

Hon. John C. Coughenour

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

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

over which trade and travel are or may be conducted in the customary modes of travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters 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.

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

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

THE CLEAN WATER ACT

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

16. The Act’s words “navigable waters” and “waters of the United States, including the territorial seas” are very close to the predecessor statutes’ words “navigable waters of the United States” and the expression “navigable capacity of the waters of the United States” in 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

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

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

THE 1986 REGULATIONS

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

- All navigable-in-fact waters, plus all waters which are, were, or reasonably could be used more generally in interstate commerce (33 C.F.R. § 328.3(a)(1) (1987)²);
- The territorial seas (33 C.F.R. § 328.3(a)(6) (1987));
- All interstate waters including interstate wetlands (“Interstate Waters”) (33 C.F.R. § 328.3(a)(2) (1987));
- All intrastate waters (whether navigable or not) that met various criteria (“Covered Intrastate Waters”) (33 C.F.R. § 328.3(a)(3) (1987));
- All non-navigable tributaries to navigable-in-fact waters, Interstate and Covered Intrastate Waters, and Impoundments (“Non-navigable Tributaries”) (33 C.F.R. § 328.3(a)(5) (1987));
- Wetlands adjacent to (meaning “bordering, contiguous, or neighboring”) the territorial seas, navigable-in-fact waters, Interstate and Covered Intrastate

¹ The EPA adopted identical conforming regulations in 1988, which are included in Plaintiff’s definition of the 1986 Regulations.

² 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.

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

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

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

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

SWANCC AND RAPANOS

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

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

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

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

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

2008 POST-RAPANOS GUIDANCE

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

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

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

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

THE 2015 NAVIGABLE WATERS DEFINITION

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

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

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

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.

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

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

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

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

LITIGATION CHALLENGING THE 2015 NAVIGABLE WATERS DEFINITION

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

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

43. Due to the potential impact of 33 U.S.C. § 1369(b)(1), Plaintiff also litigated its 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.³

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 ³ Plaintiff's Notice of Related Litigation, ECF No. 11-1, provides as complete a list as Plaintiff
 27 has been able to identify.

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

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

THE CURRENT REGULATORY LANDSCAPE

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

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

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

⁴ *See also North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015) (North and South 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.

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

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

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

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

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

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

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

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

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

THE NAVIGABLE WATERS PROTECTION RULE

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

62. The 2020 Definition includes four categories:

(1) The territorial seas, tidal waters, and waters previously or currently used, or prospectively susceptible to use, in interstate or foreign commerce. 33 C.F.R. § 328.3(a)(1) . 33 C.F.R. § 328.3(a)(1); 85 Fed. Reg. at 22,338.⁵

⁵ This and subsequent references in paragraph 62, in the Nineteenth through Twentysixth Claims 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

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

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

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

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

section is the one appearing in the Army’s regulations. EPA’s corresponding and identical 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.

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

DECLARATORY RELIEF ALLEGATIONS

65. The preceding paragraphs are incorporated herein.

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

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

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

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

INJUNCTIVE RELIEF ALLEGATIONS

70. The preceding paragraphs are incorporated herein.

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

72. Plaintiff's members will continue to be injured by the Army and EPA's expanded interpretation of "navigable waters" under the Clean Water Act.

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

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

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

FIRST CLAIM FOR RELIEF

2015 Navigable Waters Definition

***ULTRA VIRES* REGULATION OF ALL**

“TRIBUTARIES” WITH AN ORDINARY HIGH WATER MARK

76. The preceding paragraphs are incorporated herein.

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

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

79. In *Rapanos*, a majority of the Supreme Court held that the term “navigable waters” does not include all tributaries with an ordinary high water mark. *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”).

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

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

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

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

92. The regulation of isolated water bodies would exceed the scope of the Clean Water Act as interpreted by the Supreme Court in *SWANCC* and affirmed in *Rapanos*. 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).

FIFTH CLAIM FOR RELIEF

2015 Navigable Waters Definition

PLAINTIFF WAS DENIED THEIR RIGHT TO NOTICE AND COMMENT

93. The preceding paragraphs are incorporated herein.

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

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

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

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

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

SEVENTH CLAIM FOR RELIEF

2015 Navigable Waters Definition

CONSTITUTIONAL VIOLATION: EXCEEDING THE COMMERCE POWER

104. The preceding paragraphs are incorporated herein.

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

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

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

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

EIGHTH CLAIM FOR RELIEF

2015 Navigable Waters Definition

CONSTITUTIONAL VIOLATION: VOID FOR VAGUENESS

108. The preceding paragraphs are incorporated herein.

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

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

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

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

113. Therefore, the 2015 Navigable Waters Definition is contrary to law in violation of 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.

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

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

130. The regulation of isolated water bodies exceeds the scope of the Clean Water Act as interpreted by the Supreme Court in *SWANCC* and affirmed in *Rapanos*. 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).

THIRTEENTH CLAIM FOR RELIEF

1986 Regulations as Readopted By the Repeal and Recodify Rule

PLAINTIFF’S MEMBERS WERE

DENIED THEIR RIGHT TO NOTICE AND COMMENT

131. The preceding paragraphs are incorporated herein.

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

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

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

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

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 ⁶ 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.

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

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

FIFTEENTH CLAIM FOR RELIEF

1986 Regulations as Readopted By the Repeal and Recodify Rule

CONSTITUTIONAL VIOLATION: EXCEEDING THE COMMERCE POWER

140. The preceding paragraphs are incorporated herein.

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

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

SIXTEENTH CLAIM FOR RELIEF

1986 Regulations as Readopted By the Repeal and Recodify Rule

CONSTITUTIONAL VIOLATION: NON-DELEGATION DOCTRINE AND VOID FOR VAGUENESS

143. The preceding paragraphs are incorporated herein.

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

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

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

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

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

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

SEVENTEENTH CLAIM FOR RELIEF

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

VIOLATION OF THE CONGRESSIONAL REVIEW ACT

149. The preceding paragraphs are incorporated herein.

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

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

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

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

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

EIGHTEENTH CLAIM FOR RELIEF

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

FACIAL INVALIDITY

155. The preceding paragraphs are incorporated herein.

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

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

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

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

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

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)⁷ 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.

⁷ 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).⁸

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).

24
 25 ⁸ 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.

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

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

TWENTIETH CLAIM FOR RELIEF

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

Ultra Vires Regulation of All Intermittent “Tributaries”

172. The preceding paragraphs are incorporated herein.

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

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

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

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

177. The intermittent non-navigable tributaries regulated by Section 328.3(a)(2) can be 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.

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

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

TWENTYFIRST CLAIM FOR RELIEF

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

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

186. The preceding paragraphs are incorporated herein.

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

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

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

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

191. The non-navigable perennial tributaries regulated by the Navigable Waters 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.⁹

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.

⁹ See footnote 8 above on the limits of the exemption for artificial ponds.

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

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

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

206. Therefore, Sections 328.3(a)(3) and 328.3(c)(6) of the Navigable Waters Protection Rule is arbitrary and capricious, and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

TWENTYTHIRD CLAIM FOR RELIEF

Navigable Waters Protection Rule, 33 C.F.R. §§ 328.3(a)(4), 328.3(c)(1)(ii)-(iv):

Ultra Vires Regulation of Non-Abutting Wetlands

207. The preceding paragraphs are incorporated herein.

208. The Clean Water Act only regulates discharges to “navigable waters.” *See* 33 U.S.C. § 1344(a).

209. Section 328.3(a)(4) of the Navigable Waters Protection Rule interprets “navigable waters” to include four classes of non-navigable wetlands defined as “adjacent” to other regulated water bodies. 33 C.F.R. §§ 328.3(a)(4), (c)(1). One of those categories is wetlands that directly abut regulated tributaries or other regulated water bodies. 33 C.F.R. § 328.3(c)(1)(i).

210. Three other categories in the Navigable Waters Protection Rule illegally extend wetland regulation more broadly: wetlands flooded by other regulated water bodies in a typical year, 33 C.F.R. § 328.3(c)(1)(ii); wetlands separated from other regulated water bodies only by natural barriers, 33 C.F.R. § 328.3(c)(1)(iii); and wetlands separated from other regulated water bodies only by permeable artificial barriers, 33 C.F.R. § 328.3(c)(1)(iv). These three categories are beyond the scope of the Clean Water Act and exceed the agencies’ authority to regulate.

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

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).

TWENTYFOURTH CLAIM FOR RELIEF

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

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

219. The preceding paragraphs are incorporated herein.

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

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

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

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

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

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

226. *SWANCC* holds that isolated ponds are outside of the scope of the term “navigable waters” under the Clean Water Act, based in part on the absence of a clear statement in the Act that would extend regulation to such features, and the limits that the Commerce Clause and Tenth 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

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

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

TWENTYFIFTH CLAIM FOR RELIEF

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

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

234. The preceding paragraphs are incorporated herein.

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

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

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

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;
27

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,

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