10 10. The United States Army Corps of Engineers is a branch of the Department of the  
11 Army and has enforcement responsibility for portions of the Clean Water Act affected by the  
12 Navigable Waters Protection Rule, the 1986 Regulations, related guidance, and the 2015  
13 Navigable Waters Definition. The Army jointly issued the regulations challenged in this action.

14 11. R.D. James is the Assistant Secretary of the Army for Civil Works. His  
15 predecessor Jo-Ellen Darcy signed the 2015 Navigable Waters Definition on behalf of the Corps  
16 on June 29, 2015. Mr. James signed the Repeal and Recodify Rule on behalf of the Army on  
17 September 5, 2019. He signed the Navigable Waters Protection Rule on January 23, 2020.

18 *Intervenor-Defendants*

19 12. On July 16, 2019, the Court granted intervention to Puget Soundkeeper Alliance,  
20 Sierra Club, and Idaho Conservation League. ECF No. 33.

21 **LEGAL BACKGROUND**

22 13. For over a hundred years, the United States Congress regulated the obstruction of  
23 navigation on rivers and lakes through a series of statutes that applied to “navigable waters of the  
24 United States.” *Rapanos v. United States*, 547 U.S. 715, 723 (2006). In a line of cases originating  
25 with *The Daniel Ball*, the Supreme Court of the United States interpreted this term to refer to

26 [t]hose rivers . . . which are navigable in fact [, *i.e.*] when they are used, or are  
27 susceptible of being used, in their ordinary condition, as highways for commerce

1 over which trade and travel are or may be conducted in the customary modes of  
2 travel on water. And they constitute navigable waters of the United States within  
3 the meaning of the acts of Congress, in contradistinction from the navigable waters  
4 of the States, when they form in their ordinary condition by themselves, or by  
uniting with other waters, a continued highway over which commerce is or may be  
carried on with other States or foreign countries in the customary modes in which  
such commerce is conducted by water.

5 77 U.S. 557, 563 (1870); *see also Rapanos*, 547 U.S. at 723. Federal courts can take judicial  
6 notice of whether or not a given river or lake is navigable-in-fact, although the precise portions  
7 of it that are navigable may require consideration of evidence. *United States v. Rio Grande Dam*  
8 *& Irrigation Co.*, 174 U.S. 690, 698 (1899).

9 14. The phrase “navigable waters of the United States” was used in Section 10 of the  
10 River and Harbors Act when that act was first adopted in 1899, Mar. 3, 1899, c. 425, § 10, 30  
11 Stat. 1151, and remains in use today, 33 U.S.C. § 403. Section 10 also prohibits obstructions to  
12 “the navigable capacity of the waters of the United States” unless authorized by Congress.  
13 33 U.S.C. § 403.

#### 14 THE CLEAN WATER ACT

15 15. In 1972, Congress adopted significant amendments to the Federal Water Pollution  
16 Control Act, 33 U.S.C. § 1251, *et seq.*, which has since been called the Clean Water Act (the Act).  
17 The Act prohibits unpermitted discharges, defined as additions of pollutants from point sources  
18 to navigable waters. 33 U.S.C. §§ 1311(a), 1362(12). The Act assigns general permitting authority  
19 to the EPA, with specific permitting authority assigned to the Army Corps of Engineers to permit  
20 discharges of dredged or fill material. 33 U.S.C. §§ 1342(a)(1), 1344(a). So, the meaning of the  
21 term “navigable waters” is what determines whether any particular action is prohibited and/or  
22 subject to permitting by the Act. The Act defines “navigable waters” to “mean[] the waters of the  
23 United States, including the territorial seas.” 33 U.S.C. § 1362(7).

24 16. The Act’s words “navigable waters” and “waters of the United States, including  
25 the territorial seas” are very close to the predecessor statutes’ words “navigable waters of the  
26 United States” and the expression “navigable capacity of the waters of the United States” in  
27 Section 10 of the Rivers and Harbors Act. This evinces a congressional intent that the terms be

1 interpreted in a closely related way. The only significant variation in the terms is the Clean Water  
2 Act's introduction of the term "the territorial seas." This indicates that the Act applies to  
3 navigable-in-fact waters as defined in *The Daniel Ball* and referenced in Section 10 of the Rivers  
4 and Harbors Act, and *downstream* waters to and including the territorial seas.

5 17. Nothing in the Act's definition of "navigable waters" extends the term to non-  
6 navigable waters of any sort (e.g., tributaries and "adjacent waters") that are upstream of or  
7 isolated from navigable-in-fact waters. Nothing in the legislative history of the Act shows that  
8 Congress "intended to exert anything more than its commerce power over navigation." *Solid*  
9 *Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 168 n.3  
10 (2001) (*SWANCC*). In contrast, when Congress has intended to extend its reach to waters that are  
11 not navigable, it has said so expressly. For instance, with the Flood Control Act of 1936, Congress  
12 claimed authority over "navigable waters or their tributaries, including watersheds thereof." 30  
13 U.S.C. § 701(a); 49 Stat. 1570.

14 18. To the extent that "navigable waters" under the Act were to be interpreted to  
15 include any non-navigable waters upstream of navigable-in-fact waters, the Act provides no  
16 intelligible principle for determining which non-navigable waters are included.

#### 17 **EARLY AGENCY REGULATIONS AND RIVERSIDE BAYVIEW HOMES**

18 19. In 1974 the Army adopted regulations defining "navigable waters" under the Act  
19 to implement its permitting authority, consistent with the historic definition adopted in *The Daniel*  
20 *Ball*. 39 Fed. Reg. 12,119 (Apr. 3, 1974); *Rapanos*, 547 U.S. at 723; *SWANCC*, 531 U.S. at 169.  
21 The U.S. District Court for the District of Columbia ruled that these regulations were inadequate  
22 in *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D. D.C. 1975). The  
23 Army was subsequently unable to identify any "persuasive evidence that [it] mistook Congress'  
24 intent in 1974." *SWANCC*, 531 U.S. at 168.

25 20. But instead of appealing the trial court ruling, the Army adopted new and  
26 significantly broader regulations in 1975, 1977, and 1982. These regulations added the regulation  
27

1 of wetlands as “navigable waters” for the first time. *See generally United States v. Riverside*  
 2 *Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985).

3 21. In 1985 the Supreme Court decided *Riverside Bayview Homes*, which holds that  
 4 the Army regulations then in-effect reasonably interpreted “navigable waters” to include a non-  
 5 navigable wetland adjacent to a navigable-in-fact creek. 474 U.S. at 135. The Supreme Court did  
 6 not consider, in *Riverside Bayview Homes*, whether “navigable waters” included wetlands that  
 7 were not actually adjacent to navigable-in-fact waters. *Id.* at 124 n.2; *id.* at 131 n.8.

### 8 THE 1986 REGULATIONS

9 22. In 1986, EPA and the Army jointly adopted new and coordinated regulations (the  
 10 1986 Regulations)<sup>1</sup> defining “navigable waters” to include:

- 11 • All navigable-in-fact waters, plus all waters which are, were, or reasonably  
 12 could be used more generally in interstate commerce (33 C.F.R. § 328.3(a)(1)  
 13 (1987)<sup>2</sup>);
- 14 • The territorial seas (33 C.F.R. § 328.3(a)(6) (1987));
- 15 • All interstate waters including interstate wetlands (“Interstate Waters”)  
 16 (33 C.F.R. § 328.3(a)(2) (1987));
- 17 • All intrastate waters (whether navigable or not) that met various criteria  
 18 (“Covered Intrastate Waters”) (33 C.F.R. § 328.3(a)(3) (1987));
- 19 • All non-navigable tributaries to navigable-in-fact waters, Interstate and  
 20 Covered Intrastate Waters, and Impoundments (“Non-navigable Tributaries”) (33  
 21 C.F.R. § 328.3(a)(5) (1987));
- 22 • Wetlands adjacent to (meaning “bordering, contiguous, or neighboring”)  
 23 the territorial seas, navigable-in-fact waters, Interstate and Covered Intrastate  
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 26 <sup>1</sup> The EPA adopted identical conforming regulations in 1988, which are included in Plaintiff’s  
 definition of the 1986 Regulations.

27 <sup>2</sup> For ease of reference, the Army’s regulations are cited throughout. From the 1986 Regulations  
 forward, both EPA and the Army’s regulations are identical in relevant part.

1 Waters, and their Non-navigable Tributaries (“Adjacent Wetlands”) (33 C.F.R. §§  
2 328.3(a)(7), 328.3(c) (1987)); and

- 3 • All impoundments of all other waters covered by the definition  
4 (“Impoundments”) (33 C.F.R. § 328.3(a)(4) (1987)).

5 33 C.F.R. § 328.3(a) (1987); 51 Fed. Reg. 41,206, 41,250-51 (Nov. 13, 1986) (the “1986  
6 Regulations”).

7 23. When it adopted the 1986 Regulations, the Army also adopted EPA’s prior  
8 position that “navigable waters” included all waters (1) used to irrigate crops sold in interstate  
9 commerce, (2) served as habitat for birds protected by the Migratory Bird Treaty Act, (3) served  
10 as habitat for endangered species, or (4) “which are or would be used as habitat by migratory  
11 birds which cross state lines.” 51 Fed. Reg. 41,217 (Nov. 13, 1986). The last of these provisions  
12 was known as the Migratory Bird Rule.

### 13 *SWANCC AND RAPANOS*

14 24. The 1986 Regulations were the subject of two subsequent adverse Supreme Court  
15 decisions. In *SWANCC*, the Supreme Court invalidated the Migratory Bird Rule as beyond the  
16 scope of “navigable waters” under the Act. *SWANCC* narrowed *Riverside Bayview Homes* by  
17 emphasizing that the word “navigable” in the text of the Act demonstrates that Congress’ intent  
18 was focused on its “traditional jurisdiction over waters that were . . . navigable in fact.” 531 U.S.  
19 at 172. In *SWANCC* the Court further emphasized the dual purposes of the Act, with federalism  
20 and local control of land use and water allocation equal to the federal policy of water quality  
21 protection, and that the Clean Water Act lacks the necessary “clear statement” to indicate any  
22 congressional intent to interfere in traditionally local functions. *Id.* at 172-74. *SWANCC* also  
23 posits that the Army’s original 1974 regulations defining “navigable waters” consistent with the  
24 meaning set forth in *The Daniel Ball* may have been correct. 531 U.S. at 168, *id.* at 168 n.3.

25 25. Then in a fractured opinion in *Rapanos*, the Supreme Court invalidated the Non-  
26 navigable Tributary and Adjacent Wetlands provisions of the 1986 Regulations, also as being  
27 beyond the scope of the statutory term “navigable waters.”



1 26. The issue in *Rapanos* was how to interpret the Clean Water Act's term "navigable  
2 waters" in the context of non-navigable tributaries to navigable-in-fact waterways, and wetlands  
3 that do not physically abut navigable-in-fact waterways. 547 U.S. at 728, *id.* at 759 (Kennedy, J.,  
4 concurring). The judgment of the Court in *Rapanos* was to remand the case because the lower  
5 courts had not properly interpreted that term. *Id.* at 757. The five Justices who supported the  
6 judgment arrived at it by two different interpretations of the term "navigable waters."

7 27. The plurality determined that the language, structure, and purpose of the Clean  
8 Water Act all limited federal authority to "relatively permanent, standing or continuously flowing  
9 bodies of water" commonly recognized as "streams, oceans, rivers and lakes" connected to  
10 traditional navigable waters. *Id.* at 732, 739; *see also id.* at 742. The plurality also authorized  
11 federal regulation of wetlands physically abutting these water bodies, such that they have an  
12 immediate surface water connection where the wetland and water body are "indistinguishable."  
13 *Id.* at 755.

14 28. Justice Kennedy joined the plurality in the judgment. But he proposed a broader  
15 interpretation of "navigable waters" than the plurality: the "significant nexus" test. *Id.* at 759  
16 (Kennedy, J., concurring). Under this view, the federal government could regulate a non-abutting  
17 wetland if it significantly affects the physical, chemical, and biological integrity of a navigable-  
18 in-fact waterway. *Id.* at 779 (Kennedy, J., concurring).

#### 19 **2008 POST-RAPANOS GUIDANCE**

20 29. Following *Rapanos*, EPA and the Army jointly adopted an informal guidance  
21 document (the 2008 Post-*Rapanos* Guidance) which purported to apply the *Rapanos* decision to  
22 the 1986 Regulations.

23 30. The 2008 Post-*Rapanos* Guidance is a "rule" within the ambit of the Congressional  
24 Review Act, 5 U.S.C. § 801, *et seq.*, but was not and has never been submitted to Congress as the  
25 Congressional Review Act requires.

26 31. The Post-*Rapanos* Guidance asserts that the Army and EPA may exercise  
27 authority under either the *Rapanos* plurality or concurrence.

1 32. The Guidance also asserts that the plurality standard is satisfied by tributaries that  
2 flow as little as 90 days per year, and broadly defines “adjacent” for the purpose of regulating  
3 adjacent wetlands.

4 **THE 2015 NAVIGABLE WATERS DEFINITION**

5 33. In 2015, EPA and the Army adopted yet another a new regulation (the 2015  
6 Navigable Waters Definition) purporting to define the Act’s term “navigable waters.” 33 C.F.R.  
7 § 328.3 (2016); 80 Fed. Reg. 37,054 (June 29, 2015). The 2015 Navigable Waters Definition  
8 superseded the 1986 Regulations, the Post-Rapanos Guidance, and any other guidance  
9 interpreting the 1986 Regulations.

10 34. 33 C.F.R. § 328.3(a) of the 2015 Navigable Waters Definition defines “navigable  
11 waters” to include:

- 12 (1) Navigable-in-fact waters, plus all waters which are, were, or reasonably could be  
13 used more generally in interstate commerce;
- 14 (2) All interstate waters, including interstate wetlands;
- 15 (3) The territorial seas;
- 16 (4) All impoundments of other included waters;
- 17 (5) All tributaries of navigable-in-fact and interstate waters and the territorial seas  
18 (“(a)(1)-(3) Waters”);
- 19 (6) All waters adjacent to navigable-in-fact and interstate waters, the territorial seas,  
20 impoundments, and tributaries (“(a)(1)-(5) Waters”);
- 21 (7) Certain types of wetlands, ponds, and bays occurring in different regions of the  
22 country, as determined on a case-by-case basis to have a significant nexus to  
23 (a)(1)-(3) Waters; and
- 24 (8) Certain waters within the 100-year floodplain of (a)(1)-(3) Waters, and certain  
25 additional waters within 4,000 feet of (a)(1)-(5) Waters, as determined on a case-  
26 by-case basis to have a significant nexus to (a)(1)-(3) Waters.

27 35. 33 C.F.R. § 328.3(c)(1) of the 2015 Navigable Waters Definition defines  
“adjacent” as bordering, contiguous, or neighboring (a)(1)-(5) Waters.

36. 33 C.F.R. § 328.3(c)(2) of the 2015 Navigable Waters Definition defines  
“neighboring” as within 100 feet of the ordinary high water mark of an (a)(1)-(5) Water, within  
the 100-year floodplain and within 1,500 feet of the ordinary high water mark of (a)(1)-(5)  
Waters, or within 1,500 feet of (a)(1)-(3) Waters including the Great Lakes.

1 37. 33 C.F.R. § 328.3(c)(3) of the 2015 Navigable Waters Definition defines  
2 “tributary” as a water with a bed and bank and an ordinary high water mark, that contributes flow  
3 to (a)(1)-(3) Waters.

4 38. 33 C.F.R. § 328.3(c)(5) defines “significant nexus” based on nine factors, most of  
5 which are ecological factors unrelated to navigation.

6 39. Plaintiff and others submitted substantive comments to EPA and the Army during  
7 the public comment period of the rulemaking for the 2015 Navigable Waters Definition. These  
8 comments objected to the inclusion of interstate waters, intrastate waters that are not navigable-  
9 in-fact, and the regulation of all non-navigable tributaries and all adjacent wetlands and other  
10 waters.

11 40. EPA and the Army adopted certain provisions of the 2015 Navigable Waters  
12 Definition without notice and an opportunity to comment in violation of the Administrative  
13 Procedures Act, including the definition of “neighboring” in Section 328.3(c)(2), the inclusion of  
14 certain types of wetlands under Section 328.3(a)(7), the inclusion of waters within 4,000 feet of  
15 (a)(1)-(5) Waters on a case-by-case basis in Section 328.3(a)(8), and the catalog of factors for  
16 determining significant nexus in Section 328.3(c)(5).

17 **LITIGATION CHALLENGING THE 2015 NAVIGABLE WATERS DEFINITION**

18 41. Plaintiff previously filed suit to challenge the 2015 Navigable Waters Definition  
19 in the U.S. District Court for the District of Minnesota on July 15, 2015, case number 0:15-cv-  
20 03058-DWF-LIB (the 2015 Lawsuit).

21 42. The District Court for the District of Minnesota dismissed Plaintiff’s complaint in  
22 the 2015 Lawsuit without prejudice on November 8, 2016, on the ground that 33 U.S.C.  
23 § 1369(b)(1)(E) and (F) vested exclusive jurisdiction over Plaintiff’s claims in the circuit courts  
24 of appeals rather than the district courts. *See Washington Cattlemen’s Association v. EPA*,  
25 No. 0:15-cv-03058-DWF-LIB, 2016 WL 6645765 (D. Minn. Nov. 8, 2016).

26 43. Due to the potential impact of 33 U.S.C. § 1369(b)(1), Plaintiff also litigated its  
27 claims against the 2015 Navigable Waters Definition in the Sixth Circuit. *See In re United States*

1 *Dep't of Defense, United States Environmental Protection Agency Final Rule: Clean Water Rule:*  
2 *Definition of Waters of the United States*, 817 F.3d 261 (6th Cir. 2016) (Plaintiff's petition number  
3 was 15-4188.).

4 44. On October 9, 2015, the Sixth Circuit stayed the 2015 Navigable Waters  
5 Definition nationwide. *In re EPA*, 803 F.3d 804 (6th Cir. 2015). From the 2015 Navigable Waters  
6 Definition's effective date of August 28, 2015, until the Sixth Circuit stayed the rule on October  
7 9 of that year, the 2015 Navigable Waters Definition was the legal status quo in the state of  
8 Washington.

9 45. On January 22, 2018, the Supreme Court of the United States held, in *National*  
10 *Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018), that 33 U.S.C.  
11 § 1369(b)(1)(E) and (F) do not apply to cases challenging the 2015 Navigable Waters Definition,  
12 that the suits challenging them were within the jurisdiction of the district courts, and that the Sixth  
13 Circuit lacked jurisdiction to entertain Plaintiff's petition for review.

14 46. Following the Supreme Court's decision in *National Association of*  
15 *Manufacturers*, the Sixth Circuit dissolved its nationwide stay and dismissed Plaintiff's petition  
16 challenging the 2015 Navigable Waters Definition on February 28, 2018. *In re United States*  
17 *Department of Defense*, 713 Fed. Appx. 489 (6th Cir. 2018).

18 47. Following the Supreme Court's decision in *National Association of*  
19 *Manufacturers*, litigation has resumed against the 2015 Navigable Waters Definition in multiple  
20 district courts across the country.<sup>3</sup>

21 48. In 2018, two courts enjoined the 2015 Navigable Waters Definition in those states  
22 that are plaintiffs in each case. *See Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018)  
23 (Georgia, Alabama, Florida, Indiana, Kansas, North and South Carolina, Utah, West Virginia,  
24

25  
26 \_\_\_\_\_  
27 <sup>3</sup> Plaintiff's Notice of Related Litigation, ECF No. 11-1, provides as complete a list as Plaintiff  
has been able to identify.

1 Wisconsin, and Kentucky); *Texas v. EPA*, No. 3:15-cv-00162, 2018 WL 4518230 (S.D. Tex.  
2 Sept. 12, 2018) (Texas, Louisiana, and Mississippi).<sup>4</sup>

3 49. No court has enjoined the 2015 Navigable Waters Definition in the state of  
4 Washington.

#### 5 THE CURRENT REGULATORY LANDSCAPE

6 50. In anticipation of the Sixth Circuit's dissolution of its nationwide stay of the 2015  
7 Navigable Waters Definition, EPA and the Army adopted a regulation on February 6, 2018,  
8 adding a February 6, 2020, applicability date to the 2015 Navigable Waters Definition (the  
9 Applicability Date Rule). See 33 C.F.R. § 328.3(e) (2019); 83 Fed. Reg. 5208 (Feb. 6, 2018).

10 51. Multiple groups of litigants have filed suit against the Applicability Date Rule.  
11 One federal district court has enjoined it nationwide, *see South Carolina Coastal Conservation*  
12 *League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018), and this Court has vacated the Applicability  
13 Date Rule nationwide, *see Puget Soundkeeper Alliance v. Wheeler*, No. C15-1342-JCC;  
14 2018 WL 6169196 (W.D. Wash. Nov. 26, 2018). On or about March 8, 2019, the EPA and the  
15 Army abandoned their appeals from these orders. *See Puget Soundkeeper Alliance v. Wheeler*,  
16 Ninth Circuit Case No. 19-35074, Unopposed Motion to Voluntarily Dismiss Appeal, March 8,  
17 2019, Docket Entry 11; *South Carolina Coastal Conservation League v. Wheeler*, Fourth Circuit  
18 Case No. 19-1988(L), Unopposed Motion to Voluntarily Dismiss Appeal, March 8, 2019,  
19 Document 25.

20 52. Since no court has enjoined the 2015 Navigable Waters Definition in Washington,  
21 and the Applicability Date Rule that was intended to defer imposition of the 2015 Definition has  
22 been enjoined and vacated in the state with no further appeals pending, Plaintiff's members are  
23 presently subject to the 2015 Navigable Waters Definition, for all purposes.

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26 <sup>4</sup> *See also North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015) (North and South  
27 Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada,  
Wyoming, and New Mexico). This injunction was issued before the 2015 Navigable Waters  
Definition took effect.

1           53.     At the time the original complaint was filed in this action, EPA and the Army were  
2 considering a regulation that would repeal the 2015 Navigable Waters Definition and recodify the  
3 1986 Regulations (the “Repeal and Recodify Rule”). The agencies had taken two rounds of public  
4 comment on the proposed Repeal and Recodify Rule at the time the original Complaint was filed  
5 in this action.

6           54.     The proposed Repeal and Recodify Rule would readopt the 1986 Regulations and  
7 related guidance documents. But the agencies refused to consider public comment on the  
8 substance of the 1986 Regulations and related guidance. 82 Fed. Reg. 34,903.

9           55.     The refusal to take comment on the proposed “administration” of the 1986  
10 Regulations, Post-Rapanos Guidance, and other guidance documents, violated EPA and the  
11 Army’s obligations for notice and comment rulemaking under the Administrative Procedure Act,  
12 5 U.S.C. § 553(c).

13           56.     On October 22, 2019, EPA and the Army published a final regulation (the Repeal  
14 and Recodify Rule) repealing the 2015 Navigable Waters Definition and purporting to readopt  
15 the 1986 Regulations and related guidance. 84 Fed. 56,626 (October 22, 2019).

16           57.     The 1986 Regulations and related guidance readopted under the proposed Repeal  
17 and Recodify Rule were not and have never been submitted to Congress for review, in violation  
18 of the Congressional Review Act.

19           58     Several provisions of the 1986 Regulations, and certain provisions of the related  
20 guidance, exceed the scope of the Clean Water Act, in that both the Migratory Bird Rule (adopted  
21 as guidance at the time the 1986 Regulations were adopted) and the Tributary and Adjacent  
22 Wetland rules, have all been declared invalid by the Supreme Court.

23           59     The 1986 Regulation’s inclusion of all interstate waters and of many intrastate  
24 waters that are not navigable-in-fact also exceeds the agency’s authority under the Act.

25           60.     On February 14, 2019, EPA and the Army proposed another revision to the  
26 regulatory definition of “navigable waters” under the Clean Water Act. 84 Fed. Reg. 4154  
27 (Feb. 14, 2019). Plaintiff, its counsel, and others submitted substantive comments during the

1 public comment period on the proposal. These comments addressed the provisions of the final  
2 regulation challenged below. EPA and the Army fully considered each of the challenged  
3 provisions below, both on their own accord and in response to comments from Plaintiff, its  
4 counsel, and others. Plaintiff has exhausted all administrative requirements related to this  
5 rulemaking.

#### 6 THE NAVIGABLE WATERS PROTECTION RULE

7 61. On April 21, 2020, EPA and the Army published a final regulation in the Federal  
8 Register called the Navigable Waters Protection Rule (“Navigable Waters Protection Rule, or  
9 2020 Definition). 85 Fed. Reg. 22,250 (April 21, 2020). In drafting the 2020 Definition, EPA and  
10 the Army took public comment on and broadly considered all aspects of the resulting definition,  
11 including whether to readopt definitional provisions of previous regulations defining “navigable  
12 waters.” 85 Fed. Reg. at 22,259 (Executive Order directing agencies to consider *Rapanos*  
13 plurality), 22,261 (agencies considered comments in this rulemaking submitted in connection  
14 with the Repeal and Recodify Rule), 22,264 (agencies considered comments on scope of  
15 “adjacent wetland” regulation), 22,270 (agencies consideration of comments led to revisions of  
16 proposal in final rule), 22,271 (agencies developed what they consider to be reasonable priorities  
17 in defining “navigable waters”), 22,273 (rejecting, after consideration of comments, use of  
18 *Rapanos* plurality as basis for new rule), 22,280-81 (reciting comments on whether prior scope  
19 of “waters used in commerce” category should be modified or retained, agency considered  
20 comments in deciding whether to modify prior text of regulatory provision).

21 62. The 2020 Definition includes four categories:

22 (1) The territorial seas, tidal waters, and waters previously or currently used, or  
23 prospectively susceptible to use, in interstate or foreign commerce. 33 C.F.R. § 328.3(a)(1) . 33  
24 C.F.R. § 328.3(a)(1); 85 Fed. Reg. at 22,338.<sup>5</sup>

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25  
26 <sup>5</sup> This and subsequent references in paragraph 62, in the Nineteenth through Twentysixth Claims  
27 below, and in paragraphs 23-34 of the Prayer for Relief, to provisions of 33 C.F.R. § 328.3, are  
to the version set forth in the Navigable Waters Protection Rule, 85 Fed. Reg. at 22,338-39. This

1 (2) Tributaries, 33 C.F.R. § 328.3(a)(2), which are rivers, streams, or similarly  
2 naturally occurring (whether or not altered or relocated) surface water channels (including ditches  
3 that relocate or are constructed in them, or that drain adjacent wetlands) that, in a typical year,  
4 contribute intermittent or perennial surface water flow to other regulated waters, 33 C.F.R.  
5 § 328.3(c)(12). Perennial “means surface water flowing continuously year-round.” 33 C.F.R.  
6 § 328.3(c)(8). Intermittent “means surface water flowing continuously during certain times of the  
7 year and more than in direct response to precipitation.” 33 C.F.R. § 328.3(c)(5). A typical year is  
8 based generally on a thirty-year period. 33 C.F.R. § 328.3(c)(13). Tributaries are regulated even  
9 if they are severed from other regulated waters by non-regulated features. 33 C.F.R.  
10 § 328.3(c)(12); 85 Fed. Reg. at 22,338-39.

11 (3) Lakes and ponds, and impoundments of regulated waters, 33 C.F.R.  
12 § 328.3(a)(3), which are standing bodies of open water that either contribute surface water flow  
13 to, or are inundated by, other regulated waters in a typical year. 33 C.F.R. § 328.3(c)(6). Lakes  
14 and ponds, and impoundments of regulated waters are regulated even if they are severed from  
15 other regulated waters by non-regulated features. 33 C.F.R. § 328.3(c)(6); 85 Fed. Reg. at 22,338-  
16 39.

17 (4) Adjacent wetlands, 33 C.F.R. § 328.3(a)(4), which are wetlands that abut or  
18 are inundated by other regulated non-wetland waters, or are physically separated from them only  
19 by natural, or permeable artificial, barriers. 33 C.F.R. § 328.3(c)(1); 85 Fed. Reg. at 22,338.

20 63. In general, features may be regulated under more than one of these categories. So  
21 a small river might be both a “water used in commerce” and a “tributary” while a lake might  
22 be both a “water used in commerce” and a “lake, pond, or impoundment of a regulated water.”  
23  
24

25 \_\_\_\_\_  
26 section is the one appearing in the Army’s regulations. EPA’s corresponding and identical  
27 regulations are also published in the Navigable Waters Protection Rule as 40 C.F.R. § 120.2, see  
85 Fed. Reg. at 22,340-41. Plaintiff’s Eleventh through Eighteenth Claims challenge the  
provisions of both the Army’s regulations, as listed, and the identical provisions of the EPA  
regulations, incorporated here by reference.



1           64. Many of the “waters” included within these categories do not stand or flow year-  
2 round, and many of these non-perennial waters are only present for days or weeks before they dry  
3 up. EPA and the Army regulate discharges to the locations of these waters even though the  
4 “waters” only occupy those locations for a few days or weeks in any given year.

5                                   **DECLARATORY RELIEF ALLEGATIONS**

6           65. The preceding paragraphs are incorporated herein.

7           66. The validity of the Navigable Waters Protection Rule, the 1986 Regulations and  
8 related guidance and the 2015 Navigable Waters Definition is the subject of a live controversy.  
9 Plaintiff contends the 1986 Regulations and related guidance and the 2015 Definition change and  
10 broaden the substantive standards for determining jurisdictional waters under the Clean Water  
11 Act in violation of statutory and constitutional authority. Plaintiff contends that the Navigable  
12 Waters Protection Rule violates the Constitution, the Clean Water Act, and Supreme Court  
13 precedent. Defendants claim the 1986 Regulations and related guidance and the 2015 Navigable  
14 Waters Definition merely “clarify” existing standards and are consistent with these authorities,  
15 and that the Navigable Waters Protection Rule is legally valid. The validity of the 2015 Navigable  
16 Waters Definition, despite the Repeal and Recodify Rule, is also the subject of a live controversy.  
17 Defendant-intervenor Sierra Club has publicly stated its intent challenge the Repeal and Recodify  
18 Rule. If the portion of the Repeal and Recodify Rule repealing the 2015 Rule is enjoined pursuant  
19 to that or another threatened lawsuit, then the 2015 Rule will remain in effect in the State of  
20 Washington. The same is true of the validity of the 1986 Regulations and related guidance; other  
21 pending litigation asks that the Navigable Waters Protection Rule be vacated, which would  
22 reinstate the Repeal and Recodify Rule.

23           67. No factual development is necessary to resolve this case as Plaintiff raises a pure  
24 legal challenge to the Navigable Waters Protection Rule, the 1986 Regulations and related  
25 guidance as they are re-adopted by the Repeal and Recodify Rule, and the 2015 Navigable Waters  
26 Definition on their face.

1           68. Plaintiff’s members are injured by the Navigable Waters Protection Rule, the 1986  
2 Regulations and related guidance as readopted by the Repeal and Recodify Rule, and the 2015  
3 Navigable Waters Definition, because they hold beneficial interests in property that is or will be  
4 subject to increased federal regulatory authority under the various regulations’ changed and illegal  
5 standards for determining jurisdiction. This will require such landowners to seek federal permit  
6 approval (at significant cost) to use their property for its intended purpose. Or, it will require  
7 Plaintiff’s members to seek a determination from the Army or a private party expert whether the  
8 final rule applies to them. *See Hawkes Co., Inc. v. United States Army Corps of Engineers*, 782  
9 F.3d 944, 1003 (8th Cir. 2015) (Kelly, J., concurring) (“This is a unique aspect of the CWA; most  
10 laws do not require the hiring of expert consultants to determine if they even apply to you or your  
11 property.”), *aff’d*, *Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

12           69. Accordingly, an actual and substantial controversy exists between Plaintiff and  
13 Defendants as to the parties’ respective legal rights and responsibilities. A judicial determination  
14 of the parties’ rights and responsibilities arising from this actual controversy is necessary and  
15 appropriate at this time.

#### 16                                   **INJUNCTIVE RELIEF ALLEGATIONS**

17           70. The preceding paragraphs are incorporated herein.

18           71. Because of the Navigable Waters Protection Rule, the 1986 Regulations and  
19 related guidance and the 2015 Navigable Waters Definition’s broadened and illegal jurisdictional  
20 interpretation of “navigable waters” under the Clean Water Act, Plaintiff’s members will now be  
21 required to obtain federal approval of new and ongoing land-use projects at a cost of tens of  
22 thousands of dollars and months, if not years, of delay.

23           72. Plaintiff’s members will continue to be injured by the Army and EPA’s expanded  
24 interpretation of “navigable waters” under the Clean Water Act.

25           73. Enjoining the enforcement of the offending provisions of the Navigable Waters  
26 Protection Rule, the Repeal and Recodify Rule’s readoption of the 1986 Regulations and related  
27 guidance, and the 2015 Navigable Waters Definition, will redress these harms.

1           74.     Plaintiff has no plain, speedy, and adequate remedy at law and, absent judicial  
2 intervention, Plaintiff will suffer irreparable injury.

3           75.     If not enjoined, the Corps and EPA will enforce the Navigable Waters Protection  
4 Rule, the 1986 Regulations and related guidance and/or the 2015 Navigable Waters Definition,  
5 based on their erroneous interpretation of “navigable waters” under the Act.

6                                   **FIRST CLAIM FOR RELIEF**

7                                   **2015 Navigable Waters Definition**

8                                   ***ULTRA VIRES* REGULATION OF ALL**

9                                   **“TRIBUTARIES” WITH AN ORDINARY HIGH WATER MARK**

10          76.     The preceding paragraphs are incorporated herein.

11          77.     Under the Clean Water Act, the Corps and EPA may regulate “navigable waters.”  
12 33 U.S.C. §§ 1342(a)(1), 1344(a), 1362(7).

13          78.     The 2015 Navigable Waters Definition defines “waters of the United States” to  
14 include all tributaries with an ordinary high water mark. 33 C.F.R. § 328.3(a)(5); 80 Fed. Reg.  
15 37,104-37,106.

16          79.     In *Rapanos*, a majority of the Supreme Court held that the term “navigable waters”  
17 does not include all tributaries with an ordinary high water mark. *Rapanos*, 547 U.S. at 725  
18 (rejecting the regulation of tributaries based on an ordinary high water mark because “[t]his  
19 interpretation extended ‘the waters of the United States’ to virtually any land feature over which  
20 rainwater or drainage passes and leaves a visible mark—even if only ‘the presence of litter and  
21 debris’”). *See also id.* at 781 (Kennedy, J., concurring) (rejecting categorical regulation of  
22 tributaries with an ordinary high water mark because “the breadth of this standard . . . [would]  
23 leave wide room for regulation of drains, ditches and streams remote from any navigable-in-fact  
24 water and carrying only minor water volumes toward it”).

25          80.     Categorical regulation of all tributaries with an ordinary high water mark exceeds  
26 the scope of the Clean Water Act as interpreted by the Supreme Court. Therefore, the 2015 Rule  
27

1 is arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act.  
2 See 5 U.S.C. § 706(2)(A).

3 **SECOND CLAIM FOR RELIEF**

4 **2015 Navigable Waters Definition**

5 ***ULTRA VIRES* REGULATION OF ALL WATERS “ADJACENT”**

6 **TO ALL “TRIBUTARIES” WITH AN ORDINARY HIGH WATER MARK**

7 81. The preceding paragraphs are incorporated herein.

8 82. It is axiomatic that if the regulation of all tributaries with an ordinary high water  
9 mark is invalid then the categorical regulation of all waters adjacent to such tributaries is also  
10 invalid. See *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring) (Regulation of all tributaries  
11 with an ordinary high water mark “precludes its adoption as the determinative measure of whether  
12 adjacent wetlands are likely to play an important role in the integrity of an aquatic system  
13 comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent  
14 to tributaries covered by this standard might appear little more related to navigable-in-fact waters  
15 than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.”).

16 83. The 2015 Navigable Waters Definition interprets the Act as including all waters  
17 adjacent to any tributary. 33 C.F.R. § 328.3(a)(6); 80 Fed. Reg. 37,104.

18 84. Categorical regulation of all waters adjacent to all tributaries with an ordinary high  
19 water mark exceeds the scope of the Clean Water Act as interpreted by the Supreme Court.  
20 Therefore, the final rule is arbitrary and capricious, and contrary to law, in violation of the  
21 Administrative Procedure Act. See 5 U.S.C. § 706(2)(A).

**THIRD CLAIM FOR RELIEF**

**2015 Navigable Waters Definition**

***ULTRA VIRES* REGULATION OF ALL INTERSTATE WATERS**

85. The preceding paragraphs are incorporated herein.

86. The 2015 Navigable Waters Definition purports to regulate all interstate waters regardless of navigability or connection to navigable-in-fact waters. 33 C.F.R. § 328.3(a)(2); 80 Fed. Reg. 37,104.

87. Such waters would include isolated waters or waters that the Supreme Court determined would have no connection or effect on navigable-in fact waters and could not be regulated under the Clean Water Act. *See SWANCC*, 531 U.S. at 171-72 (“We cannot agree that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the statute. We said in *Riverside Bayview Homes* that the word ‘navigable’ in the statute was of ‘limited import’ and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”) (internal citation omitted).

88. Categorical regulation of all interstate waters would exceed the scope of the Clean Water Act as interpreted by the Supreme Court. Therefore, the final rule is arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

**FOURTH CLAIM FOR RELIEF**

**2015 Navigable Waters Definition**

***ULTRA VIRES* REGULATION OF ISOLATED WATERS**

89. The preceding paragraphs are incorporated herein.

90. The final rule purports to regulate all waters within 4,000 feet of another

1 jurisdictional water if it has a “significant nexus” to an interstate water or navigable-in-fact water.  
2 33 C.F.R. § 328.3(a)(8); 80 Fed. Reg. at 37,104-105.

3 91. This necessarily includes “isolated waters” which the Supreme Court has held as  
4 a matter of law cannot be regulated under the Clean Water Act. *See SWANCC*, 531 U.S. at 172.

5 92. The regulation of isolated water bodies would exceed the scope of the Clean Water  
6 Act as interpreted by the Supreme Court in *SWANCC* and affirmed in *Rapanos*. Therefore, the  
7 final rule is arbitrary and capricious, and contrary to law, in violation of the Administrative  
8 Procedure Act. *See* 5 U.S.C. § 706(2)(A).

9 **FIFTH CLAIM FOR RELIEF**

10 **2015 Navigable Waters Definition**

11 **PLAINTIFF WAS DENIED THEIR RIGHT TO NOTICE AND COMMENT**

12 93. The preceding paragraphs are incorporated herein.

13 94. Federal agencies must conduct rulemaking in accord with the Administrative  
14 Procedure Act which requires public notice of substantive rule changes and an opportunity for  
15 public comment on those changes. 5 U.S.C. § 553(b), (c).

16 95. Among other things, the final 2015 Navigable Waters Definition substantially  
17 changed the category of “adjacent waters” from the proposed rule by including a definition of  
18 “neighboring” that includes: (1) all waters located within 100 feet of the ordinary high water mark  
19 of certain waters; (2) all waters within the 100-year floodplain and 1,500 feet of the ordinary high  
20 water mark of certain waters; and (3) all waters located within 1,500 feet of the high tide line of  
21 certain waters. This change was not subject to public review and comment.

22 96. The final 2015 Navigable Waters Definition substantially changed the category of  
23 “other waters” from the proposed rule by aggregating normally isolated waters to determine if  
24 they will have a “significant nexus” with downstream navigable-in-fact waters including: Prairie  
25 potholes; Carolina and Delmarva bays; pocosins; western vernal pools in California; and Texas  
26 coastal prairie wetlands. This change was not subject to public review and comment.

1 97. The final 2015 Navigable Waters Definition also substantially changed the  
2 category of “other waters” from the proposed rule by allowing case-by-case analysis of all waters  
3 within 4,000 feet of any other covered water. This change was not subject to public review and  
4 comment.

5 98. And, the final 2015 Navigable Waters Definition substantially changed the case-  
6 by-case analysis for determining a “significant nexus” from the proposed rule by defining such a  
7 nexus based on the effect of any one of nine factors including: (i) sediment trapping; (ii) nutrient  
8 recycling; (iii) pollutant trapping, transformation, filtering, and transport; (iv) retention and  
9 attenuation of flood waters; (v) runoff storage; (vi) contribution of flow; (vii) export of organic  
10 matter; (viii) export of food resources; and (ix) provision of life cycle dependent aquatic habitat  
11 (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species  
12 located in certain waters. This change was not subject to public notice or comment.

13 99. Based on these and other changes between the proposed and final versions of the  
14 2015 Navigable Waters Definition, Plaintiff was deprived of notice and an opportunity to  
15 comment on substantive changes to the proposed rule. Therefore, the final 2015 Navigable Waters  
16 Definition is invalid and should be set aside for procedural inadequacy under the Administrative  
17 Procedure Act. *See* 5 U.S.C. § 706(2).

18 **SIXTH CLAIM FOR RELIEF**

19 **2015 Navigable Waters Definition**

20 **CONSTITUTIONAL VIOLATION:**

21 **IMPINGEMENT ON TRADITIONAL STATE AUTHORITY**

22 100. The preceding paragraphs are incorporated herein.

23 101. In *SWANCC*, the Supreme Court held that federal regulation of small ponds and  
24 mudflats “would result in a significant impingement of the States’ traditional and primary power  
25 over land and water use.” 531 U.S. at 174.

26 102. The 2015 Navigable Waters Definition extends federal jurisdiction so far into local  
27 land and water resources that it necessarily undermines State power, in violation of the Tenth

1 Amendment. The Tenth Amendment provides that “[t]he powers not delegated to the United  
2 States by the Constitution . . . are reserved to the States respectively, or to the people.” U.S. Const.  
3 amend. X. Congress expressly acknowledged the prerogative of the States to regulate local land  
4 and water use in the Clean Water Act itself: “It is the policy of the Congress to recognize, preserve  
5 and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate  
6 pollution, to plan the development and use (including restoration, preservation, and enhancement)  
7 of land and water resources . . . .” 33 U.S.C. § 1251(b). Rather than preserve and protect these  
8 rights and responsibilities, the 2015 Navigable Waters Definition eviscerates them.

9 103. Therefore, the 2015 Navigable Waters Definition is contrary to law in violation of  
10 the Administrative Procedure Act. *See* 5 U.S.C. § 706(2).

## 11 SEVENTH CLAIM FOR RELIEF

### 12 2015 Navigable Waters Definition

#### 13 CONSTITUTIONAL VIOLATION: EXCEEDING THE COMMERCE POWER

14 104. The preceding paragraphs are incorporated herein.

15 105. In *SWANCC*, the Supreme Court not only recognized that federal regulation of  
16 small water bodies would impinge on the power of the States to regulate local land and water use,  
17 the Court also recognized that such regulation may exceed the scope of the commerce power as  
18 limited by that Court’s decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States*  
19 *v. Morrison*, 529 U.S. 598 (2000). *SWANCC*, 531 U.S. at 173. The Supreme Court raised similar  
20 concerns in *Rapanos* over the Army’s broad interpretation of tributaries and adjacent wetlands.  
21 “Likewise, just as we noted in *SWANCC*, the Corps’ interpretation stretches the outer limits of  
22 Congress’s commerce power.” *Rapanos*, 547 U.S. at 738 (Scalia, J., for the plurality).. But here,  
23 the 2015 Navigable Waters Definition goes even further than the interpretation of “navigable  
24 waters” advanced in those cases.

25 106. The 2015 Navigable Waters Definition includes “all waters” which are, have been,  
26 or reasonably could be used “in interstate or foreign commerce.” 33 C.F.R. § 328.3(a)(1); 80 Fed.  
27 Reg. 37,104 (June 29, 2015). This would include waters included within *The Daniel Ball*



1 definition of navigable waters of the United States, which are limited to those waters that can be  
2 used to transport interstate commerce. 77 U.S. at 563. This is consistent with the Supreme Court’s  
3 statement that the Act’s application is limited to Congress’ traditional concern with navigation.  
4 But the 2015 Navigable Waters Definition extends far beyond to include waters merely used in  
5 or related to interstate commerce.

6 107. Therefore, the 2015 Navigable Waters Definition is contrary to law in violation of  
7 the Administrative Procedure Act. *See* 5 U.S.C. § 706(2).

8 **EIGHTH CLAIM FOR RELIEF**

9 **2015 Navigable Waters Definition**

10 **CONSTITUTIONAL VIOLATION: VOID FOR VAGUENESS**

11 108. The preceding paragraphs are incorporated herein.

12 109. The Act imposes criminal penalties for violations of its protections of “navigable  
13 waters.” 33 U.S.C. § 1319(c).

14 110. The Supreme Court has held, in *SWANCC* and *Rapanos*, that the term “navigable  
15 waters” in the Act does not encompass all non-navigable waters upstream of waters that are  
16 navigable-in-fact.

17 111. To the extent that the term “navigable waters” in the Act is properly interpreted to  
18 include non-navigable waters upstream of or isolated from navigable-in-fact waters, the Act  
19 provides no intelligible principle for determining which upstream non-navigable waters are  
20 included and which are not

21 112. The term “navigable waters” in the Act is thus void for vagueness, in violation of  
22 the Due Process Clause of the U.S. Constitution, if it is interpreted to include other than navigable-  
23 in-fact waters and the territorial seas.

24 113. Therefore, the 2015 Navigable Waters Definition is contrary to law in violation of  
25 the Administrative Procedure Act. *See* 5 U.S.C. § 706(2).

**NINTH CLAIM FOR RELIEF**

**1986 Regulations as Readopted By the Repeal and Recodify Rule**

***ULTRA VIRES* REGULATION OF ALL “TRIBUTARIES”**

**WITH AN ORDINARY HIGH WATER MARK**

114. The preceding paragraphs are incorporated herein.

115. Under the Clean Water Act, the Army and EPA may regulate “navigable waters” defined in the statute as “waters of the United States.” *See* 33 U.S.C. §§ 1344(a), 1362(7).

116. The 1986 Regulations define “waters of the United States” to include all tributaries. 33 C.F.R. § 328.3(a)(5) (2014).

117. In *Rapanos*, however, a majority of the Supreme Court held that this precise provision of the 1986 Regulations was invalid. *See Rapanos*, 547 U.S. at 725 (rejecting the regulation of tributaries based on an ordinary high water mark because “[t]his interpretation extended ‘the waters of the United States’ to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only ‘the presence of litter and debris’”). *See also id.* at 781 (Kennedy, J., concurring) (rejecting categorical regulation of tributaries with an ordinary high water mark because “the breadth of this standard . . . [would] leave wide room for regulation of drains, ditches and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it”).

118. Categorical regulation of all tributaries with an ordinary highwater mark exceeds the scope of the Clean Water Act as interpreted by the Supreme Court. Therefore, the 1986 Regulations, as readopted by the Repeal and Recodify Rule, are arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

**TENTH CLAIM FOR RELIEF**

**1986 Regulations as Readopted By the Repeal and Recodify Rule**

***ULTRA VIRES* REGULATION OF ALL WATERS “ADJACENT”**

**TO ALL “TRIBUTARIES” WITH AN ORDINARY HIGHWATER MARK**

119. The preceding paragraphs are incorporated herein.

120. It is axiomatic that if the regulation of all tributaries with an ordinary highwater mark is invalid then the categorical regulation of all waters adjacent to such tributaries is also invalid. *See Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring) (regulation of all tributaries with an ordinary high water mark “precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*”). For its part the *Rapanos* plurality opined that wetlands may only be regulated under the Clean Water Act if they are so closely connected to regulated tributaries that it can’t be discerned where one ends and the other begins. 547 U.S. at 755.

121. The 1986 Regulations interpret the Act as including all wetlands adjacent to any tributary. 33 C.F.R. § 328.3(a)(7) (2014). The Supreme Court invalidated this very provision of the 1986 Regulations in *Rapanos*.

122. Categorical regulation of all wetlands adjacent to all tributaries with an ordinary high water mark exceeds the scope of the Clean Water Act as interpreted by the Supreme Court. Therefore, the 1986 Regulations, as readopted by the Repeal and Recodify Rule, are arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

**ELEVENTH CLAIM FOR RELIEF**

**1986 Regulations as Readopted By the Repeal and Recodify Rule**

***ULTRA VIRES* REGULATION OF ALL INTERSTATE WATERS**

123. The preceding paragraphs are incorporated herein.

124. The 1986 Regulations purport to regulate all interstate waters regardless of navigability or connection to navigable-in-fact waters. 33 C.F.R. § 328.3(a)(2);

125. Such waters would include isolated waters or waters that the Supreme Court determined would have no connection or effect on navigable-in fact waters and could not be regulated under the Clean Water Act. *See SWANCC*, 531 U.S. at 171-72 (“We cannot agree that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the statute. We said in *Riverside Bayview Homes* that the word ‘navigable’ in the statute was of ‘limited import’ and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”) (internal citation omitted).

126. Categorical regulation of all interstate waters would exceed the scope of the Clean Water Act as interpreted by the Supreme Court. Therefore, the 1986 Regulations are arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

**TWELFTH CLAIM FOR RELIEF**

**1986 Regulations as Readopted By the Repeal and Recodify Rule**

***ULTRA VIRES* REGULATION OF ISOLATED WATERS**

127. The preceding paragraphs are incorporated herein.

128. The 1986 Regulations include a wide variety of intrastate waters with potential effects on interstate commerce, but which are not used to transport interstate commerce. 33 C.F.R.

1 § 328.3(a)(2) (2014). The 1986 Regulations also include waters used in interstate commerce  
2 which are not themselves used to transport interstate commerce. 33 C.F.R. § 328.3(a)(1) (2014).

3 129. These waters include those which the Army treated as regulated under the 1986  
4 Regulations because they provide habitat for migratory birds, as well as other waters with historic,  
5 present, or reasonable future use in transporting interstate commerce. These isolated waters,  
6 particularly those subject to the Migratory Bird Rule, are precisely the waters that the Supreme  
7 Court held are not within the term “navigable waters” in the Act, in *SWANCC*.

8 130. The regulation of isolated water bodies exceeds the scope of the Clean Water Act  
9 as interpreted by the Supreme Court in *SWANCC* and affirmed in *Rapanos*. Therefore, the 1986  
10 Regulations, as readopted by the Repeal and Recodify Rule, are arbitrary and capricious, and  
11 contrary to law, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

12 **THIRTEENTH CLAIM FOR RELIEF**

13 **1986 Regulations as Readopted By the Repeal and Recodify Rule**

14 **PLAINTIFF’S MEMBERS WERE**

15 **DENIED THEIR RIGHT TO NOTICE AND COMMENT**

16 131. The preceding paragraphs are incorporated herein.

17 132. Federal agencies must conduct rulemaking in accord with the Administrative  
18 Procedure Act which requires public notice of substantive rule changes and an opportunity for  
19 public comment on those changes. 5 U.S.C. § 553(b), (c).

20 133. Defendants refused to take comment on the proposed readoption of the 1986  
21 Regulations and related guidance during the comment periods on the proposed Repeal and  
22 Recodify Rule.

23 134. If Defendants had accepted comments on the readoption of the 1986 Regulations  
24 and related guidance, Plaintiff would have submitted comments objecting to the 1986  
25 Regulations, including those regulations’ inclusion of all interstate waters, intrastate waters, non-  
26 navigable tributaries to navigable-in-fact waters, and adjacent wetlands. Plaintiff would also have  
27

1 objected to the “readoption” of guidance related to the 1986 regulations for the reasons stated  
2 herein.<sup>6</sup>

3 135. Plaintiff was deprived of notice and an opportunity to comment on the proposed  
4 readoption of the 1986 Regulations and related guidance. Therefore, the 1986 Regulations, as  
5 readopted by the Repeal and Recodify Rule, are invalid and should be set aside for procedural  
6 inadequacy under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2).

7 **FOURTEENTH CLAIM FOR RELIEF**

8 **1986 Regulations as Readopted By the Repeal and Recodify Rule**

9 **CONSTITUTIONAL VIOLATION:**

10 **IMPINGEMENT ON TRADITIONAL STATE AUTHORITY**

11 136. The preceding paragraphs are incorporated herein.

12 137. In *SWANCC*, the Supreme Court held that federal regulation of small ponds and  
13 mudflats “would result in a significant impingement of the States’ traditional and primary power  
14 over land and water use.” 531 U.S. at 174.

15 138. The 1986 Regulations, as readopted by the Repeal and Recodify Rule, extend  
16 federal jurisdiction so far into local land and water resources that it necessarily undermines State  
17 power, in violation of the Tenth Amendment. The Tenth Amendment Provides that “[t]he powers  
18 not delegated to the United States by the Constitution . . . are reserved to the States respectively,  
19 or to the people.” U.S. Const. amend. X. Congress expressly acknowledged the prerogative of the  
20 States to regulate local land and water use in the Clean Water Act itself: “It is the policy of the  
21 Congress to recognize, preserve and protect the primary responsibilities and rights of the States  
22 to prevent, reduce, and eliminate pollution, to plan the development and use (including  
23 restoration, preservation, and enhancement) of land and water resources . . . .” 33 U.S.C.

24  
25  
26 <sup>6</sup> Plaintiff’s counsel submitted substantive comments objecting to the re-adoption of the 1986  
27 Regulations and related guidance. Plaintiff submitted comments supporting the repeal of the 2015  
Navigable Waters Definition and objecting to the readoption of the 1986 Regulations and related  
guidance.

1 § 1251(b). Rather than preserve and protect these rights and responsibilities, the 1986 Regulations  
2 violate them.

3 139. Therefore, the 1986 Regulations, as readopted by the Repeal and Recodify Rule,  
4 are contrary to law, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2).

5 **FIFTEENTH CLAIM FOR RELIEF**

6 **1986 Regulations as Readopted By the Repeal and Recodify Rule**

7 **CONSTITUTIONAL VIOLATION: EXCEEDING THE COMMERCE POWER**

8 140. The preceding paragraphs are incorporated herein.

9 141. In *SWANCC*, the Supreme Court not only recognized that federal regulation of  
10 small water bodies would impinge on the power of the States to regulate local land and water use,  
11 the court also recognized that such regulation would exceed the scope of the commerce power.  
12 *SWANCC*, 531 U.S. at 173. The Supreme Court raised similar concerns in *Rapanos* over the  
13 Army’s broad interpretation of tributaries and adjacent wetlands. “Likewise, just as we noted in  
14 *SWANCC*, the Corps’ interpretation stretches the outer limits of Congress’s commerce power.”  
15 *Rapanos*, 547 U.S. at 738.

16 142. Therefore, the 1986 Regulations, as readopted by the Repeal and Recodify Rule,  
17 are contrary to law, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2).

18 **SIXTEENTH CLAIM FOR RELIEF**

19 **1986 Regulations as Readopted By the Repeal and Recodify Rule**

20 **CONSTITUTIONAL VIOLATION: NON-DELEGATION DOCTRINE AND VOID FOR**  
21 **VAGUENESS**

22 143. The preceding paragraphs are incorporated herein.

23 144. The Act imposes criminal penalties for violations of its protections of “navigable  
24 waters.” 33 U.S.C. § 1319(c).

25 145. The Supreme Court has held, in *SWANCC* and *Rapanos*, that the term “navigable  
26 waters” in the Act encompasses some but not all non-navigable waters upstream of waters that  
27

1 are navigable-in-fact. The Act fails to provide notice to persons of ordinary intelligence of which  
2 non-navigable waters are regulated by the Act and which are not.

3 146. To the extent that the term “navigable waters” in the Act is properly interpreted to  
4 include non-navigable waters upstream of or isolated from navigable-in-fact waters, the Act  
5 provides no intelligible principle for determining which upstream non-navigable waters are  
6 included and which are not, in violation of the non-delegation doctrine. The Act does not limit its  
7 delegation of authority to EPA and the Army, to define “navigable waters,” to only fact finding.  
8 The Act does not set forth the facts the agencies must consider in defining “navigable waters” or  
9 the criteria by which to measure those facts. And the Act delegates all policy judgment related to  
10 the scope of “navigable waters” to the agencies. For these reasons, the Act violates the non-  
11 delegation doctrine. *See generally Gundy v. United States*, 139 S.Ct. 2116, 2141 (2019) (Gorsuch,  
12 J., dissenting).

13 147. The term “navigable waters” in the Act is void for vagueness, in violation of the  
14 Due Process Clause of the U.S. Constitution, and violates the non-delegation doctrine, if it is  
15 interpreted to include other than navigable-in-fact waters and the territorial seas.

16 148. Therefore, the 1986 Regulations, as readopted by the Repeal and Recodify Rule,  
17 are contrary to law, in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2).

## 18 SEVENTEENTH CLAIM FOR RELIEF

### 19 1986 Regulations and Related Guidance as Readopted By the Repeal and Recodify Rule

#### 20 VIOLATION OF THE CONGRESSIONAL REVIEW ACT

21 149. The preceding paragraphs are incorporated herein.

22 150. The 1986 Regulations are a rule within the meaning of the Congressional Review  
23 Act, 5 U.S.C. § 801, *et seq.*

24 151. The 1986 Regulations were not submitted to Congress pursuant to the  
25 Congressional Review Act when they were readopted under the Applicability Date Rule.



1 152. The 2008 Post-*Rapanos* Guidance and other related guidance documents  
2 readopted by the Repeal and Recodify Rule are “rules” as defined by the Congressional Review  
3 Act, 5 U.S.C. § 804(c).

4 153. The 2008 Post-*Rapanos* Guidance and other related guidance documents  
5 readopted by the Applicability Date Rule were not submitted to Congress as required by the  
6 Congressional Review Act, 5 U.S.C. § 801(a)(1).

7 154. As a result, the 1986 Regulations and related guidance are not legally in effect  
8 pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A).

9 **EIGHTEENTH CLAIM FOR RELIEF**

10 **2008 Post-*Rapanos* Guidance as Readopted By the Repeal and Recodify Rule**

11 **FACIAL INVALIDITY**

12 155. The preceding paragraphs are incorporated herein.

13 156. The Post-*Rapanos* Guidance purports to reinterpret the 1986 Regulations “in light  
14 of” the Supreme Court’s decision in *Rapanos*. The Guidance is legally invalid in a number of  
15 ways, including:

16 157. The Post-*Rapanos* Guidance claims that EPA and the Army may establish  
17 jurisdiction under either the plurality or concurring opinions in *Rapanos*. *Marks v. United States*  
18 allows the use of only one non-majority opinion, if any, as the holding of a fractured opinion. 430  
19 U.S. at 193.

20 158. The Post-*Rapanos* Guidance asserts jurisdiction over seasonal tributaries that flow  
21 as few as 90 days per year. But the *Rapanos* plurality requires that tributaries flow continuously,  
22 and does not allow the regulation of tributaries that lack “the ordinary presence of water.” 547  
23 U.S. at 739, *id.* at 732 n.5

24 159. The Post-*Rapanos* Guidance also allows regulation of wetlands well beyond those  
25 that abut covered waters and covered tributaries under the *Rapanos* plurality. *See* 547 U.S. at 742

26 160. The Post-*Rapanos* Guidance is therefore facially invalid.  
27

**NINETEENTH CLAIM FOR RELIEF**

**Navigable Waters Protection Rule, 33 C.F.R. § 328.3(a)(1):**

***Ultra Vires* Regulation of Isolated**

**Non-Navigable Waters “Used in Interstate Commerce”**

161. The preceding paragraphs are incorporated herein.

162. The Clean Water Act only regulates discharges to “navigable waters.” 33 U.S.C. §§ 1311(a), 1344(a), 1362(12).

163. Section 328.3(a)(1)<sup>7</sup> of the Navigable Waters Protection Rule defines navigable waters to include waters previously or currently used, or prospectively susceptible of use, “in interstate or foreign commerce.” 33 C.F.R. § 328.3(a)(1). The term of art “navigable waters of the United States” refers to a subset of these waters, i.e. those that are navigable-in-fact and used *for the transportation of goods* in interstate or foreign commerce. *The Daniel Ball*, 77 U.S. at 563.

164. Many waters within Section 328.3(a)(1) are not, have never been, and could never be used to transport goods in interstate commerce, but are “used in interstate commerce” in various ways. Section 328.3(a)(1) does not expressly require that “waters used in commerce” be navigable-in-fact or be connected, by tributaries or otherwise, to any other regulated water body. Nor is the category expressly limited to surface water.

165. Given the breadth of New Deal-era legal notions of “commerce” and the expansive scope presently afforded Congress under the Supreme Court’s Commerce Clause jurisprudence, *see, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (under Commerce Power, Congress may forbid people from eating food they grew for themselves on their own property), the “non-transport” portion of “waters used in commerce” probably captures most of the water in the United States.

166. Most germanely to Plaintiff and its members, these “non-transport” “waters used in commerce” appear to include those used to water livestock and to irrigate crops sold in interstate commerce. In today’s world of global agricultural markets, this probably includes all such waters anywhere in the United States.

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<sup>7</sup> See footnote 5 above.

1           167. Waters used to water livestock and irrigate crops occur ubiquitously on private  
2 farm and ranch properties owned or operated by Plaintiff’s members throughout the State of  
3 Oregon. These include many non-navigable streams, ponds, wetlands, and other natural features,  
4 as well as developed water sources like reservoirs, tanks, troughs, and the like (some fed only by  
5 groundwater).<sup>8</sup>

6           168. In *SWANCC*, the Supreme Court held that EPA and the Army’s “migratory bird  
7 rule” was not a reasonable or constitutionally permissible interpretation of “navigable waters”  
8 under the Clean Water Act. 531 U.S. at 167 (“not fairly supported by” the Act), *id.* at 174  
9 (interpreting Act to allow regulation of isolated non-navigable ponds would violate Tenth  
10 Amendment absent clear statutory statement of Congressional intent to that effect). In so holding,  
11 the Court reasoned that Congress’ intent in using the term “navigable waters” tethered the  
12 meaning of the term to Congress’ traditional regulation of navigation. 531 U.S. at 172. Further,  
13 the Court questioned whether the Army’s original regulatory definition of the term “navigable  
14 waters,” which mirrored the meaning of “navigable waters of the United States,” might have been  
15 the correct one after all. *Id.* at 168. The Court also refused to read the Act as extending Congress’  
16 Commerce Power authority to its outermost limit absent a “clear statement” to that effect, which  
17 the Act lacks. *Id.* at 174. Ultimately, the Supreme Court held in *SWANCC* that “navigable waters”  
18 does not include isolated ponds whose only basis for regulation is that they are used by migratory  
19 birds. *Id.*

20           169. The agency interpretation which announced the Migratory Bird rule also  
21 interpreted “navigable waters” to include water used “to irrigate crops sold in interstate  
22 commerce.” *SWANCC*, 531 U.S. at 164 (quoting 51 Fed. Reg. at 41,217).

23  
24  
25 <sup>8</sup> A provision of the 2020 Definition purports to exempt “[a]rtificial lakes and ponds, including  
26 water storage reservoirs and farm, irrigation, [and] stock watering ponds[.]” 33 C.F.R.  
27 § 328.3(b)(8). However, this applies by its terms only to artificial standing water storage, and  
does not apply if the ostensibly exempt water bodies are “lakes and ponds, and impoundments of  
regulated waters.” Nor does the “artificial lakes and ponds” exemption appear to apply at all to  
flowing water bodies (however small) used to water livestock or irrigate crops.

1 170. Categorical regulation, of isolated, non-navigable, “waters used in commerce” to  
2 water livestock and irrigate crops, exceeds the scope of the Clean Water Act as interpreted by the  
3 Supreme Court in *SWANCC*, for the same reasons that the Migratory Bird rule did in that case.

4 171. Therefore, Section 328.3(a)(1) of the Navigable Waters Protection Rule is  
5 arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act,  
6 5 U.S.C. § 706(2)(A).

#### 7 TWENTIETH CLAIM FOR RELIEF

##### 8 **Navigable Waters Protection Rule, 33 C.F.R. § 328.3(a)(2):**

##### 9 ***Ultra Vires* Regulation of All Intermittent “Tributaries”**

10 172. The preceding paragraphs are incorporated herein.

11 173. The Clean Water Act only regulates discharges to “navigable waters.” 33 U.S.C.  
12 §§ 1311(a), 1344(a), 1362(12).

13 174. Section 328.3(a)(2) of the Navigable Waters Protection Rule defines “navigable  
14 waters” to include intermittent non-navigable tributaries. 33 C.F.R. § 328.3(a)(2); § 328.3(c)(5);  
15 § 328.3(c)(12); § 328.3(c)(13) (2020). An “intermittent” tributary flows more than ephemerally  
16 (i.e. only in direct response to precipitation), but not perennially. 33 C.F.R. § 328.3(c)(5).

17 175. In *Rapanos* a majority of the Justices of the Supreme Court opined that the  
18 categorical regulation of intermittent tributaries exceeds the scope of the Clean Water Act. 547  
19 U.S. at 733-34; *id.* at 733 n.6 (rejecting the regulation of any intermittent tributaries); *id.* at 781  
20 (Kennedy, J., concurring) (rejecting categorical regulation of tributaries with an ordinary high  
21 water mark).

22 176. Both the *Rapanos* plurality and the concurrence cast doubt on the authority of the  
23 agencies to regulate non-navigable ditches under the Clean Water Act. 547 U.S. at 734; *id.* at 779  
24 (Kennedy, J., concurring in judgment) (rejecting regulation of roadside ditches with insignificant  
25 flow).

26 177. The intermittent non-navigable tributaries regulated by Section 328.3(a)(2) can be  
27 both negligible in volume and very limited in duration. The definition concededly includes the

1 “merest trickle” because it has no lower bound for the volume of flow necessary to be a tributary.  
2 85 Fed. Reg. at 22,291. The Rule also has no minimum duration of flow for a tributary to be  
3 regulated, other than that it flow more than in direct response to precipitation. *Id.* at 22,292.

4 178. So, a tributary would be regulated under Section 328.3(a)(2) even if it had as little  
5 as a garden hose worth of non-ephemeral flow extending over as little as a single week.

6 179. These tributaries will be at the very outer edges of any watershed and at the farthest  
7 distance possible from navigable-in-fact rivers or lakes. Their connection to downstream  
8 navigable rivers and lakes is necessarily the remotest, most attenuated, and least significant  
9 possible connection in any watershed.

10 180. Section 328.3(a)(2) also includes many ditches in the definition of tributary,  
11 including any that the agencies determine to be constructed in or to relocate natural tributaries,  
12 and any that are constructed in adjacent wetlands. 33 C.F.R. § 328.3(a)(2); § 328.3(c)(2)  
13 (definition of ditch); § 328.3(c)(12); § 328.3(b)(5) (limited exemption for ditches that are not  
14 tributaries or located in adjacent wetlands).

15 181. Intermittent non-navigable tributaries routinely occur on private property that  
16 legally is or may be used for a wide variety of land uses and purposes, as an aspect of property  
17 ownership and affirmed under state and local law. These uses include but are not limited to  
18 farming, ranching, roads, ditches, wells, pipelines, tanks, reservoirs, ponds, troughs, windmills,  
19 power and telecommunications poles and related infrastructure, fencing, livestock pens and  
20 corrals, equipment and storage yards, loading facilities, parking areas, and buildings (including  
21 but not limited to barns, shops, sheds, warehouses, stores, garages, and homes). All of these are  
22 traditional and customary uses of real property and generally create no nuisance conditions.

23 182. Plaintiff’s members routinely put their real property to most if not all of these uses,  
24 consistent with their property ownership and with local and state regulation and permitting.

25 183. These uses frequently coincide with areas where intermittent non-navigable  
26 tributaries occur, and routinely involve non-exempt discharges of dredged or fill material to those  
27 locations.

1 184. Categorical regulation of tributaries (including ditches) with flow volumes so low  
2 or infrequent that they would not in normal parlance be called “rivers” or “streams” exceeds the  
3 scope of the Clean Water Act as interpreted by the Supreme Court.

4 185. Therefore, Sections 328.3(a)(2), 328.3(c)(5), 328.3(c)(12), and 328.3(c)(13) of the  
5 Navigable Waters Protection Rule are arbitrary and capricious, and contrary to law, in violation  
6 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

7 **TWENTYFIRST CLAIM FOR RELIEF**

8 **Navigable Waters Protection Rule, 33 C.F.R. § 328.3(a)(2):**

9 ***Ultra Vires* Regulation of Non-Navigable Perennial “Tributaries”**

10 186. The preceding paragraphs are incorporated herein.

11 187. Under the Clean Water Act, the Army and EPA may only regulate discharges to  
12 “navigable waters.” *See* 33 U.S.C. § 1344(a).

13 188. Section 328.3(a)(2) of the Navigable Waters Protection Rule defines “navigable  
14 waters” to include perennial non-navigable tributaries. 33 C.F.R. § 328.3(a)(2); § 328.3(c)(8);  
15 § 328.3(c)(12); § 328.3(c)(13) (2020). This includes ditches, as discussed above in paragraph 180.

16 189. The *Rapanos* plurality stated that only those waters which in normal parlance  
17 would be called “rivers” or “streams” were within the scope of the Act. *Rapanos*, 547 U.S. at 739;  
18 *cfid.* at 781-82 (Kennedy, J, concurring) (rejecting categorical regulation of all tributaries without  
19 consideration of flow volume or distance from navigable-in-fact rivers or lakes); *id.* at 769  
20 (Kennedy, J., concurring) (rejecting regulation of “the merest trickle” even if continuously  
21 flowing).

22 190. Both the *Rapanos* plurality and concurrence cast doubt on the authority of the  
23 agencies to regulate non-navigable ditches under the Clean Water Act. 547 U.S. at 734; *id.* at 779  
24 (Kennedy, J., concurring in judgment) (rejecting regulation of roadside ditches with insignificant  
25 flow).

26 191. The non-navigable perennial tributaries regulated by the Navigable Waters  
27 Protection Rule are very frequently negligible in flow volume. The definition concededly includes

1 “mere trickles” because it has no lower bound for the volume of flow necessary to be a tributary.  
2 85 Fed. Reg. at 22,292.

3 192. So, a tributary would be regulated under the Rule even if it had as little as a garden  
4 hose worth of flow throughout the year.

5 193. Such tributaries routinely occur on private property that legally is or may be used  
6 for a wide variety of land uses and purposes, as an aspect of property ownership and affirmed  
7 under state and local law. These uses include but are not limited to farming, ranching, roads,  
8 ditches, wells, pipelines, tanks, reservoirs, ponds, troughs, windmills, power and  
9 telecommunications poles and related infrastructure, fencing, livestock pens and corrals,  
10 equipment and storage yards, loading facilities, parking areas, and buildings (including but not  
11 limited to barns, shops, sheds, warehouses, stores, garages, and homes). All of these are traditional  
12 and customary uses of real property and generally create no nuisance conditions.

13 194. Plaintiff’s members routinely put their real property to most if not all of these uses,  
14 consistent with their property ownership and with local and state regulation and permitting.

15 195. These uses frequently coincide with areas where perennial non-navigable  
16 tributaries occur, and routinely involve non-exempt discharges of dredged or fill material to those  
17 locations.

18 196. Categorical regulation of all non-navigable perennial tributaries (including  
19 ditches, as discussed above in paragraph 180) with flow volumes so low that they would not in  
20 normal parlance be called “rivers” or “streams” exceeds the scope of the Clean Water Act as  
21 interpreted by the Supreme Court.

22 197. Therefore, Sections 328.3(a)(2), 328.3(c)(5), 328.3(c)(12), and 328.3(c)(13) of the  
23 Navigable Waters Protection Rule are arbitrary and capricious, and contrary to law, in violation  
24 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).  
25  
26  
27

**TWENTYSECOND CLAIM FOR RELIEF**

**Navigable Waters Protection Rule, 33 C.F.R. §§ 328.3(a)(3), 328.3(c)(6):**

***Ultra Vires* Regulation of Isolated and/or**

**Non-Navigable Lakes and Ponds, and Impoundments**

198. The preceding paragraphs are incorporated herein.

199. The Clean Water Act only regulates discharges to “navigable waters.” 33 U.S.C. §§ 1311(a), 1344(a), 1362(12).

200. Section 328.3(a)(3) of the Navigable Waters Protection Rule defines navigable waters to include “[l]akes and ponds, and impoundments” of other regulated waters, whether these water bodies are navigable-in-fact, and so long as they have only the slightest surface connection to other regulated waters. § 328.3(a)(3), § 328.3(c)(6). As opposed to tributaries, which need to at least flow intermittently in order to be regulated, § 328.3(c)(12), lakes and ponds, and impoundments, are regulated so long as *any* surface water flows from them to other regulated non-wetland waters. § 328.3(c)(6). And, lakes and ponds, and impoundments, are regulated if they are inundated by a regulated non-wetland water in a typical year. *Id.* Nor are “impoundments” necessarily within the channel of or even adjacent to the regulated water which they impound. Reservoirs are routinely fed by pipelines or ditches and are remote from the regulated waters that they “impound,” yet they are still regulated so long as *any* water inundates them from, or spills from them to, another regulated water.<sup>9</sup>

201. Such lakes and ponds, and impoundments, occur ubiquitously on private farm and ranch properties owned or operated by Plaintiff’s members throughout the State of Oregon. These include many developed water sources like reservoirs, tanks, troughs, and the like. Development, use, maintenance, and repair of these resources frequently involves the non-exempt discharge of dredged or fill material to them.

202. Many of these lakes and ponds, and impoundments, are “isolated” from other regulated waters.

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<sup>9</sup> See footnote 8 above on the limits of the exemption for artificial ponds.



1           203. In *SWANCC*, the Supreme Court held that EPA and the Army’s “migratory bird  
2 rule” was not a reasonable or constitutionally permissible interpretation of “navigable waters”  
3 under the Clean Water Act. 531 U.S. at 167 (“not fairly supported by” the Act), *id.* at 174  
4 (interpreting Act to allow regulation of isolated non-navigable ponds would violate Tenth  
5 Amendment absent clear statutory statement of Congressional intent to that effect). In so holding,  
6 the Court reasoned that Congress’ intent in using the term “navigable waters” tethered the  
7 meaning of the term to Congress’ traditional regulation of navigation. 531 U.S. at 172. Further,  
8 the Court questioned whether the Army’s original regulatory definition of the term “navigable  
9 waters,” which mirrored the meaning of “navigable waters of the United States,” might have been  
10 the correct one after all. *Id.* at 168. The Court also refused to read the Act as extending Congress’  
11 Commerce Power authority to its outermost limit absent a “clear statement” to that effect, which  
12 the Act lacks. *Id.* at 174. Ultimately, the Supreme Court held in *SWANCC* that “navigable waters”  
13 does not include isolated ponds whose only basis for regulation is that they are used by migratory  
14 birds. *Id.* In doing so, the Supreme Court made clear that ponds are not “adjacent” to (and are  
15 therefore “isolated from”) other regulated waters unless they directly abut them. *Id.* at 167-68  
16 (describing wetland in *Riverside Bayview Homes* as adjacent to navigable creek, and isolated  
17 pond in question as not adjacent to other regulated waters). See also *Riverside Bayview Homes*,  
18 474 U.S. at 131 n.8. (no opinion on non-adjacent wetlands).

19           204. Categorical regulation of all isolated non-navigable lakes and ponds, and  
20 impoundments of regulated waters, exceeds the scope of the Clean Water Act as interpreted by  
21 the Supreme Court in *SWANCC*.

22           205. The regulation of all such water bodies also violates the Act, for the same reasons  
23 that the broad regulation of tributaries violates the Act, since the required surface water  
24 connection for regulation of lakes and ponds, and impoundments, is even more tenuous than  
25 Section 328.3(a)(2)’s criterion for tributaries.  
26  
27



1           212. Plaintiff’s members routinely put their real property to most if not all of these uses,  
2 consistent with their property ownership and with local and state regulation and permitting.

3           213. These uses frequently coincide with areas where intermittent non-navigable  
4 tributaries occur, and routinely involve non-exempt discharges of dredged or fill material to those  
5 locations.

6           214. The regulation of non-abutting wetlands “adjacent” to non-navigable tributaries  
7 exceeds the scope of the Act to the same degree that regulation of those non-navigable tributaries  
8 does. *See, e.g., Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring) (rejecting categorical  
9 regulation of all tributaries based in part on concerns addressed in *SWANCC*).

10           215. The Supreme Court in *SWANCC* rejected Clean Water Act regulation of water  
11 bodies that are not “adjacent” to open water. 531 U.S. at 168. It is clear from the context that the  
12 Supreme Court’s use of the term “adjacent” meant “abutting.” *Id.* at 167-168 (citing *Riverside*  
13 *Bayview Homes*, 474 U.S. at 131-132 n.8, as not addressing whether wetlands not immediately  
14 touching a navigable creek could be regulated). Sections 328.3(c)(1)(ii)-(iv) violate *SWANCC*  
15 and exceed the scope of the Clean Water Act and the authority of the agencies to regulate under  
16 that Act.

17           216. The *Rapanos* plurality opined that wetlands may only be regulated under the Clean  
18 Water Act if they are so closely connected to regulated tributaries that it can’t be discerned where  
19 one ends and the other begins. 547 U.S. at 755.

20           217. Categorical regulation of all non-abutting wetlands “adjacent” to all tributaries  
21 exceeds the scope of the Clean Water Act as interpreted by the Supreme Court.

22           218. Therefore, Sections 328.3(c)(1)(ii)-(iv) of the Navigable Waters Protection Rule  
23 are arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure  
24 Act, 5 U.S.C. § 706(2)(A).

1 **TWENTYFOURTH CLAIM FOR RELIEF**

2 **Navigable Waters Protection Rule, 33 C.F.R. § 328.3(a):**

3 ***Ultra Vires* Regulation of Non-Navigable “waters used in interstate commerce,”**  
4 **“Tributaries,” “Lakes and Ponds, and Impoundments,” and “Adjacent Wetlands” in**  
5 **Violation of Commerce Clause and/or Tenth Amendment**

6 219. The preceding paragraphs are incorporated herein.

7 220. Under the Clean Water Act, the Army and EPA may only regulate discharges to  
8 “navigable waters.” *See* 33 U.S.C. § 1344(a).

9 221. The Navigable Waters Protection Rule defines “navigable waters” to include all  
10 non-navigable “waters used in interstate commerce” beyond those used to transport goods in  
11 interstate commerce. 33 C.F.R. § 328.3(a)(2).

12 222. When enacting the Clean Water Act, Congress had in mind only its traditional  
13 regulation of navigation. *SWANCC*, 531 U.S. at 172.

14 223. The Navigable Waters Protection Rule defines “navigable waters” to include all  
15 perennial and intermittent non-navigable tributaries. 33 C.F.R. § 328.3(a)(2); § 328.3(c)(5);  
16 § 328.3(c)(8); § 328.3(c)(12); § 328.3(c)(13).

17 224. The *Rapanos* plurality left open the question of whether perennial non-navigable  
18 tributaries, even if they were relatively permanent and continuously flowing “waters,” could be  
19 regulated under the Act. 547 U.S. at 731 (declining to address how “navigable” and “of the United  
20 States” modify “waters”).

21 225. The Navigable Waters Protection Rule defines “navigable waters” to include  
22 “lakes and ponds, and impoundments of regulated waters,” including those which are isolated  
23 from regulated waters. 33 C.F.R. § 328.3(a)(3).

24 226. *SWANCC* holds that isolated ponds are outside of the scope of the term “navigable  
25 waters” under the Clean Water Act, based in part on the absence of a clear statement in the Act  
26 that would extend regulation to such features, and the limits that the Commerce Clause and Tenth  
27 Amendment place on Congress’ regulatory power. 531 U.S. at 174.

1           227. The Navigable Waters Protection Rule defines “navigable waters” to include  
2 adjacent wetlands that do not abut “navigable waters of the United States.” 33 C.F.R.  
3 § 328.3(c)(1)(ii)-(iv).

4           228. All of these types of features routinely occur on private property that legally is or  
5 may be used for a wide variety of land uses and purposes, as an aspect of property ownership and  
6 affirmed under state and local law. These uses include but are not limited to farming, ranching,  
7 roads, ditches, wells, pipelines, tanks, reservoirs, ponds, windmills, power and  
8 telecommunications poles and related infrastructure, fencing, livestock pens and corrals,  
9 equipment and storage yards, loading facilities, parking areas, and buildings (including but not  
10 limited to barns, sheds, shops, warehouses, stores, garages, and homes). All of these are traditional  
11 and customary uses of real property and generally create no nuisance conditions.

12           229. Plaintiff’s members routinely put their real property to most if not all these uses,  
13 consistent with local and state regulation and permitting.

14           230. Many of these uses routinely coincide with areas within or near the ordinary high-  
15 water mark of water features regulated by the Navigable Waters Protection Rule and involve non-  
16 exempt discharges of dredged or fill material to those features.

17           231. Interpreting “navigable waters” in the Clean Water Act to allow regulation of the  
18 use of private property such as described in the preceding paragraphs 228-30 would extend federal  
19 authority to and beyond the outer reaches of the Commerce Power. The Clean Water Act contains  
20 no clear statement of Congressional intent to regulate to such extent. *SWANCC*, 531 U.S. at 174.  
21 The agencies’ interpreting of the Act to authorize themselves to engage in such regulation violates  
22 the Commerce Clause.

23           232. Interpreting “navigable waters” in the Clean Water Act to allow regulation of the  
24 use of private property such as described in paragraphs 228-30 above would intrude extensively  
25 on local land use regulation and water resource regulation and allocation. The Tenth Amendment  
26 reserves government power over these questions to the states. *SWANCC*, 531 U.S. at 173 (“This  
27 concern is heightened where the administrative interpretation alters the federal-state framework

1 by permitting federal encroachment upon a traditional state power.”); *see also Rapanos*, 547 U.S.  
2 at 737-38. Clean Water Act regulation of such activities would amount to a federal veto power  
3 over local land use law, zoning, and permitting. The agencies’ interpretation of the Clean Water  
4 Act to authorize themselves to engage in such regulation violates the Tenth Amendment.

5 233. Therefore, the Navigable Waters Protection Rule is arbitrary and capricious, and  
6 contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

#### 7 **TWENTYFIFTH CLAIM FOR RELIEF**

##### 8 **Navigable Waters Protection Rule, 33 C.F.R. § 328.3(a):**

##### 9 ***Ultra Vires* Regulation of Non-Navigable “waters used in interstate commerce,”** 10 **“Tributaries,” “Lakes and Ponds, and Impoundments,” and “Adjacent Wetlands” in** 11 **Violation of Article I and the Non-Delegation Doctrine**

12 234. The preceding paragraphs are incorporated herein.

13 235. Under the Clean Water Act, the Army and EPA may only regulate discharges to  
14 “navigable waters.” *See* 33 U.S.C. § 1344(a).

15 236. The 2020 Definition interprets “navigable waters” in the Clean Water Act to  
16 include an extensive catalog of “tributaries” that are not navigable and which are not even  
17 “waters” for most of every year, as well as non-navigable isolated lakes and ponds, and non-  
18 abutting wetlands. The Supreme Court has held that while the Clean Water Act regulates some  
19 waters that are not navigable-in-fact, it does not regulate all “waters” and that “navigable” must  
20 have some limiting meaning. *SWANCC*, 531 U.S. 171-72 (the Act regulates some waters not  
21 “deemed navigable under the classical understanding of that term” but not all such waters)  
22 (quoting *Riverside Bayview Homes*, 474 U.S. at 133).

23 237. The Act does not define “navigable.” If the term does not have its ordinary  
24 meaning but instead has some broader or different meaning, then the statute unconstitutionally  
25 delegates to EPA and the Army the task of deciding, as a policy matter, what waters the agencies  
26 will regulate. The agencies themselves see their work as largely one of identifying, balancing,  
27

1 and selecting among competing policy priorities. *See, e.g.*, 85 Fed. Reg. at 22,264, 22,270-71,  
2 22,277, 22,290, 22,292, 22,300.

3 238. In making this delegation, the Act lacks any appropriately understood “intelligible  
4 principle” and provides no guidance or criteria to the agencies to circumscribe their policy  
5 decision defining “navigable.”

6 239. The Act identifies no fact-finding that the agencies must engage in to define  
7 “navigable.”

8 240. The Act provides no factors for the agencies to consider, let alone what weight to  
9 give to any such factors, in determining the meaning of “navigable.”

10 241. Rather, if “navigable” in the statute means something other than “navigable-in-  
11 fact,” then the statute delegates unbounded discretion to the agencies to define the term, in  
12 violation of the non-delegation doctrine, and Article I of the Constitution (vesting “all legislative  
13 powers” in the Congress).

14 242. Therefore, the Navigable Waters Protection Rule is arbitrary and capricious, and  
15 contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

16 **TWENTYSIXTH CLAIM FOR RELIEF**

17 **Navigable Waters Protection Rule, 33 C.F.R. § 328.3(a):**

18 ***Ultra Vires* Regulation of Non-Navigable “waters used in interstate commerce,”**  
19 **“Tributaries,” “Lakes and Ponds, and Impoundments,” and “Adjacent Wetlands” in**  
20 **Violation of the Due Process Clause and the Void-for-Vagueness Doctrine**

21 243. The preceding paragraphs are incorporated herein.

22 244. Under the Clean Water Act, the Army and EPA may only regulate discharges to  
23 “navigable waters.” *See* 33 U.S.C. § 1344(a).

24 245. The 2020 Definition interprets “navigable waters” in the Clean Water Act to  
25 include an extensive catalog of “tributaries” that are not navigable and which are not even  
26 “waters” for most of every year, as well as non-navigable isolated lakes and ponds, and non-  
27 abutting wetlands.

1           246. The Act does not define “navigable.” If the term does not have its ordinary  
2 meaning but instead has some broader or different meaning, the Act gives no notice of that  
3 meaning or its contours. The agencies themselves see their work as largely one of identifying,  
4 balancing, and selecting among competing policy priorities, rather than elaborating a technical  
5 definition of some commonly known term. *See, e.g.*, 85 Fed. Reg. at 22,264, 22,270-71, 22,277,  
6 22,290, 22,292, 22,300; *See also Sackett*, 566 U.S. 120, 133 (Alito, J., concurring) (“the words  
7 themselves are hopelessly indeterminate.”).

8           247. The Due Process Clause of the U.S. Constitution requires that criminal statutes  
9 provide adequate notice of the conduct which they proscribe to those who must comply. *United*  
10 *States v. Lanier*, 520 U.S. 259, 265-57 (1997). The Clean Water Act imposes criminal penalties.  
11 33 U.S.C. § 1319(c).

12           248. The rule of lenity also requires that statutes with criminal penalties be interpreted  
13 in the light most favorable to criminal defendants. *United States v. Granderson*, 511 U.S. 39, 54  
14 (1994) (“[W]here text, structure, and history fail to establish that the Government's position is  
15 unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant’s]  
16 favor.”).

17           249. If the term “navigable” in the Act does not have the ordinary meaning of  
18 “navigable,” but at the same time does not encompass “all waters,” then it is impossible for any  
19 regulated party to know *from the statute* what waters are regulated unless and until the agencies  
20 give some meaning to the term.

21           250. A statute whose requirements are only knowable after they are “interpreted” by  
22 enforcement officials is a classic violation of the void for vagueness doctrine. If “navigable” is  
23 interpreted in a way that its meaning is unknown absent case by case agency interpretation, then  
24 the statute fails to give constitutionally adequate notice of the conduct that it proscribes and is  
25 void-for-vagueness under the Due Process Clause.

26           251. Therefore, the Navigable Waters Protection Rule is arbitrary and capricious, and  
27 contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).



**PRAYER FOR RELIEF**

Plaintiff prays for judgment from this Court as follows:

1. A declaratory judgment stating that the categorical regulation of all tributaries as defined by the 2015 Navigable Waters Definition is contrary to law and invalid;

2. A declaratory judgment stating that the categorical regulation of adjacent waters as defined by the 2015 Navigable Waters Definition is contrary to law and invalid;

3. A declaratory judgment stating that the categorical regulation of all interstate waters as defined by the 2015 Navigable Waters Definition is contrary to law and invalid;

4. A declaratory judgment stating that the regulation of hydrologically isolated waters and other waters that only may affect or may be used in interstate commerce, as defined by the 2015 Navigable Waters Definition, is contrary to law and invalid;

5. A declaratory judgment stating that the 2015 Navigable Waters Definition is invalid because it lacked the notice and comments procedures required by the Administrative Procedure Act;

6. A declaratory judgment stating that the 2015 Navigable Waters Definition unduly impinges on the States' traditional power over land and water use and therefore is invalid under the Constitution of the United States;

7. A declaratory judgment stating that the 2015 Navigable Waters Definition exceeds the commerce power and is invalid under the Constitution of the United States;

8. A declaratory judgment that the term "navigable waters" in the Clean Water Act is void for vagueness.

9. An injunction barring federal Defendants from asserting federal jurisdiction based on the 2015 Navigable Waters Definition or otherwise enforcing the 2015 Navigable Waters Definition;

10. A declaratory judgment stating that the categorical regulation of all tributaries as defined by the 1986 Regulations, as readopted by the Repeal and Recodify Rule, is contrary to law and invalid;

1 11. A declaratory judgment stating that the categorical regulation of adjacent waters  
2 as defined by the 1986 Regulations, as readopted by the Repeal and Recodify Rule, is contrary to  
3 law and invalid;

4 12. A declaratory judgment stating that the categorical regulation of all interstate  
5 waters as defined by the 1986 Regulations, as readopted by the Repeal and Recodify Rule, is  
6 contrary to law and invalid;

7 13. A declaratory judgment stating that the regulation of hydrologically isolated  
8 waters and other waters that only may affect or may be used in interstate commerce, as defined  
9 by the 1986 Regulations, as readopted by the Repeal and Recodify Rule, is contrary to law and  
10 invalid;

11 14. A declaratory judgment stating that the 1986 Regulations, as re-adopted by the  
12 Repeal and Recodify Rule, are invalid due to violation of the notice and comments procedures  
13 required by the Administrative Procedure Act;

14 15. A declaratory judgment stating that the 1986 Regulations, as re-adopted by the  
15 Repeal and Recodify Rule, unduly impinge on the States' traditional power over land and water  
16 use and therefore is invalid under the Constitution of the United States;

17 16. A declaratory judgment stating that the 1986 Regulations, as re-adopted by the  
18 Repeal and Recodify Rule, exceed the commerce power and are invalid under the Constitution of  
19 the United States;

20 17. An injunction barring Federal Defendants from asserting federal jurisdiction based  
21 on the 1986 Regulations, as readopted by the Repeal and Recodify, or otherwise enforcing the  
22 1986 Regulations, as readopted by the Repeal and Recodify Rule;

23 18. A declaratory judgment that EPA and the Army have failed to submit the 1986  
24 Regulations to Congress for review as required by the Congressional Review Act, and that as a  
25 consequence those regulations are not legally in effect;

26 19. A declaratory judgment that EPA and the Army have failed to submit the Post-  
27 *Rapanos* Guidance and other guidance related to the 1986 Regulations to Congress as required

1 by the Congressional Review Act, and that as a consequence those guidance documents are not  
2 legally in effect;

3 20. A declaratory judgment that the 2008 Post-*Rapanos* Guidance is invalid as  
4 exceeding the scope of the term “navigable waters” under the Clean Water Act;

5 21. An injunction barring Federal Defendants from asserting federal jurisdiction based  
6 on the 2008 Post-*Rapanos* Guidance, or otherwise enforcing the 2008 Post-*Rapanos* Guidance;

7 22. A declaratory judgment that the term “navigable waters” in the Clean Water Act  
8 is void for vagueness and/or violates the non-delegation doctrine;

9 23. A declaratory judgment that the Navigable Waters Protection Rule, Section  
10 328.3(a)(1), exceeds the scope of the Clean Water Act to the extent that it regulates waters (other  
11 than the territorial seas) that are not or have not been used, or are not susceptible of future use,  
12 for the transport of goods in interstate or foreign commerce;

13 24. A declaratory judgment that the Navigable Waters Protection Rule, Section  
14 328.3(a)(1), is unconstitutional to the extent that it regulates waters (other than the territorial seas)  
15 that are not or have not been used, or are not susceptible of future use, for the transport of goods  
16 in interstate or foreign commerce;

17 25. A preliminary and permanent injunction against the Navigable Waters Protection  
18 Rule, Section 328.3(a)(1), to the extent that it regulates waters (other than the territorial seas) that  
19 are not or have not been used, or are not susceptible of future use, for the transport of goods in  
20 interstate or foreign commerce;

21 26. A declaratory judgment that the Navigable Waters Protection Rule, Section  
22 328.3(a)(2), exceeds the scope of the Clean Water Act to the extent that it regulates intermittent  
23 and non-navigable perennial tributaries;

24 27. A declaratory judgment that the Navigable Waters Protection Rule, Section  
25 328.3(a)(2), is unconstitutional to the extent that it regulates intermittent and non-navigable  
26 perennial tributaries;

1           28.     A preliminary and permanent injunction against the Navigable Waters Protection  
2 Rule, Section 328.3(a)(2), to the extent that it regulates intermittent and non-navigable perennial  
3 tributaries;

4           29.     A declaratory judgment that the Navigable Waters Protection Rule, Section  
5 328.3(a)(3), exceeds the scope of the Clean Water Act to the extent that it regulates isolated or  
6 non-navigable lakes and ponds, and impoundments of regulated waters;

7           30.     A declaratory judgment that the Navigable Waters Protection Rule, Section  
8 328.3(a)(3), is unconstitutional to the extent that it regulates isolated or non-navigable lakes and  
9 ponds, and impoundments of regulated waters;

10          31.     A preliminary and permanent injunction against the Navigable Waters Protection  
11 Rule, Section 328.3(a)(3), to the extent that it regulates isolated or non-navigable lakes and ponds,  
12 and impoundments of regulated waters;

13          32.     A declaratory judgment that the Navigable Waters Protection Rule, Section  
14 328.3(c)(1)(ii)-(iv), exceeds the scope of the Clean Water Act to the extent that it regulates  
15 wetlands that don't abut navigable-in-fact waters;

16          33.     A declaratory judgment that the Navigable Waters Protection Rule, Section  
17 328.3(c)(1)(ii)-(iv), is unconstitutional to the extent that it regulates wetlands that don't abut  
18 navigable-in-fact waters;

19          34.     A preliminary and permanent injunction against the Navigable Waters Protection  
20 Rule, Section 328.3(c)(1)(ii)-(iv), to the extent that it regulates wetlands that don't abut navigable-  
21 in-fact waters;

22          35.     An award to Plaintiff of reasonable attorneys' fees and costs, pursuant to 28 U.S.C.  
23 § 2412, or any other authority, including the Court's inherent authority, as appropriate; and,  
24  
25  
26  
27

36. An award of any other relief as the Court may deem proper.

DATED: May 4, 2020.

Respectfully submitted,

By: s/ Ethan W. Blevins  
ETHAN W. BLEVINS, WSBA # 48219  
Pacific Legal Foundation  
255 South King Street, Suite 800  
Seattle, Washington 98104  
Telephone: (206) 619-8944  
Email: EBlevins@pacificlegal.org

ANTHONY F. FRANÇOIS, Cal. Bar # 184100\*  
MOLLIE R. WILLIAMS, Cal. Bar # 322970\*  
DANIEL M. ORTNER, Va. Bar # 89460\*  
Pacific Legal Foundation  
930 G Street  
Sacramento, California 95814  
Telephone: (916) 419-7111  
Fax: (916) 419-7477  
Email: AFrancois@pacificlegal.org  
Email: MWilliams@pacificlegal.org  
Email: DOrtner@pacificlegal.org

*Counsel for Plaintiff*

*\* Pro Hac Vice*