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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Mining Association, Arizona Farm Bureau, Association of Commerce and Industry, New Mexico Mining Association, Arizona Chamber of Commerce & Industry, Arizona Rock Products Association, and New Mexico Farm & Livestock Bureau,

Plaintiffs,

vs.

United States Environmental Protection Agency; Gina McCarthy in her official capacity as Administrator of the Environmental Protection Agency; United States Army Corps of Engineers; Thomas P. Bostock in his official capacity as Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers; and Jo-Ellen Darcy in her official capacity as Assistant Secretary of the Army,

Defendants.

No. ____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, the ARIZONA MINING ASSOCIATION, the ARIZONA FARM BUREAU, the ASSOCIATION OF COMMERCE AND INDUSTRY, the NEW MEXICO MINING ASSOCIATION, the ARIZONA CHAMBER OF COMMERCE & INDUSTRY, the ARIZONA ROCK PRODUCTS ASSOCIATION, and the NEW MEXICO FARM & LIVESTOCK BUREAU (collectively, "Plaintiffs" or "the Trade Associations") for their complaint against Defendants, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA"); GINA McCARTHY, in her official capacity as Administrator of the EPA; UNITED STATES ARMY CORPS OF ENGINEERS (the "Corps", together with EPA "the Agencies"); LIEUTENANT GENERAL THOMAS P. BOSTOCK, in his official capacity as Chief of Engineers and Commanding General of the United States Army Corps of Engineers; and JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army for Civil Works (collectively "Defendants"), allege by and through their attorneys, on knowledge as to Plaintiffs' information and belief as follows:

INTRODUCTION

1. This is a lawsuit for declaratory and injunctive relief challenging the legality of the final administrative rule titled "Clean Water Rule: Definition of 'Waters of the United States'" (the "Rule"), and promulgated by the Defendants. The Rule was signed by Administrator McCarthy and Assistant Secretary Darcy on May 27, 2015, and published in the Federal Register at 80 Fed. Reg. 37,054 on June 29, 2015.

2. This lawsuit is the latest chapter in extraordinary and long-running efforts by EPA and the Corps to expand federal Clean Water Act ("CWA") jurisdiction over navigable "*waters* of the United States," 33 U.S.C. § 1362(7) (emphasis added), to include all manner of dry *lands*. Despite resounding defeats in the Supreme Court, which has confirmed that Congress meant what it said by vesting jurisdiction only over "waters," the Agencies have now adopted rules that categorically declare vast expanses of land—including large swaths of desert in the arid American West—to be jurisdictional "waters." They have done so based on the flimsiest policy rationales and scientific and other record

support, including the extraordinarily over-inclusive (and factually erroneous) assertion that "physical indicators of a bed and banks and an ordinary high water mark," 80 Fed. Reg. at 37,117—whether actually in existence, or "absent in the field" but counterfactually "infer[red]" by a distant bureaucrat, using remote-sensing data or computer modeling, *id.* at 37,077—are sufficient to establish a jurisdictional nexus to navigable waters.

3. Whatever the validity of that proposition in other parts of the country, it is demonstrably false in the arid West, where highly erodible soils, and irregular flow events, can give rise to such topography even if years, decades, or even centuries have passed since water has flowed. Features can be formed in response to a single storm event, and persist indefinitely, even if they never convey water again. *See Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality opinion) (in challenge to EPA assertion of authority over wetlands located up to 20 miles from nearest navigable water, criticizing "immense expansion of federal regulation of land use . . . under the Clean Water Act," to include "ripples of sand in the desert that may contain water once a year"). Yet under the challenged Rule (and current agency guidance), such features are categorically deemed "tributaries" subject to federal jurisdiction. In short, the Rule unlawfully regulates large swaths of privately owned, bone dry desert as "waters of the United States," while simultaneously and irrationally *exempting* from regulation lands in other, temperate areas of the country that experience regular rainfall and have clearly discernible connections with traditional navigable "waters of the United States."

4. The consequences of the Agencies' dramatic overreach are real, immediate, and severe—among other things, imposing a broad array of new, unfamiliar, and complex restrictions on expanses of land not previously subject to regulation. The CWA generally prohibits the "discharge of any pollutant" into navigable waters without a permit, under threat of steep civil fines and harsh criminal liability. 33 U.S.C. §§ 1311(a), 1362(12)(A). Navigable waters, in turn, are defined to mean "the waters of the United States." *Id.* § 1362(7). From that narrow statutory mandate flows a dizzying array of prohibitions and

obligations. Land owners must often obtain a federal permit, at the cost of years and hundreds of thousands of dollars, before undertaking "ordinary industrial and commercial activities" or even moving dirt or fill material. They may face obligations to comply with surface water quality standards, or develop a spill prevention, control and countermeasures program. *Rapanos*, 547 U.S. at 719-21 (plurality opinion). While the Agencies claim that the new Rule simply clarifies the existing definition of "waters of the United States," the Rule's practical effect is to subject land owners and business operators, who never dreamed their activities could affect navigable waters, to unlawful and unreasonable burdens—not only the cost of assessing vast expanses of land to determine which features are jurisdictional, but also the staggering burdens of complying with the CWA in using lands magically transformed by bureaucratic decree into waters.

5. In promulgating the Rule, Defendants have acted in a manner that ignores Supreme Court precedent and violates the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706, and specific provisions of the United States Constitution, including but not limited to the Commerce Clause, U.S. CONST. art. I, sec. 8, cl. 3. Plaintiffs seek a declaration from this Court to that effect, and an order vacating the rule and enjoining its implementation or application.

6. Given these patent defects, it is perhaps unsurprising that lawsuits challenging the Rule have been filed in several other districts nationwide.[1] In one such suit, brought by a coalition of 13 States, including Arizona, New Mexico, and Colorado, the U.S. District Court for the District of North Dakota recently issued a preliminary injunction, prohibiting the Agencies from implementing or enforcing the rule pending disposition of that case.[2] The court held, among other things, that the States were "likely

[1] On July 27, 2015, the United States filed a motion with the U.S. Judicial Panel for Multidistrict Litigation ("MDL") seeking transfer of those actions pursuant to 28 U.S.C. § 1407, to the U.S. District Court for the District of Columbia. That motion has been docketed as MDL case number 2663, and scheduled for oral argument on October 1, 2015 before the MDL Panel. Plaintiffs in several cases oppose the government's motion.

[2] *See* Mem. Op. & Order, *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D. Aug. 27, 2015), ECF No. 70.

to succeed on their claim" that "EPA has violated its Congressional grant of authority," because the Rule's expansive definition of "tributary" "includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term."[3] EPA has acknowledged that the decision prevents it from implementing the rule—which otherwise would have gone into effect on August 28, 2015—in either Arizona or New Mexico.[4]

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action under 28 U.S.C. § 1331. It has the authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202; 5 U.S.C. §§ 705, 706(1), 706(2); and its general equitable powers.

8. The APA provides a cause of action for parties adversely affected by final agency action when "there is no other adequate remedy in a court." 5 U.S.C. § 704. That condition is met in this case because there is no other adequate remedy available in any other court.[5]

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[3] *Id.* at 2, 11.

[4] *See* Juan Carlos Rodriguez, Law360, *EPA's Clean Water Rule Halted in 13 States* (Aug. 27, 2015) (quoting EPA statement that "[i]n light of the order, EPA and the Army Corps of Engineers will continue to implement the prior regulation in the following states: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming"). On August 28, 2015, the North Dakota district court ordered further briefing on whether its preliminary injunction applies outside those 13 states.

[5] In other pending challenges to the Rule, Defendants have taken the position that the U.S. Courts of Appeals have exclusive subject-matter jurisdiction under Section 509(b) of the CWA, 33 U.S.C. § 1369(b)(1). *See* 80 Fed. Reg. at 37,104. Although Plaintiffs believe that jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 704, because the deadline for filing a petition for review under Section 509(b) is 120 days, Plaintiffs anticipate filing a protective petition for review of the Rule in the appropriate U.S. Court of Appeals. *See Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008) (noting "protective" filing in Ninth Circuit); *Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989) ("careful lawyers must apply for judicial review of anything remotely resembling a reviewable order" under Section 509(b)(1)). Pursuant to 28 U.S.C. § 2112(a)(3) and a July 28, 2015 order of the U.S. Judicial Panel on Multidistrict Litigation, all such petitions for review have been consolidated in the U.S. Court of Appeals for the Sixth Circuit.

9. Venue is proper in this district under 28 U.S.C. § 1391(e)(1)(C) because the defendants are officers or agencies of the United States and one or more plaintiffs resides in the district within the meaning of 28 U.S.C. §§1391(c) and (e). In particular, plaintiffs Arizona Mining Association, Arizona Chamber of Commerce & Industry, and Arizona Rock Products Association maintain their principal places of business in Phoenix, Arizona, and plaintiff Arizona Farm Bureau maintains its principal place of business in Gilbert, Arizona.

PARTIES

10. Plaintiff the Arizona Mining Association ("AMA") is a non-profit business league comprised of entities engaged in metal mining, beneficiation, and mineral processing activities in Arizona. AMA represents the interests of participants in the Arizona mining industry, promotes sound public policy on mining-related issues, including those relating to land-use and environmental regulation, participates in the regulatory process and litigation to protect the interests of its members, educates the public about the benefits of mining, and supports the sustainability of a safe and responsible mining industry.[6] Mining activity in 2012 provided a total of 52,100 Arizona jobs and generated $4.80 billion in total income for workers, businesses and property owners, and governments in Arizona. AMA member companies produced 1.63 billion pounds of copper, which represents roughly 65% of the nation's newly-mined copper, along with significant amounts of associated valuable co-products (*e.g.*, gold, silver, selenium, tellurium, and molybdenum). Several AMA members, including ASARCO LLC ("ASARCO") and Freeport-McMoRan Inc. ("Freeport") (or their subsidiaries), operate mining, beneficiation, and mineral processing facilities in Arizona that are subject to regulation under the CWA. ASARCO, Freeport, and AMA participated in proceedings before the Agencies, and submitted extensive comments on the proposed rule.

[6] *See* Arizona Mining Ass'n, *Mission and Vision Statement*, http://www.azmining.com/members/mission-and-vision-statement- (last visited Aug. 4, 2015).

11. Plaintiff the Arizona Farm Bureau ("AFB") is an independent, non-governmental grassroots organization, whose members represent production agriculture throughout the state of Arizona. AFB is Arizona's largest farm and ranch organization, and serves to promote educational improvement, economic opportunity, and social advancement, and to represent its members' interests in public policy and legal matters, including on questions of environmental regulation.[7] Many of AFB's members engage in agricultural and related activities in Arizona that subject them to regulation under the CWA. AFB submitted comments on the proposed rule.

12. Plaintiff the New Mexico Mining Association ("NMMA") is a trade organization that serves as a spokesperson for the New Mexico mining industry. NMMA members include: companies that explore, produce, and refine metals and industrial materials; companies that manufacture and distribute mining and mineral processing; and individuals engaged in various phases of the mineral industry. Among other things, NMMA works to keep the mining industry informed on pending legislation, and likewise informs and represents the interests of its members and the mining industry generally on a wide range of subjects including taxation, environmental quality, public lands, health and safety, and education.[8] Many of NMMA's members undertake mining and related activities in New Mexico that subject them to regulation under the CWA. NMMA submitted comments on the proposed rule.

13. Plaintiff the Association of Commerce and Industry ("NMACI") is a member-driven organization working to promote common-sense, pro-business policies that will grow the economy and create better opportunities for all New Mexicans. NMACI helps to keep businesses engaged in the policy process, educates members on the latest news and developments, promotes pro-business policies and laws, and represents its

[7] *See* Arizona Farm Bureau, *Who We Are*, http://www.azfb.org/public/228/about-/who-we-are (last visited Aug. 4, 2015).

[8] *See* New Mexico Mining Association, *About Us*, http://www.nmmining.org/_pages/about/about.html (last visited Aug. 4, 2015).

members' interests in a range of public policy and legal matters.[9] Many of NMACI's members engage in business and other activities in New Mexico that subject them to regulation under the CWA. NMACI submitted comments on the proposed rule.

14. Plaintiff the Arizona Rock Products Association ("ARPA") represents companies producing nearly all the aggregate materials in the State of Arizona. Its organizational purposes are to keep member companies informed of key environmental, safety, transportation, and governmental affairs, to educate members on the potential impact of current issues, and to represent its members' interests in public policy and legal matters.[10] Many of ARPA's members undertake activities in Arizona that subject them to regulation under the CWA. ARPA submitted comments on the proposed rule.

15. Plaintiff the Arizona Chamber of Commerce & Industry ("ACCI") is a statewide business advocate serving as the collective voice for Arizona business. ACCI's mission is the advancement of Arizona's competitive position in the global economy by advocating free-market policies that stimulate economic growth and prosperity for all Arizonans.[11] ACCI represents its members' interests in a range of public policy and legal matters. Many of its members engage in business and other activities in Arizona that subject them to regulation under the CWA. ACCI submitted comments on the proposed rule.

16. Plaintiff the New Mexico Farm & Livestock Bureau ("NMFLB") is a non-partisan, non-governmental organization of farm and ranch families organized for the purpose of analyzing agricultural problems and formulating action to achieve educational awareness, social awareness, and promote the national well-being.[12] Founded in 1917,

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[9] *See* Association of Commerce and Industry, *About ACI*, http://www.nmaci.org/about-aci.aspx (last visited Aug. 4, 2015).

[10] *See* Arizona Rock Products Association, *About ARPA*, http://www.azrockproducts.org/about-us/ (last visited Aug. 4, 2015).

[11] *See* Arizona Chamber of Commerce & Industry, *Mission Statement and Guiding Principles*, http://www.azchamber.com/about/mission.html (last visited Aug. 4, 2015).

[12] *See* New Mexico Farm & Livestock Bureau, *Our Mission*, http://www.nmflb.org/public/367/membership/our-mission (last visited Aug. 24, 2015).

NMFLB is New Mexico's oldest and largest agricultural organization, currently has more than 18,000 member families, and is an affiliate of the American Farm Bureau Federation (the world's largest private organization of agricultural producers). NMFLB submitted comments on the proposed rule.

17. Defendant United States Environmental Protection Agency is the agency of the United States government with primary responsibility for implementing the CWA. The EPA promulgated the Rule with the Corps.

18. Defendant Gina McCarthy is the Administrator of the EPA, acting in her official capacity. Administrator McCarthy signed the Rule on May 27, 2015.

19. Defendant United States Army Corps of Engineers is responsible for implementing certain aspects of the CWA. The Corps promulgated the Rule with the EPA.

20. Defendant Lieutenant General Thomas P. Bostock is the Chief of Engineers and Commanding General for the U.S. Army Corps of Engineers, acting in his official capacity.

21. Defendant Jo-Ellen Darcy is the Assistant Secretary of the Army for Civil Works, acting in her official capacity. Assistant Secretary Darcy signed the Rule on May 27, 2015.

STANDING

22. Numerous members of each of the Plaintiff Trade Associations are regulated entities under multiple provisions of the CWA, whose compliance obligations are created, or directly and immediately affected, and made more onerous, by the challenged Rule. To take one example, numerous members of AMA and each of the other Plaintiffs own or work on real property that includes land areas that are not currently subject to federal jurisdiction but which constitute "waters of the United States" on the face of the challenged Rule, requiring those members to comply with numerous provisions of the CWA, including but not limited to: the National Pollutant Discharge Elimination System ("NPDES") permit program established under CWA § 402, 33 U.S.C. § 1342; the CWA

§ 404 permit program, 33 U.S.C. § 1344; the Spill Prevention, Control and Countermeasures program established pursuant to CWA § 311, 33 U.S.C. § 1321; surface water quality standards established under CWA §§ 303(a), (b), and (c), 33 U.S.C. § 1313; and the impaired waters program under CWA § 303(d), *id.* Where land is subject to CWA jurisdiction, the operation, construction, and expansion of many business activities, including agriculture, logging, manufacturing, construction, real estate development, energy generation, and mining and mineral processing activities, to name a few, is typically regulated under each of these programs. The Rule's broad definition of "tributary" that applies to virtually all desert washes, substantially increases the number and types of land covered, increases the regulatory burdens on members of AMA and the other Plaintiffs, and will dramatically increase the complexity, expense, uncertainty, and time required to obtain permits for mining activities. The Rule may also effectively require members of each Plaintiff Trade Association to alter or avoid the kinds of economically productive activities discussed above.

23. Members of each Plaintiff Trade Association would have standing to sue in their own right because they are regulated entities under the CWA whose interests are directly and immediately affected by the Rule in the manner described above.

24. The interests that each Plaintiff seeks to protect through this lawsuit are germane to each organization's purpose of advocating for the interests of its members and promoting sound policy on issues affecting those members, including land-use and environmental regulation.

25. Neither the claims asserted nor the relief requested requires individual members' participation in this lawsuit.

26. The challenged Rule causes concrete, particularized, actual and imminent injuries to numerous members of each Plaintiff Trade Association that can be redressed by an order of this court vacating the Rule and enjoining the Agencies from enforcing it.

BACKGROUND

A. The Supreme Court Has Rejected Attempts to Expand CWA Jurisdiction to Include Ephemeral or Insubstantial Channels of Water

27. Congress passed the CWA in 1972 with the stated objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the CWA's principal provisions is 33 U.S.C. § 1311(a) which, with limited exceptions, prohibits "discharg[ing] . . . any pollutant," defined to include "any addition of any pollutant to navigable waters," *id.* § 1362(12), without an appropriate permit from EPA or the Corps. "Pollutant" is defined to include not only traditional contaminants but also solids such as "dredged spoil, . . . rock, [and] sand . . . ." *Id.* § 1362(6). CWA jurisdiction extends only to "navigable waters," defined to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

28. "For a century prior to the CWA, [the Supreme Court] had interpreted the phrase 'navigable waters of the United States' in the [CWA's] predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (plurality opinion). Although EPA and the Army Corps initially abided by this ordinary, common-sense meaning of the jurisdictional term, beginning in the 1970s, the Agencies "sought to extend the definition of 'the waters of the United States' to the outer limits of Congress's commerce power." *Id.* at 724.

29. The Supreme Court, however, has rejected the Agencies' expansive readings of "the waters of the United States." In so doing, the Court has explained that while the statutory term "the waters of the United States" reflects Congress's intent "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985), Congress plainly "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," *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("*SWANCC*").

30. *SWANCC* involved whether the so-called Migratory Bird Rule extended the Corps' jurisdiction under the CWA to "an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds." 531 U.S. at 162. Stating that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed [the Court's] reading of the CWA in *Riverside Bayview Homes*," the Court held that these "nonnavigable, isolated, intrastate waters," which did not "actually abu[t] on a navigable waterway," were not "waters of the United States." *SWANCC*, 531 U.S. at 167, 171.

31. In *Rapanos*, the Court considered whether four Michigan wetlands, located near ditches or man-made drains that eventually empty into traditional navigable waters, constitute "waters of the United States" within the meaning of the CWA. Prior to *Rapanos*, "the Corps [had] interpreted its own regulations to include 'ephemeral streams' and 'drainage ditches' as 'tributaries' that are part of the 'waters of the United States.'" 547 U.S. at 725 (citing 33 C.F.R. § 328.3(a)(5)). But that interpretation "extended 'the waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark." *Id.* A four-Justice plurality rejected that interpretation, concluding that "the waters of the United States" extends only to "relatively permanent, standing or flowing bodies of water," and not "merely intermittent or ephemeral flow[s]." *See Rapanos*, 547 U.S. at 732-34 (plurality opinion).

32. Justice Kennedy concurred in the judgment, concluding that jurisdiction may have been lacking in *Rapanos* because there needed to be a "significant nexus" between the wetlands or other non-navigable waters and navigable waters "in the traditional sense." *Id.* at 779 (Kennedy, J.). Such a nexus would be present, in Justice Kennedy's view, for wetlands that "either alone or in combination" with other, "similarly situated" waters in the region, "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" but not for features that have only a "speculative and insubstantial" connection to such waters. *Id.* at 779-80. Justice Kennedy rejected the proposition that mere "adjacency to tributaries, however remote and insubstantial," could bring wetlands within federal jurisdiction. *Id.* at

780. He criticized the Corps' then-existing definition of "tributary"—which required that a feature "feed[] into a traditional navigable water (or a tributary thereof) and possess[] an ordinary high-water mark"—as improperly allowing "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id.* at 781. In Justice Kennedy's view, the "breadth" of a standard based on the existence of an ordinary high water mark "precludes its adoption as the determinative measure of whether [certain lands] are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Id.* Adopting such a standard, Justice Kennedy observed, would improperly sweep into federal jurisdiction lands "little more related to navigable-in-fact waters than were the isolated ponds held to fall outside the Act's scope in *SWANCC*." *Id.* at 782.

B. The Challenged Rule Significantly and Impermissibly Expands the Scope of Federal Jurisdiction Over Lands in the Arid West

33. In response to these Supreme Court cases, the Agencies have promulgated the new Rule challenged in this lawsuit, which redefines the phrase, "waters of the United States."

34. In adopting this Rule, the Agencies purport to be implementing Justice Kennedy's "significant nexus" standard. But the Rule in fact gives the Agencies jurisdiction over all "tributaries," expansively defined, even where any arguable nexus between the "tributary" and other waters in the region is not only speculative and insubstantial, but in fact nonexistent, and even in the absence of plausible and relevant evidence of a significant effect on the "chemical, physical and biological integrity of other covered waters."

35. The new Rule separates waters into three jurisdictional categories under the CWA: waters that are always jurisdictional; waters "that require a case-specific significant nexus evaluation" to determine if they are jurisdictional; and waters always excluded from jurisdiction. 80 Fed. Reg. at 37,073; *see* 33 C.F.R. § 328.3(a). The Rule declares that "tributaries" are always subject to federal jurisdiction, even where their flows may be

intermittent or even "ephemeral"—that is, they "have flowing water only in response to precipitation events" and "are always above the water table." 80 Fed. Reg. at 37,076.

36. The Rule's declaration that tributaries with ephemeral flows are always jurisdictional is a significant departure from the Agencies' own prior guidance, which applied a case-specific significant nexus analysis to determine if particular tributaries had the requisite significant nexus to be deemed jurisdictional under the CWA. *See* Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (2008). The new Rule, however, takes the position that case-specific analysis is no longer necessary "because the science confirms that [tributaries] have a significant nexus to traditional navigable waters . . . ." 80 Fed. Reg. at 37,058. Thus, the Rule declares as jurisdictional any feature that qualifies as a tributary, whether perennial, intermittent, or ephemeral in nature.

37. The Rule defines tributaries to include any water that (A) "contributes flow" "directly or through another water or waters to a traditional navigable water, interstate water, or the territorial seas," and (B) is characterized by the presence of physical indicators of "a bed and banks and an ordinary high water mark." 80 Fed. Reg. at 37,105-06, 37,107, 37,109, 37,111, 37,113, 37,115, 37,117, 37,119, 37120-21, 37,122-23, 37,124, 37,126. As to the first condition, the Rule does not specify any required amount, volume, or duration of "flow"—thus, even a one-time, minute amount of flow would suffice to meet the Rule.

38. As to the second condition, the Rule's Preamble explains that physical indicators of a bed and banks and ordinary high water mark ("OHWM") may be detected not only by "direct field observation," but also by tools such as "remote sensing sources" or "mapping information," including "USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NCRS) Soil Surveys, and State or local stream maps," "aerial photographs, and light detection and ranging (also known as LIDAR) data," as well as "desktop tools" for "hydrologic

estimation of a discharge sufficient to create an [OHWM], such as a regional regression analysis or hydrologic modeling." 80 Fed. Reg. at 37,076-77. Indeed, the Preamble states that regulators can use these desktop computer models "independently to infer" jurisdiction over a tributary without "a field visit" or where "physical characteristics" of bed and banks and an OHWM "are absent in the field." *Id.* at 37,077. In other words, even though the existence on an expanse of land of a drainage with features including a bed, banks and OHWM may be so *de minimis* as to be invisible to the naked eye, the Agencies may still determine that such features exist and thus constitute "waters of the United States," without regard to any significant nexus to traditionally navigable waters. With respect to geographical features in the arid West, the new Rule simply adds nebulous concepts of "bed" and "bank" to an otherwise vague standard that Justice Kennedy already rejected in *Rapanos*. Worse, the new Rule undermines even those vague concepts by stating that they do not need to exist if a federal bureaucrat decides to "infer" their existence.

39. Such a limitless definition of tributary is self-evidently overbroad. Moreover, it does not cure the defects in the earlier definition of tributary that Justice Kennedy rejected in *Rapanos* for failing to require a significant nexus. At the time of *Rapanos*, the Corps "deem[ed] a water a tributary if it fe[d] into a traditional navigable water (or a tributary thereof) and possesse[d] an ordinary high-water mark." *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment). That standard, Justice Kennedy said, "provides no assurance" of the requisite nexus. *Id.*

40. At the same time, the new Rule expressly exempts gullies, rills, and other "ephemeral features" from CWA jurisdiction, with this significant catch: such features are only exempt from jurisdiction if they "do not meet the definition of tributary." *See* 80 Fed. Reg. at 37,105, 37,107, 37,109, 37,111, 37,112, 37,114, 37,116, 37,118, 37,120, 37,122, 37,124, 37,126. But this is an exemption without meaning in the arid West, because such features will very likely meet the broad definition of "tributary" discussed above.

41. Incredibly, the Agencies take the position that requiring tributaries to have a bed, banks, and OHWM properly avoids jurisdictional overreach, limiting the CWA to features that have flows of sufficient volume, frequency, and duration to have a significant nexus to downstream waters. *Id.* at 37,068, 37,076.

42. Yet as numerous parties informed the Agencies during the rulemaking process, this rationale simply does not hold true categorically, and certainly not in the arid West. Due to the infrequency of rainfall events and the highly erodible nature of desert soils, dry land features with a bed, banks, and OHWM, such as desert washes and arroyos, are ubiquitous, can be formed by a single rainfall event, and persist for decades, if not centuries. *See* Comment Submitted by William E. Cobb, Vice President, Freeport-McMoran Inc. (Nov. 12, 2014) at 5, www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-14135 (hereinafter "Freeport Comments"); Comment Submitted by Kelly Norton, President, Arizona Mining Association (Nov. 13, 2014) at 8, 9, www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-13951 (hereinafter "AMA Comments"). Thus, in the arid West, the Rule provides no rational or principled basis by which the Agencies or regulated parties could reasonably distinguish between tributaries subject to federal jurisdiction under the new Rule, on the one hand, and ephemeral features that are exempt by that Rule, on the other.

43. Moreover, the Rule creates a circular "Catch-22": ephemeral features are exempt from CWA jurisdiction only if they "do not meet the definition of tributary," but due to the unique nature of the arid West, virtually all ephemeral features may be found to meet the definition of tributary. Furthermore, in the arid West, even if water flows in upstream channels, such flows are often lost to infiltration long before reaching a traditional navigable water. Thus, it is erroneous and an abuse of discretion to conclude—as the Agencies did here—that a dry wash that can be physically traced through the desert provides evidence of a *significant* physical nexus to navigable waters, or "significantly affect[s]" the chemical, physical, and biological integrity of other covered waters more

readily understood as "navigable." Rather, these features have at most a "speculative and . . . insubstantial" connection to such waters. *See* Freeport Comments at 5-6.

44. As a result, the Rule's assertion of jurisdiction over all "tributaries" impermissibly expands federal jurisdiction in the arid West to features that are ubiquitous in, and in fact *define*, the landscape of the arid West, and whose connection to traditionally jurisdictional waters is at best speculative and insubstantial, in clear violation of the CWA's statutory limits on federal jurisdiction, as construed in either the plurality or Justice Kennedy's opinions in *Rapanos*.

45. As the plurality opinion noted in *Rapanos*, the CWA specifically states that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 547 U.S. at 722 (plurality opinion) (quoting 33 U.S.C. § 1251(b)). Interpreting "the waters of the United States" to include even "intermittent" waters would be inconsistent with the CWA's stated Congressional policy. *Id.* at 737 (plurality opinion).

46. Just as the plurality opinion explained in *Rapanos*, the "expansive theory" advanced in the new Rule, rather than "preserv[ing] the primary rights and responsibilities of the States," would bring "virtually all plan[ning of] the development and use . . . of land and water resources by the States under federal control." *Id.* (plurality opinion) (internal quotation marks omitted). As in *Rapanos*, "[i]t is therefore an unlikely reading of the phrase 'the waters of the United States.'" *Id.* (plurality opinion).

47. Many of the Plaintiffs here, including AMA and several of its members, filed comments on the Agencies' proposed Rule explaining, among other things, that the proposed definition of tributary (a) would far exceed permissible jurisdiction under the CWA, as illustrated by its defects in the arid West and (b) was unsupported by the scientific and other record evidence. *See, e.g.*, AMA Comments at 7; Freeport Comments

at 2; Comment Submitted by Krishna Parameswaran, Director, Environmental Services & Compliance Assurance, Environmental Affairs Department, ASARCO LLC (Nov. 13, 2014) at 2, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-19604 (hereinafter "ASARCO Comments"); *see also, e.g.*, Comment Submitted by Kevin Rogers, President, Arizona Farm Bureau Federation (Nov. 14, 2014) at 2, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-15064; Comment Submitted by Steve Trussell, Executive Director, Arizona Rock Products Association, (Nov. 10, 2014) at 4-6, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-17055; Comment Submitted by Mike Bowen, Executive Director, New Mexico Mining Association (Nov. 13, 2014) at 1-2, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-15158. These comments explained that in the arid West, a bed, banks, and OHWM are not necessarily indicia of substantial or ordinary flow. *See* AMA Comments at 7-8, 9-11; Freeport Comments at 5-6. To the contrary, the comments noted that the Corps' own studies of the arid West conclude that, in such a region, "ordinary" high water marks are the result of extraordinary events. *Id.*

48. The comments further documented that the Agencies had not provided any workable method for distinguishing between what the Agencies claimed to be jurisdictional ephemeral tributaries, and exempt erosional features. *See* AMA Comments at 13; Freeport Comments at 7-8. In addition, the comments provided data and expert analysis demonstrating that the single watershed in the arid West that the challenged Rule examines in depth, and the Science Report on which the Rule relies heavily, are not generally representative of river systems in the arid West. *See* Martin W. Doyle and Jason P. Julian, Technical Comments on the Applicability of the Proposed Rule of Jurisdictional Waters Determination in Arid Landscapes at 14-15, www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-14135. Indeed, the Agencies' proposed Rule explicitly acknowledged that it relied on the San Pedro river

system in the arid West because it is "heavily studied." 79 Fed. Reg. 22,188, 22,232 (Apr. 21, 2014). Neither the proposed nor final versions of the Rule provides a reasonable explanation of why sweeping new assertions of jurisdiction across the entire arid West can be justified based on data from a single watershed that is not representative of the areas over which jurisdiction was being asserted.

49. The administrative record demonstrates the numerous respects in which the San Pedro system is not representative of the kinds of arid conveyance features that the new Rule deems "tributaries." To begin with, the relevant focus when defining "tributary" is not mainstem rivers themselves, but rather conveyance features at the extreme distal ends of a channel network. What is more, the mainstem San Pedro River experiences water flow some 261 days a year, in sharp contrast to more typical arid rivers such as Arizona's Santa Cruz, which has a median annual flow of zero cubic feet per second, and experiences flow only some 39 days per year—and the tributaries of which have even rarer flows. Doyle & Julian, *supra*, at 4, 15. As record evidence indicates, the San Pedro's Walnut Gulch tributary generates unusually large runoff, due to its gravelly soil composition and the existence of a calcite layer which prevents water from passing through to greater depths. By contrast, typical arid upstream channels like those associated with the Santa Cruz River, whose water table is several hundred feet below the channel bed, "behave more like deep sandboxes than streams." *Id.* at 11-12, 14, 15. Although commenters submitted technical data and analysis demonstrating the San Pedro system's unrepresentative nature, EPA simply ignored them.

50. By contrast to this sweepingly over-inclusive approach to defining "tributary," paragraph (b) of the new Rule completely and arbitrarily excludes "non-wetland swales" and "lawfully constructed grassed waterways" from jurisdiction under the CWA, even if they *do* meet the definition of a tributary. According to the EPA, a "swale" is a "nonchannelized, shallow trough-like depression that carries water mainly during rainstorms or snowmelt." EPA, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence* (Jan. 2015) at A-13,

cpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414 (hereinafter "EPA Science Report"). Under the Rule, then, such a "shallow trough-like depression" is not a covered "tributary," even if it does regularly contribute flow to a traditionally navigable water and has bed, banks, and an OHWM, while an ephemeral "gully" or "rill" may be a covered tributary, even if it only once contributed an insignificant flow—or *never* contributed *any* flow—to a traditionally navigable water.

51. Such patent flaws effectively preclude "consistent application," *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment), of the new Rule, and sweep in vast expanses of previously unregulated desert, as "waters of the United States," even if the land in question only has water present on the rare occasions when it rains, and visible indicia of bed, banks and OHWM "are absent in the field."

52. Despite these glaring defects, the Agencies finalized a definition of tributary that far exceeds the permissible scope of their jurisdiction in the arid West. In so doing, the Agencies relied upon the EPA Science Report and a single case study, despite relevant and persuasive comments from AMA and its member companies explaining that this data was insufficient to demonstrate the required significant nexus for all arid West "tributaries." *See* EPA Science Report at B-37. The Agencies did not meaningfully address these comments in the Rule, its Preamble, the separate response to comments documents, or anywhere else in the administrative record. *See* Clean Water Rule Comment Compendium Topic 8: Tributaries at 506-08, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ow-2011-0880-20872; Clean Water Comment Compendium Topic 9: Comments on Scientific Evidence Supporting Rule at 113, 191, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ow-2011-0880-20872. Therefore, the Agencies have failed to provide an adequately reasoned, scientifically defensible justification for their decision to declare large swaths of the desert to be "waters of the United States."

CLAIMS FOR RELIEF

First Cause of Action: Violation of the Commerce Clause of the United States Constitution

53. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint.

54. The Rule would improperly extend Congressional authority beyond the limits of the Commerce Clause because, among other things, it asserts jurisdiction over all features that fall within the Rule's definition of "tributary," even those that are not channels of interstate commerce and otherwise have no connection to, and do not substantially affect, interstate commerce. U.S. CONST. art. I, sec. 8, cl. 3.

Second Cause of Action: Violation of 5 U.S.C. § 706(2)(A)

55. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint.

56. The Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" in violation of 5 U.S.C. § 706(2)(A) because, among other things, the Rule is inconsistent with the plain language of the CWA, unsupported by law, and unsupported by record evidence before the Agencies.

Third Cause of Action: Violation of 5 U.S.C. § 706(2)(B)

57. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint.

58. The Rule is "contrary to constitutional right, power, privilege or immunity" in violation of 5 U.S.C. § 706(2)(B) because the Rule exceeds the Agencies' authority under the Constitution of the United States, including the Commerce Clause of Article I, Section 8.

Fourth Cause of Action: Violation of 5 U.S.C. § 706(2)(C)

59. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint.

60. The Rule was promulgated "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" in violation of 5 U.S.C. § 706(2)(C) because its definition of "waters of the United States" exceeds Defendants' statutory authority under the CWA.

Fifth Cause of Action: Violation of 5 U.S.C. § 706(2)(D)

61. Plaintiffs incorporate by reference the preceding paragraphs of this Complaint.

62. The Rule was promulgated "without observance of procedure required by law" because, among other things, the Agencies failed to meaningfully respond to comments received regarding the Rule's defects in the arid West.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request this Court:

(1) declare that the Rule is unlawful because it exceeds the government's authority under the Commerce Clause and is otherwise contrary to Constitutional rights and powers;

(2) declare that the Rule is unlawful because its promulgation was arbitrary, capricious, an abuse of discretion, and not in accordance with law;

(3) declare that the Rule is unlawful because it is inconsistent with and in excess of Defendants' authority under the CWA;

(4) declare that the Rule is unlawful because it was promulgated without the observance of procedure required by law;

(5) enter an order vacating the Rule;

(6) enjoin Defendants from implementing, applying, or enforcing the rule;

(7) award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys' fees as may be permitted by law; and

(8) grant Plaintiffs such additional relief as the Court may deem just, proper, and necessary.

RESPECTFULLY submitted this 1st day of September, 2015.

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