

**Case No. 15-3751 (and related cases: 15-3799; 15-3817; 15-3820; 15-3822; 15-3823; 15-3831; 15-3837; 15-3839; 15-3850; 15-3853; 15-3858; 15-3885; 15-3887; 15-3948; 15-4159; 15-4162; 15-4188; 15-4211; 15-4234; 15-4305; 15-4404)**

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

<b>MURRAY ENERGY CORPORATION, et al.</b>	)	<b>In Re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, published June 29, 2015 (MCP. No 135)</b>
<b>Petitioners,</b>	)	
<b>v.</b>	)	
<b>U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.</b>	)	<b>On petition for review from the Environmental Protection Agency and the U.S. Army Corps of Engineer</b>
<b>Respondents.</b>	)	
	)	
	)	

---

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

---

Charles C. Caldart  
National Environmental Law Center  
1402 3rd Avenue, Suite 618  
Seattle, WA 98101

Heather A. Govern  
National Environmental Law Center  
294 Washington Street, Suite 500  
Boston, MA 02108

John Rumpler  
Environment America  
294 Washington Street, Suite 500  
Boston, MA 02108

*ATTORNEYS FOR AMICI CURIAE*

Date: January 19, 2017

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i-ii
TABLE OF AUTHORITIES .....	iii-iv
IDENTITY, INTEREST, AND SOURCE OF AUTHORITY OF <i>AMICI CURIAE</i> .....	v
ARGUMENT .....	1
I.    THE RULE AND ITS PROTECTIONS ARE VITAL TO SMALL BUSINESSES.....	1
A. The Rule Benefits Famers Across the United States.....	1
B. The Rule Benefits Outdoor Sports and Recreation Businesses Across Across the United States. ....	3
C. The Rule Benefits Craft Breweries Across the United States. ....	7
II.   THE RULE IS NOT UNCONSTITUTIONALLY VAGUE AND SATISFIES PRINCIPLES OF DUE PROCESS.....	10
A. The Rule Provides Ordinary Persons With a Reasonable Opportunity to Understand Which Waters are Subject to Clean Water Act Jurisdiction. ....	11
B. The Rule Provides Clear Standards and Guidelines that Discourage Arbitrary or Discriminatory Enforcement of the Clean Water Act....	15
1) The Rule’s Definition of Tributary is Not Vague and Includes Bright Line Standards.....	16
2) The Rule’s Inclusion of Certain Types of Ditches is Not Vague.....	19
3) The Rule’s Case-Specific Analysis for Determining “Significant Nexus” is Not Vague.....	22
III.  THE AGENCIES COMPLIED WITH THE REGULATORY FLEXIBILITY ACT.....	24

A. Respondents Provided Two Bases for the RFA Section 605(b) Certification.....	23
1) First, the Rule is a definitional change that imposes no direct costs.....	24
2) Second, The Rule Narrows the Scope of CWA Jurisdiction.	24
i. Respondents chose a reasonable baseline for comparison.....	25
ii. EPA’s Economic Analysis neither considered, nor concluded, that the Rule results in an overall expansion of CWA jurisdiction. ....	26
B. Petitioners’ Examples of Concerned Small Business Owners are Misleading.....	27
CONCLUSION.....	28
ADDENDUM. LIST OF SMALL BUSINESS AMICI .....	29

## TABLE OF AUTHORITIES

### Cases

<i>Am. Trucking Ass'n v. EPA</i> , 175 F.3d 1027 (D.C. Cir. 1999) .....	14
<i>Boyce Motor Lines v. United States</i> , 342 U.S. 337 (1952) .....	13
<i>Cement Kiln Recycling Coalition v. EPA</i> , 493 F.3d 207 (D.C. Cir. 2007) .....	16, 24
<i>Coates v. City of Cincinnati</i> , 402 U.S. 611 (1971) .....	12
<i>FCC v. Fox Television Stations, Inc.</i> , 132 S.Ct. 2307 (2012) .....	11
<i>Freeman United Coal Min. Co. v. Federal Mine Safety and Health Review Com'n</i> , 108 F.3d 358 (D.C. Cir. 1997) .....	11
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972) .....	12
<i>Green Party of Tennessee v. Hargett</i> , 700 F.3d 816 (6th Cir. 2012) .....	11
<i>Hill v. Colorado</i> , 530 U.S. 703 (2000) .....	11
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010) .....	13
<i>In re U.S. Dep't of Def &amp; EPA Final Rule.</i> , 817 F.3d 261 (6th Cir. 2016) .....	24
<i>Johnson v. United States</i> , 135 S.Ct. 2551, (2015) .....	15
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983) .....	15
<i>Michigan v. EPA</i> , 213 F.3d 663 (D.C. Cir. 2000) .....	24
<i>Mid-Tex Coop., Inc. v. Fed. Energy Regulatory Comm'n</i> , 773 F.2d 327 (1985) ...	24
<i>Nat'l Oilseed Processors Ass'n v. Occupational Safety &amp; Health Admin.</i> , 769 F.3d 1173 (D.C. Cir. 2014) .....	14

<i>Pacific Ranger, LLC v. Pritzker</i> , 2016 WL 5676276 (D.D.C. Sept. 30, 2016) .....	15
<i>Posters 'N' Things, Ltd. v. United States</i> , 511 U.S. 513 (1994).....	12
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006).....	13, 25
<i>Rybachek v. EPA</i> , 904 F.2d 1276 (9th Cir. 1990).....	27
<i>Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs</i> , 531 U.S. 159 (2001) .....	25
<i>Southern Forest Watch, Inc. v. Jewell</i> , 817 F.3d 965 (6th Cir. 2016) .....	26
<i>Stupak-Thrall v. United States</i> , 89 F.3d 1269 (6th Cir. 1996).....	28
<i>U. S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO</i> , 413 U.S. 548 (1973) .....	12
<i>United States Telecom Ass'n v. Fed. Commc'ns Comm'n</i> , 825 F.3d 674 (D.C. Cir. 2016).....	12
<i>United States v. Akzo Coatings of Am., Inc.</i> , 949 F.2d 1409 (6th Cir. 1991) .....	12
<i>United States v. Williams</i> , 553 U.S. 285 (2008) .....	11
<b>Statutes</b>	
Federal Water Pollution Control Act, 33 U.S.C. § 1251 <i>et seq.</i> .....	23

**IDENTITY, INTEREST, AND SOURCE OF AUTHORITY  
OF *AMICI CURIAE***

*Amici curiae* are 234 small business founders, owners, or operators who depend on clean water for the success of their businesses (hereinafter “*Amici*”). They are organic farmers, outdoor and recreation outfitters, guides, and retailers, craft brewers, coffee shop owners, wine makers, florists, and operators of camping resorts. A list of *Amici* is attached as an Addendum hereto. In this case involving the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (“Clean Water Act” or “act”), *Amici* have strong interests in describing their support for upholding the final Clean Water Rule defining the term “waters of the United States.” 80 Fed. Reg. 37,054 (June 29, 2015). The interests of *Amici* are further set forth in the accompanying Motion for Leave to File, and the specific interests of several of the *Amici* are set forth in detail in Section I of this brief. *Amici* are authorized to file this brief pursuant to Federal Rules of Appellate Procedure Rule (“FRAP”) 29(a) and the accompanying Motion for Leave to File.<sup>1</sup>

---

<sup>1</sup> In accordance with FRAP 29(a)(4)(E), *Amici* confirm that no party’s counsel authored this amicus brief in whole or in part, no party or party’s counsel contributed money to fund this amicus brief, and no outside party contributed money that was intended to fund the preparation or submission of this brief.

## ARGUMENT

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

All 234 of the small business *amici* strongly support the Clean Water Rule and believe that its protection of intermittent and ephemeral waterways is important to their businesses and livelihood. The following examples, drawn from the experiences of some of the *amici*, are representative of this support of, and interest in, the Rule.

#### A. The Rule Benefits Small Farmers Across the United States.

Cheyenne Zigmund<sup>2</sup> is the co-owner of the Root N' Roost Farm in Livingston Manor, New York, an all-natural, organic, human-powered, human-scale permaculture-based farm. The farm is in the Southern Catskill Mountain Region, where several streams have been dammed to create reservoirs. A perpetual priority for Cheyenne, who runs the farm with her husband, is having a reliable source of clean water for their plants and livestock. Most of their water comes from an unnamed seasonal creek. The seasonal creek feeds a larger creek, which feeds into Swan Lake. Cheyenne's farm is also surrounded by oil and gas operations that can lead to the discharge of damaging chemicals into small waterways. Supplies for her farm depend on clean water from these waterways,

---

<sup>2</sup> The persons discussed in this section are all named small business *amici* on this brief.

and the oil and gas facility pollution can reduce the quality and quantity of certain supplies, like feed for her livestock. Cheyenne strongly supports the Rule's clear protections for small waters such as her creek; clean water undoubtedly affects the health of her livestock and crops, and thus her farm's bottom line.

Vicki Westerhoff grows organic vegetables and fruit at The Genesis Growers Farm in St. Anne, Illinois. Her farm provides fresh organic food through a community supported agriculture ("CSA") program and supplies local farmer's markets. Vicki strives to keep her farm's soil healthy, so she can grow the most nutritious vegetables possible. Clean water is essential to Vicki's farm, especially since the use of polluted water could prevent her vegetables from meeting the organic food standard on which her business depends. Genesis Growers obtain their water from an aquifer that is also used by many other people in the surrounding community, including other organic farmers. The aquifer is fed, in part, by small surface waters. Vicki supports the Rule's protections because she and those in the community depend on clean water to survive in the competitive small farming industry.

Amy Hansen owns the Comeback Farm, a 44-acre certified organic fruit and vegetable farm located in Asbury, New Jersey, in Hunterdon County. She and her husband preserved the farm through the State Agricultural Development Committee, as well as through an easement. Today, their large farm in the



Musconetcong River Valley is surrounded by many preserved farms and includes an orchard with peaches, apples, pears, and other fruits that is becoming more productive each year. Amy and her husband also grow kale, mustard, arugula, tomatoes, basil, peppers, onions, leeks, garlic, and flowers.

The farm's orchard and healthy greens harvest would not be so abundant if they did not have clean water. Amy believes the Clean Water Act, and the Rule and the definitions it provides, are incredibly beneficial tools to protect our Nation's waters from pollution. If the small streams that feed her farm's aquifers became polluted, the farm's soil, their crops, and their day-to-day health and livelihood would be negatively impacted, and this would have a significant negative impact on their children's future as well.

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

Jeff Garnsey is the owner of Classic Island Cruises, a recreation and fishing charter boat company in Clayton, New York, along the St. Lawrence River. His family has been chartering fishing expeditions for seven generations. Jeff and his family have a vital stake in the Clean Water Rule, because their business depends on the health and integrity of the streams, tributaries, and wetlands in the St. Lawrence River watershed. As he puts it, "These waters are, quite simply, the pumps through which the lifeblood of the river flows." The river has lost thousands of acres of wetlands over the past century, and the remaining wetlands

are vital spawning grounds for fish. These wetlands are so important to Jeff's business that he is not only a business owner, but also a volunteer board president of Save the River, which works to restore and protect the flow of the St. Lawrence River. Similarly, the smallest streams in the watershed are vital to Jeff's business, as many of them are spawning areas for grey eels, a critical part of the ecosystem. Tributaries of the St. Lawrence are also critical habitats for other fish, such as walleye. Jeff's business depends on the Rule's protections for the streams, wetlands, and tributaries in the St. Lawrence watershed because without fish, Classic Island Cruises would cease to have customers.

The owner of Not a Clue Adventures in Tampa, Jeanene Arrington, leads people on camping, kayaking, and fishing expeditions throughout Florida, "teaching people the value of being outdoors." Her trips are only as good as the water is, and some of her trips on Florida rivers have been marred by the ugly overpopulation of algae caused by upstream pollution. The Rule's jurisdiction over intermittent streams and wetlands that flow into the Suwannee River and affect the biological integrity of the Floridan aquifer will have a direct impact on her business. Because it protects the upstream waters that flow into Florida's rivers and aquifers, Jeanene believes the Rule to small business owners, such as herself, who dedicate their lives to bringing people in touch with nature and the Nation's waters.

Lloyd Vogel is the owner and founder of Big Outdoors, a retailer of outdoor goods in Saint Paul, Minnesota. Lloyd's business "exists to help people get outside," and equips travelers for the trails and waterways that he hopes will lead them toward a deeper understand of self, of nature, and the relationship between humans and the outdoors. Lloyd's duty, as a member of the outdoor industry, is to work to protect the environment and the well-being of the places being explored. Lloyd believes that without the Rule's jurisdiction over streams, tributaries, and other small waterways, the contamination of natural spaces, such as Minnesota's Boundary Waters, would likely increase and could eventually lead to the destruction of his industry. A strong Clean Water Rule prevents irreparable damage to the places our country holds most dear. Clean waterways enable citizens to experience and appreciate the waters safely, and lead to more vibrant growth of all the surrounding natural space for everyone's enjoyment.

John Hannum is the owner of American Canoe Adventures in White Springs, Florida, which John's father founded in 1995. The Hannum family arranges canoe and kayak trips for their clients, sells river gear, and provides related repair services. Their business encompasses the entire 260 miles of the Suwannee River, from Georgia to the Gulf of Mexico. John takes an active role in keeping the Suwannee River clean by organizing volunteer clean-ups, supplying volunteers with boats, and picking up trash along the riverbank. John is concerned

about the contamination of the Withlacoochee River (which flows into the Suwannee River), especially from the type of pollution that leads to swimming bans. Swimming bans have a significant negative effect on John's business. John supports the Rule because contamination from pipeline construction is currently taking place on small waterways and wetlands in Florida that would fall within the Rule's protected waters. He wants to see continued regulation of those waters so his family's business thrives for another 22 years.

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

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

Sondra Morlan of Rock-n-Row Adventures on the Iowa River and Jane Koschak of River Point Resort in Ely, Minnesota, own resorts whose paramount attraction is the opportunity to recreate on local rivers. As self-named “Clean Water Ambassadors,” they are strongly in favor of the Rule for both their personal and business interests. Clean water is essential for their businesses since their customers’ primary purpose in visiting their resorts is to enjoy the scenery, the river, its ecosystem, and the associated wildlife.

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

According to the Brewers Association, out of the rapidly growing number of operating breweries in the U.S. (4,269 in 2015), 99 percent are small and independent breweries. Michael Rose co-owns and operates one of those breweries, the Manayunk Brewing Company. Located in the Manayunk neighborhood of Philadelphia, the brewery depends on clean water. All its beer is

brewed using Philadelphia municipal water, which is drawn from the Schuylkill and Delaware Rivers. The watershed of the Schuylkill River – the smaller of the two – spans twelve counties and draws from dozens of ephemeral streams and non-navigable waterways. The Delaware River is larger and draws water from streams in three states by the time it reaches Philadelphia. Without the assurance that they are covered by the Clean Water Rule, the small and ephemeral streams that comprise the headwaters of these rivers are vulnerable, thus jeopardizing the source water for businesses like Rose's. To produce flavorful, safe beer Manayunk Brewing Company needs to be able to trust that the waterways feeding the municipal water sources fall under the protection of the Clean Water Act. Were there to be a contamination advisory of Philadelphia's drinking water, the brewery would need to stop production, would be unable to supply the many buyers who depend on its products, and would suffer considerable financial losses.

Additionally, Manayunk Brewing Company sits along the banks of Schuylkill River in a historic, low-lying neighborhood. The Schuylkill has seen an increase in flooding in recent years, which is projected to increase as the region experiences more frequent extreme weather events. The restaurant and brewery suffered extensive damage and was closed for weeks following flooding in 2014, losing revenue and requiring investment in repairs. Flooding along this part of the river is worsened by development along headwater streams and wetlands farther up

in the watershed, which increases run-off and compromises the watershed's ability to absorb rain. Guaranteeing that these small waterways have the same protection that the Schuylkill and Delaware Rivers have is critical to not only ensuring the quality of water, but to providing valuable water retention that keeps down-river businesses like the Manayunk Brewing Company in operation.

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

Jenn Vervier works with the New Belgium Brewing Company in Fort Collins, Colorado. Since water makes up over 90% of New Belgium's beer, clean and abundant water supplies are critical to the brewery's business. The company sees itself as a steward of the rivers in the communities in which they brew their

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

Larry Bennett, a member of the management group of Brewery Ommegang in Cooperstown, New York, makes business decisions with an environmental consciousness. Clean water is extremely important to Ommegang; the brewery itself stands only 300 feet from the Susquehanna River. The company wants to prevent any pollution to the Susquehanna or the streams and tributaries that flow into the Susquehanna, and thus supports the Clean Water Rule's inclusion of these waters within its coverage. Ommegang also supports the Rule's clear delineations of which waters are protected and which are exempt, since small businesses need comprehensible, straightforward regulations so they can continue doing the work they love.

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

A statute or regulation may be deemed impermissibly vague under the Due Process Clause only if it: 1) "fails to provide people of ordinary intelligence a



reasonable opportunity to understand what conduct it prohibits;” or 2) “authorizes or ...encourages arbitrary and discriminatory enforcement.” *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012) (internal quotations omitted)); *see Hill v. Colorado*, 530 U.S. 703, 732 (2000). “[R]egulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.” *Freeman United Coal Min. Co. v. Federal Mine Safety and Health Review Com’n*, 108 F.3d 358, 362 (D.C. Cir. 1997). Elimination of all uncertainty is not the benchmark, as “perfect clarity and precise guidance have never been required . . .” *United States v. Williams*, 553 U.S. 285, 304 (2008) (internal quotations omitted); *Green Party of Tennessee v. Hargett*, 700 F.3d 816, 825 (6th Cir. 2012) (holding that a state statute, “although certainly not a model of clarity,” was not unconstitutionally vague). The Clean Water Rule satisfies these standards of due process because it provides sufficient notice to potentially regulated entities and establishes clear standards designed to prevent arbitrary or discriminatory enforcement.

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

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

In fact, the Rule provides considerably more clarity to regulated entities on this topic than at any time since the modern Clean Water Act was passed in 1972,

with definitions that are more understandable than the previous definitions adopted in 1977, *see* 42 Fed. Reg. 37144 (July 19, 1977), and 1986, 51 Fed. Reg. 41,206 (Nov. 13, 1986). Additionally, the Clean Water Act’s “waters of the United States” language itself has never been found void for vagueness, *see Rapanos v. United States*, 547 U.S. 715 (2006), and the Clean Water Rule clarifies and narrows this language consistent with Supreme Court precedent. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Supreme Court held that a statute was not unconstitutionally vague, in part, because “Congress . . . took care to add narrowing definitions to the . . . statute over time,” which “increased the clarity of the statute's terms.” *Id.* at 21. Similarly, the narrowing of the definition of “waters of the United States” over an extended period of time has provided potentially regulated entities extensive notice of the Clean Water Act’s jurisdictional reach.

Further, the Rule’s final language was adopted only after the Agencies received – and responded to – over one million public comments. *Clean Water Rule Response to Comments – Topic 1: General Comments* at 1. This process provided extensive notice of the Rule’s content to potentially regulated entities. In *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952), the Supreme Court held that an Interstate Commerce Commission regulation mandating that drivers transporting dangerous materials avoid driving in certain areas “so far as

practicable” was not unconstitutionally vague, in part, because the regulation was “adopted only after more than three years of study and a number of drafts,” including extensive participation by the regulated industry. *Id.* at 341-42 (“The trucking industry participated extensively in this process, making suggestions relating to drafts . . . submitted to carriers and their organizations, and taking part in several hearings.”).

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

---

<sup>3</sup> See *Documents Related to the Clean Water Rule*, <https://www.epa.gov/cleanwaterrule/documents-related-clean-water-rule> (last visited Jan. 19, 10:58 AM).

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

In order to satisfy due process, a provision must not be “so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015). However, “the fact that a regulation requires the exercise of judgment, or that there is room for disagreement about the existence of a necessary factual predicate, is not a proper grounds for a vagueness challenge.” *Pacific Ranger, LLC v. Pritzker*, 2016 WL 5676276, at \*14 (D.D.C. Sept. 30, 2016). The Supreme Court has suggested that providing “minimal guidelines” adequate to prevent arbitrary enforcement is the key to compliance with the vagueness doctrine. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal citation omitted). Here, rather than encouraging a “standardless sweep” of potentially regulated entities, *id.* (internal citation omitted), the Clean Water Rule provides clear and limited definitional scope to guide the Agencies’ enforcement—defining waters that are jurisdictional, waters that are not jurisdictional, and waters that are subject to case-by-case nexus determinations—without the use of subjective or ambiguous terms. The Rule delineates precise standards and guidelines designed to preclude arbitrary enforcement of the Clean Water Act.<sup>4</sup>

---

<sup>4</sup> Additionally, this pre-enforcement facial challenge to the Clean Water Rule includes no allegation of evidence of discriminatory enforcement actions. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503

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

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

(2015). The ordinary high water mark (“OHWM”) is, in turn, defined as:

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

*Id.* § 328.3(e).

The State, Business, and Municipality Petitioners take issue with the portion of this definition allowing agency staff to determine the existence of an OHWM using "other appropriate means that consider the characteristics of the surrounding areas." *Id.* But courts have upheld very similar provisions as not impermissibly vague and not likely to cause arbitrary enforcement. For example, in *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207 (D.C. Cir. 2007), a trade association

---

(1982) (finding an ordinance was not vague, in part, because “no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner” and because “[t]he language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness.”).

challenged an EPA regulation governing the permitting process for facilities that burn hazardous waste as fuel. The regulation laid out eight specific criteria for consideration, followed by a ninth criterion allowing the agency to consider “[s]uch other factors as may be appropriate.” *Id.* at 221. The D.C. Circuit held that “[a]lthough the challenged regulation may ‘not provide as much detail as petitioner wishes’” it was not impermissibly vague. *Id.* at 221-222 (internal citation and quotations omitted). The Court held that the “as may be appropriate” criterion, while “general,” did not “render the regulation standardless,” as the types of information specified in the preceding eight criteria provided sufficient context to help define the scope of the ninth. *Id.* at 221. Similarly, the “other appropriate means” indicator in the definition of OHWM is preceded by several enumerated physical characteristics that are sufficiently specific and familiar to guide petitioners and other entities in complying with the Rule. The Corps has also issued technical assistance documents to further standardize OHWM delineations for citizens and regulators.<sup>5</sup>

---

<sup>5</sup> See, e.g., Robert W. Lichvar et al., U.S. Army Corps of Eng’rs, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual*. ERDC/CRREL TR-08-12 (2008); Matthew K. Mersel et al., U.S. Army Corps of Eng’rs, *A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States* ERDC/CRREL TR-14-13 (2014).

The Rule also makes clear that “breaks” in a waterway do not, in and of themselves, prevent the waterway from being a “tributary.” The Rule provides that tributary waters with “constructed breaks (such as bridges, culverts, pipes, or dams)” or “more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground),” remain tributaries “so long as a bed and banks and an ordinary high water mark can be identified upstream of the break.” 33 C.F.R. § 328.3(c)(3) (2015). *See also* U.S. Environmental Protection Agency et al., *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* 57 (2015), [https://www.epa.gov/sites/production/files/2015-05/documents/technical\\_support\\_document\\_for\\_the\\_clean\\_water\\_rule\\_1.pdf](https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf) (hereinafter Technical Support Document). Finally, the preamble to the Rule includes extensive discussion of the tools and information available to clearly and consistently implement the definition of tributary. 80 Fed. Reg. at 37,076-77; *see also* Technical Support Document at 57.

Thus, contrary to the arguments of State, Business, and Municipal Petitioners, the definitions of tributary and OHWM set bright line standards that will enable regulators to enforce the Rule objectively. These guidelines provide a meaningful “physical characteristics” test that will allow agency personnel in all



field offices to impartially determine whether a waterway constitutes a “tributary” within the jurisdiction of the Clean Water Act.

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

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

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

80 Fed. Reg. at 37,078. Ditches excluded from the Rule are those: 1) with ephemeral flow that are not a relocated tributary or excavated in a tributary, 2) with intermittent flow that are not a relocated tributary, are not excavated in a tributary, and do not drain wetlands, and 3) that do not flow into navigable or interstate waters or the territorial seas. 33 C.F.R. § 328.3(b)(3)(i)-(iii) (2015). These exclusions provide the regulated community with a clearer picture of what is covered than either the proposed rule or current policies. For example, it is now clear that ephemeral and intermittent ditches that flow only after precipitation are excluded from jurisdiction. Also, since the Rule focuses on the physical characteristics of excluded ditches, individuals will be able to more easily identify which ditches are exempt.

Municipal and business petitioners argue that the Rule allows the Agencies to use advanced technology and non-public information to identify an OHWM when determining whether a ditch falls within the Rule. Petitioners claim that this means that “[a]gency bureaucrats reviewing satellite images and other non-public surveillance data will determine from distant, government offices when and where OHWMs and tributaries lie without ever putting their eyes on the scene or putting their feet on the ground.” Opening Brief for the Business and Municipal Petitioners (ECF No. 129-1) at 81 (hereinafter “Bus. Br.”). In reality, the many of the sources of data that the Rule references to help agencies and citizens identify OHWMs and tributaries are publicly available. 80 Fed. Reg. at 37036-37077 (“Among the types of remote sensing or mapping information that can assist in establishing the presence of water are USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools [to identify] an [OHWM], such as a regional regression analysis or hydrologic modeling.”).

Many of these sources of information are accessible in well-maintained and publicly available databases. For example, there are extensive USGS topographic data publicly available on the USGS website, U.S. Department of the Interior et al.,

*The National Map: Data Download*, <https://viewer.nationalmap.gov/launch/> (last visited Jan. 19, 2017, 12:55 PM), with current and historical topographic maps and extensive GIS data including elevation source data. The website is user-friendly with a “zoom-able” map feature, “How To” guides, and a video guide to assist users in finding and downloading information. The USGS National Hydrography Data (“NHD”) and the National Resources Conservation Service (“NRCS”) Soil Surveys are also publicly available and easily searchable with zoom-able maps and guides on how to browse data. The Internet also has numerous public and private sources of aerial photography over large spans of time, as well as light detection and ranging (LIDAR) data.<sup>6</sup> The Army Corp of Engineers also provides easily downloadable desktop software to the public, along with user manuals. *See* <https://water.usgs.gov/nrp/software.php>.

In sum, what Petitioners describe as “non-public surveillance data,” Bus. Br. at 81, actually is, in fact, publicly available on numerous government and non-

---

<sup>6</sup> *See, e.g.*, U.S. Department of the Interior et al., *Earth Explorer*, <https://earthexplorer.usgs.gov> (last visited Jan. 19, 12:58 PM); GeoSearch, *Historical Aerial Photographs*, <https://geo-search.com/historical-aerial-photos> (last visited Jan. 19, 1:00 PM); Nationwide Environmental Title Research, LLC, <http://www.historicaerials.com/?javascript=&> (last visited Jan 19, 1:02 PM); NOAA Office for Coastal Management, *DIGITALCOAST*, <https://coast.noaa.gov/digitalcoast/> (last visited Jan. 19, 1:04 PM); Commonwealth of Massachusetts Executive Office for Administration and Finance, *MassGIS Data - LiDAR Terrain Data*, <http://www.mass.gov/anf/research-and-tech/it-serv-and-support/application-serv/office-of-geographic-information-massgis/datalayers/lidar.html> (last visited Jan. 19, 1:07 PM).

government Internet sources. In today's modern world, citizens have the ability to identify ditches, OHWMs, and tributaries with many of the same technologies used by our government agencies.

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

Definitions and regulations deemed vague are often broad in scope and short in length. In contrast, the Rule's definition of "significant nexus" is specific and detailed, and carefully outlines (and limits) how the case-specific test for determining significant nexus is to be conducted. *See* 33 C.F.R. § 328.3(c)(5) (2015). The prescribed analysis is by no means "standardless," as the Business and Municipal Petitioners allege. Bus. Br. 82.

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

Although the State Petitioners assert that the analysis of whether the waterway in question has the requisite effect on downstream waters will be “unguided,” Opening Brief of State Petitioners (ECF No. 141) at 73, the Rule actually is quite specific as to how that analysis is to be performed. The Rule specifies that the significant nexus analysis must be based on a consideration of whether, and to what extent, the subject water performs nine specifically-described functions related to the chemical, physical, and/or biological integrity of the downstream jurisdictional waterway. *Id.* § 328.3(c)(5)(i)-(ix). If it contributes significantly to the performance of any of those nine listed functions for the downstream waterway, it is covered by the act. If it does not, it is outside of the act’s jurisdiction (unless covered under a separate section of the Rule). Thus, rather than allowing agency personnel to impose their own concept of “significant nexus” in each new situation – an approach that clearly could result in disparate and unpredictable enforcement – the Rule provides clear and specific guidelines that must be applied in all situations. This satisfies the principles of due process.

### **III. THE AGENCIES COMPLIED WITH THE REGULATORY FLEXIBILITY ACT.**

An agency need not perform a Regulatory Flexibility Act (“RFA”) analysis if it (a) certifies a rule will not have a significant economic impact on a substantial number of small entities and (b) provides a factual basis for that certification. 5 U.S.C. § 605(b); *see* 80 Fed. Reg. at 37,102.

**A. Respondents Provided Two Bases for the RFA Section 605(b) Certification.**

**1. First, the Rule is a definitional change that imposes no direct costs.**

The RFA imposes no obligation to conduct a small entity impact analysis for rules that regulate entities indirectly. *See Michigan v. EPA*, 213 F.3d 663, 689 (D.C. Cir. 2000) (EPA action “[did] not directly regulate individual sources”); *see also Am. Trucking Ass’n v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1999) ([Clean Air Act ambient air standards “regulate small entities indirectly”). Agencies need not “consider every indirect effect . . . on small businesses,” *Mid-Tex Coop., Inc. v. Fed. Energy Regulatory Comm’n*, 773 F.2d 327, 343 (1985), as doing so would “convert every rulemaking process into a massive exercise in economic modeling.” *Cement Kiln Recycling Coalition. v. EPA*, 255 F.3d 855, 869. This Court has already found the Rule is definitional and regulates small entities only indirectly: “the Rule is definitional only and does not *directly* impose any restriction or limitation.” *In re U.S. Dep’t of Def & EPA Final Rule.*, 817 F.3d 261, 269 (6th Cir. 2016) (McKeague, J.); *id.* at 276 (Griffin, J., concurring) (noting the Rule is definitional and not self-executing). Asserted costs would be an indirect result of distinct permitting processes.

**2. Second, the Rule narrows the scope of CWA jurisdiction**

The RFA section 605(b) certification is logically justified because “the final rule is narrower in jurisdictional scope than the existing regulations.” EPA, *et al.*, *Economic Analysis of the EPA-Army Clean Water Rule 5* (2015) (hereinafter *Economic Analysis*). Petitioners do not dispute the Rule narrows the existing regulatory definition, 33 C.F.R. § 328.

**i. Respondents chose a reasonable baseline for comparison.**

The Agencies could have employed one of two potential baselines for analyzing the impact of the Rule: (a) existing regulations and historic practice or (b) recent practice. Recent practice has been uneven because *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) and *Rapanos* obscured the jurisdictional scope. As a result, current CWA jurisdiction is notoriously unclear, leading to varying interpretations, *see* Brief of Petitioners National Wildlife Federation, et al (ECF No. 130) at 9-10; Opening Brief of Petitioners Waterkeeper Alliance, et al. (ECF No. 131) at 36-38, and inconsistencies in practice between districts. Respondents Brief (ECF No. 149-1) at 215-16 (hereinafter “Resp’t Br.”). The Rule, “like the prior 1986 regulation, constitutes binding law,” *id.* at 216, and resolves the recent uncertainty. *See also Economic Analysis* at iv. Comparing this Rule with previous binding law was reasonable; defining the alternate baseline would be exceedingly difficult, given the inconsistent practice and agency uncertainty about asserting jurisdiction.

Petitioners argue an Office of Management and Budget Circular “requires” agencies use the status quo ante as the RFA analysis baseline. Bus. Br. at 39. But the Circular does not apply to RFA analyses, *see* Resp’t Br. at 215 n.51; the Circular concerns analysis under Executive Order 12866. Office of Mgmt. and Budget, *Circular A-4* (2003) 1. Petitioners also argue a general guidance document requires agencies to use the status quo ante “for any comparative analysis,” Bus. Br. at 39, but guidance documents “[do] not create legally enforceable rules.” *Southern Forest Watch, Inc. v. Jewell*, 817 F.3d 965, 973. Moreover, if the Court considers guidance documents, it should give greater weight to the RFA-specific guidance, which suggests the existing rule is the proper baseline. Resp’t Br. at 214-15.

**ii. EPA’s Economic Analysis neither considered, nor concluded, that the Rule results in an overall expansion of CWA jurisdiction.**

Citing the Economic Analysis, Petitioners and the Small Business Administration argue the Rule expands jurisdiction. Bus. Br. at 41. But that report is not a jurisdictional map: “nationwide data do not exist on the extent of all waters covered by the CWA.” *Economic Analysis* at vi. The Economic Analysis forecast the percentage of recent negative jurisdictional determinations (“JDs”) that would be positive under the Rule and only considered the “result[s] from the associated change in negative JDs.” *Id.* at vi. The report measured potential increases in



jurisdiction without assessing reductions (due, e.g., to the new definition of “tributary”). *Id.* at vi-ix. The report *did not* examine “how the scope of jurisdiction changes.” *Id.* at vi.

**B. Petitioners’ Examples of Concerned Small Business Owners are Misleading.**

Petitioners cite declarations that are outside of the record and should be disregarded. Bus. Br. at 40-41; *see Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990). Also, the averred costs are not only speculative, but also are *indirect* effects of the Rule. Even if Michael Jacobs’ creek or Robert Reed’s ditches were to fall within the new definition of tributary, 80 Fed. Reg. at 37,058, neither would face additional permitting requirements. The Rule’s preamble plainly states “the rule does not affect any of the exemptions . . . including those for normal farming, ranching, [etc.]” *Id.* at 37,055. In fact, the Rule “expands regulatory exclusions . . . to make it clear that [the Rule] does not add any additional permitting requirements on agriculture.” *Id.*

To exaggerate the scope of the Rule, Petitioners misrepresent their choice example. Petitioners describe Michael Jacobs’ land as containing a “small creek bed . . . [that] will often go dry.” Bus. Br. at 40, *citing* M. Jacobs Declaration ¶¶ 14, 20. Yet according to Mr. Jacobs, his land contains “[a] ravine . . . about 75-85 feet deep and 200-250 feet wide,” which sometimes contains a river “about 6-8 feet deep and 20-30 feet wide.” M. Jacobs Declaration ¶¶ 11, 15.

## CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court uphold the Clean Water Rule. If this Court holds the rule partially invalid, Amici request that the Court only strike down those portions of the Rule that it deems invalid. As this Court has observed, “the court would exceed its proper scope of review if it struck down the entirety of [a regulation], where only a part is invalid, and where the remaining portion may sensibly be given independent life.” *Stupak-Thrall v. United States*, 89 F.3d 1269, 1288-89 (6th Cir. 1996) (internal quotations omitted).

## ADDENDUM

### LIST OF SMALL BUSINESS AMICI

<b>NAME</b>	<b>BUSINESS</b>	<b>CITY</b>	<b>STATE</b>
Alexandra Nielsen	Robins & Morton	Birmingham	Alabama
Joan Werner	BKW III, LLC	Bisbee	Arizona
Nathan Miller	Ibex Advisors LLC	Tucson	Arizona
Diann Peart	Truce LLC	Tempe	Arizona
Charles Rudy	Captain Chuck's Charters	Sausalito	California
Justin Sternberg	Continuum Industries, Inc	Nevada City	California
John Evans	DIESEL, A Bookstore	Santa Monica	California
Roger Pritchard	Financial Alternatives	Berkeley	California
Louanne Klein	Distance Learning Consulting	Lafayette	California
Leslie Sheridan	THE CARPE DIEM VOICE	Clearlake	California
Paul Scott	TransPower	San Diego	California
Sandra Stewart	Thinkshift Communications	San Francisco	California
Cathe Cornello	Alter Images	San Francisco	California
James Weil	Weil Aquatronics, Inc.	Glendale	California
John Montgomery	Startworks Ventures, LLC	Point Reyes Station	California
Brian Weissbuch	KW Botanicals Inc.	San Anselmo	California
Susanna Cummings	Secret Harbor Boatworks	Potter Valley	California
Jan Dietrick	Rincon-Vitova Insectaries, Inc.	Ventura	California
Jim Lansing	SFMG	San Francisco	California
Walter Pelton	Finesse	Stockton	California
Diann Rose	Dharma Merchant Services	San Francisco	California
David Bronner	Dr. Bronner's	Vista	California
Rose Yee	Green Retirement	Alameda	California
Susan Haymer	360 Degree Communications		California
Judith Marquez	Innovare	Costa Mesa	California

	Environmental		
Alex Kahl	Kahl Consultants	San Rafael	California
Adam Ryznar	Intex Solutions	Montebello	California
David Callicott	GoodLight Natural Candles	San Francisco	California
Gregory Wendt	Living Economy Advisors	Santa Monica	California
Hank Skade	Tiburon Ventures, LLC	Larkspur	California
Leslie Sheridan	Planet Cents	Clearlake	California
Bill Kirton	Rocky Mountain Employee Ownership Center	Denver	Colorado
Eileen Waldow	Waldow & Daughter Trucking	Fraser	Colorado
Belinda Wilks	Wilks Farms	Burlington	Colorado
Gary Guerette	3ECS	Lakewood	Colorado
Sarah Martinez	Eco-Products	Boulder	Colorado
Richard Kamolvathin	World Trade Fund	Denver	Colorado
Jenn Vervier	New Belgium Brewing Company	Fort Collins	Colorado
Steven Morgan	4Sight Energy Solutions	Golden	Colorado
Nancy York	Poster It!	Fort Collins	Colorado
Seleyn DeYarus	Compass Natural LLC	Longmont	Colorado
Kim Bova	Kim Bova Photography	Mansfield Center	Connecticut
Mike Papa	Artscape organic care llc	Stamford	Connecticut
Rajneesh Aggarwal	Provoc	Washington	DC
Rudy Arredondo	National Latino Farmers & Ranchers Trade Association	Washington	DC
Charles Sharp	Black Emergency Managers Association International	Washington	DC
Kimberley Jutze	Shifting Patterns Consulting	Washington	DC
Cuchulain Kelly	Sustainable Purchasing Leadership Council	Washington	DC
Richard Eidlin	American Sustainable Business Council	Washington	DC

Tom McFarland	Sea Life Kayak Adventures	Sarasota	Florida
Mike Berthold	Carolina Mikes Kayaking	Safety Harbor	Florida
Steven Beumer	National Benefit Service Center	Maitland	Florida
John Hannum	American Canoe Adventures	White Springs	Florida
Nancy Deren	Nancy Deren Financial Coaching	Gainesville	Florida
Daniel Tunncliffe	Dtunncliffe LLC	St. Augustine	Florida
Kenneth Meles	Sleeperwoods	St. Petersburg	Florida
Woody Pershing	Woodys Watersports LLC	Madeira Beach	Florida
Jeanene Arrington	Not a Clue Adventures	Tampa	Florida
Allen Clark	Allen's Aquatic Adventures	St. Pete Beach	Florida
Neil Kirkham	Island Marine Land and SeaRentals	Indian Shores	Florida
Barrett Walker	B&P Walker Inc.	Decatur	Georgia
Denise Taggart	T.C. Services	Atlanta	Georgia
David Nelson	Nelson Consulting	Atlanta	Georgia
William Owens	Owens Business & Consulting, LLC	Conyers	Georgia
Steve Dorage	Tai Chi 4 L.I.F.E.	Decatur	Georgia
Raven Waters	Red Earth Farm	Reidsville	Georgia
Jay Payne	Cedar Grove Farm	Stephens	Georgia
Debbie Brock	Grandma Brock	Danielsville	Georgia
Cathy Payne	Broad River Pastures	Elberton	Georgia
Clay Brady	Foster-Brady Farm	Monroe	Georgia
Thayne Taylor	Raku Media, LLC	Kalaheo	Hawaii
Jim Brandt	Ringspann Corp.	Chicago	Illinois
Thomas Macroy	DuPage Psychological Associates	Naperville	Illinois
David Borris	Hels Kitchen Catering	Northbrook	Illinois
Nicole Doucet	Green Sheep Water	Chicago	Illinois
Greg Fischer	Bev Art Brewer and Winemaker Supply	Chicago	Illinois
Satina Braswell	Common Ground Food Co-op	Urbana	Illinois
Vicki Westerhoff	Genesis Growers Inc.	St. Anne	Illinois
Bruce Peterson	Navarro Canoe Co.	Rock Island	Illinois

Josh Gilbert	Temperance Beer Co	Evanston	Illinois
Gandi Falcon	Gandi the Juice Guru	Aurora	Illinois
John Sodrel	Sodrel Photography	New Albany	Indiana
Sondra Morlan	Rock'n Row River Adventures	Eldora	Iowa
Randy Vendevevter	R Campground	Charles City	Iowa
Rob Gates	Bluegrass Greensource	Lexington	Kentucky
Carrie VanWinkle	Natural Investments / Just Money Advisors	Louisville	Kentucky
Paul Troyano	Living Furniture	New Orleans	Louisiana
Clifford Krolick	Back Country Excursions	Parsonsfield	Maine
Jessie Brown	Atlantis Curio	Westbrook	Maine
Sarah Brown	Sarah Mae Brown Consulting LLC	Kittery	Maine
Wendy Flynn	Dream House (furniture store)	Frederick	Maryland
Michael Lynch	Carma's Café	Baltimore	Maryland
Kathleen Hickey	Bright Spring Communications	Frederick	Maryland
Kimry Perrone	Milagro	Baltimore	Maryland
Abigail Rome	Tierra Vista	Silver Spring	Maryland
Jason Holstine	Amicus Green Building Center, LLC	Kensington	Maryland
Sandra Zylberman	HarborWest Design	Owings Mills	Maryland
Daisy Barquist	PASADA	Baltimore	Maryland
Brian Engand	British American Auto Care Inc.	Columbia	Maryland
Aurora Reinke	Astrapto	Linthicum Heights	Maryland
Glen Ferguson	Cowork Frederick	Frederick	Maryland
David Wilcox	ReachScale	Brookline	Massachusetts
Carly Greenberg	Walden Asset Management	Boston	Massachusetts
Martha Older	Martha's	Cambridge	Massachusetts
Gregg Morris	2 Rock Oyster Farm	Duxbury	Massachusetts
Elizabeth Thomson	Direct Energy Solar	Milford	Massachusetts
Molly Bajgot	Red's Best	Boston	Massachusetts
Sarah Brezniak	Captus Group LLC	Boston	Massachusetts
Kevin McNeely	McNeely Building Group	Ann Arbor	Michigan
Audrey Britton	Small Business Minnesota	Minneapolis	Minnesota
Lloyd Vogel	Big Outdoors	St. Paul	Minnesota
Matthew Butler	Resonance Media	Duluth	Minnesota

	Group		
Timothy DenHerder-Thomas	Cooperative Energy Futures	Minneapolis	Minnesota
Dawn Kroonblawd	Watertown Floral; Watertown, MN	Watertown	Minnesota
Karen Frazier	Gatherings at Excelsior Florist	Excelsior	Minnesota
Shawn Davis	Artistic Floral	Edina	Minnesota
Eric Faust	Duluth Coffee Company	Duluth	Minnesota
Richard Dodge	Shady Hollow Resort and Hotel on Gull Lake	Brainerd	Minnesota
Bill Gordon	River's North Outfitters of Minnesota	Big Falls	Minnesota
Steve Piragis	Piragis Northwoods Company	Ely	Minnesota
Jane Koschak	River Point Resort	Ely	Minnesota
Marissa Rosen	TriplePundit	St. Louis	Missouri
Pam Hausner	BASE KC	Kansas City	Missouri
Marissa Rosen	Climate Social, LLC	St. Louis	Missouri
kent mollohan	KM Designs!	Helena	Montana
Greg Findley	Detour, The Adventure Travel Marketplace	Bozeman	Montana
Jay Toups	Bioroot Energy, Inc.	Darby	Montana
Derek Gendvil	On Demand Ventures, Inc.	Las Vegas	Nevada
Joel Harmon	Institute for Sustainable Enterprise	Madison	New Jersey
Richard Lawton	Triple Ethos	Point Pleasant Beach	New Jersey
Carolyn Barrett	BARRETT INTERNATIONAL TECHNOLOGY INCORPORATED	Ewing	New Jersey
Aria McKenna	The Global Cooling Project	Jersey City	New Jersey
Marcia Frieze	Case Medical	South Hackensack	New Jersey
Kimi Wei	The Wei	Fair Lawn	New Jersey
Sally Malanga	Ecco Bella	West Orange	New Jersey
Shoshana Osofsky	HeartPath Acupuncture	Bridgeton	New Jersey
Jim Hennessey	Heritage Surf and	Ocean City	New Jersey

	Sport		
Andrew Funk	Surfers Supplies	Ocean City	New Jersey
Alene Hartman	Daks Kayaks	Ocean City	New Jersey
Kris Kopsaftis	NJ Surf Show	Lavallette	New Jersey
John Forkin	AC Surf & SUP School	Atlantic City	New Jersey
Tom Forkin	Inlet Surf	Atlantic City	New Jersey
Jeffrey George	Atlantic City Cruises	Atlantic City	New Jersey
Tom Sereduk	Longview Farm	Lumberton	New Jersey
Amy Hansen	Comeback Farm	Ashbury	New Jersey
Barry Savoie	Savoie Organics	Williamstown	New Jersey
Alexis Brown	Santa Fe Farmers' Market Institute	Santa Fe	New Mexico
Noah Parker	Land of Enchantment Guides	Velvarde	New Mexico
Jorge Hernandez	SolaLum	Truth or Consequences	New Mexico
Maria Rotunda	Earthprints	Santa Fe	New Mexico
Douglas Champion	EnergyWorks	Las Cruces	New Mexico
Raphael Riach	The Saratoga Winery and Tasting Company	Saratoga Springs	New York
Mark Grimaldi	Cellar d'Or	Ithaca	New York
Jeff Garnsey	Classic Island Cruises	Clayton	New York
Scott Tillitt	Antidote Collective / BEAHIVE	Beacon	New York
Rebecca Casstevens	BeanCounters Unlimited	Binghamton	New York
Gregory Garnant	Garnant Computer Services	New York	New York
Anthony Del Plato	A Stone's Throw B&B	Interlaken	New York
Steven Kostis	KKI	New York	New York
Yvonne Taylor	Gas Free Seneca Business Coalition	Watkins Glen	New York
Michele Risa	Manhattan Holistic Chamber of Commerce	New York	New York
Miriam Senft	Motivity Partnerships/Global Women 4 Wellbeing	Blooming Grove	New York
Pedro Cano	TransHispaniola	New York	New York
Gregory Garnant	Garnant Computer Services	New York	New York
Cathy Hay	Alpine Sport Shop	Saratoga Springs	New York
Steven Desimone	Cold Spring Harbor	Cold Spring Harbor	New York



	Fish Hatchery and Aquarium		
Cheyenne Zigmund	Root N' Roost Farm	Manor	New York
Larry Bennett	Brewery Ommegang	Cooperstown	New York
Philip Crimmins	Puddledockers	Ithaca	New York
Steve Doxzon	Adirondack Lakes and Trails Outfitters	Saranac Lake	New York
Robert Drake	Hungry Hollow Co-op	Chestnut Ridge	New York
Jay Rosoff	JR Sales Corp	Raleigh	North Carolina
Julia Moore	Fiberactive Organics, L3C	Apex	North Carolina
Jeffrey Evensen	Common Sense Solutions	Rougemont	North Carolina
April Clark	Second Wind Eco Tours	Swansboro	North Carolina
Robert Dubuque	Dubuque Decorating	Raleigh	North Carolina
Iliia Smirnov	Cape Fear River Adventures	Lillington	North Carolina
Justin Mickens	Appalachian Outfitters	Murphy	Ohio
Monika Moss-Gransberry	MKM Management Consulting	Cleveland	Ohio
Laura McManus	Sticky Pete's Maple Syrup	Athens	Ohio
Kathy Jacobson	Broadwell Hill/Athens' Own	Stewart	Ohio
Constantine Faller	Athens' Own	Stewart	Ohio
Becky Rondy	Green Edge Organic Gardens	Amesville	Ohio
MaryEllen Etienne	Reuse Institute	Dayton	Ohio
Sarah Benary	Brothers Drake Meadery	Columbus	Ohio
Mercedes Lackey	High Flight Arts and Letters	Claremore	Oklahoma
Alex Beamer	LifeSource Natural Foods	Salem	Oregon
Mark Wheeler	Roots Realty	Portland	Oregon
Alicia Keys	A Keys Massage	Portland	Oregon
Steve Hanrahan	Mirador Kitchen & Home	Portland	Oregon
Vanessa Keitges	Columbia Green	Portland	Oregon
Tom Bowerman	Farmers' Union, Inc	Eugene	Oregon
Franklin Jones	B-line Urban Delivery	Portland	Oregon

Brett Hamilton	simple.be	Tualatin	Oregon
Mike Radtke	Gilgamesh Brewing	Salem	Oregon
Patrick McDonald	St. John's Flower Shop	Portland	Oregon
Meenal Raval	Philly Electric Wheels	Philadelphia	Pennsylvania
Charles Rizzo	Eastern Time, Inc.	Allentown	Pennsylvania
Judy Wicks	Beautiful Business LLC	Philadelphia	Pennsylvania
Dara Bortman	Exact Solar	Yardley	Pennsylvania
Janet Williams	Sustrana LLC	Devon	Pennsylvania
Peggy Zwerver	Earth - Bread + Brewery LLC	Philadelphia	Pennsylvania
Eugene Aleci	Community Heritgae Partners, LLC	Lancaster	Pennsylvania
Greg DiMedio	Farmers Insurance Agency	Mars	Pennsylvania
Jana Mars	Aqua Vida	Philadelphia	Pennsylvania
Michael Rose	Manayunk Brewing Company	Philadelphia	Pennsylvania
Jan Marie and Alan Rushforth	Rushforth Engineering	Bryn Mawr	Pennsylvania
Kevin Meehan	M&M TwoWheelers	Bryn Mawr	Pennsylvania
Sue Miller	Birchrun Hills Farm	Chester Springs	Pennsylvania
Tim Mountz	Happy Cat Farm	Kennett Square	Pennsylvania
Landon Jefferies	Root Mass Farm	Oley	Pennsylvania
Ben Wenk	Three Springs Farm	Aspers	Pennsylvania
Nina Berryman	Weavers Way Farm	Philadelphia	Pennsylvania
Joseph James	Agri-Tech Producers, LLC	Columbia	South Carolina
Stephen Wyman	Evolving Electric Motor Company	Georgetown	Texas
Richard McCarthy	JJR Transport, LLC	Granbury	Texas
Jody Brown	The Drawing Board	Montpelier	Vermont
Eli Moulton	The Moulton Law Group	Burlington	Vermont
Larry Plesent	Vermont Soap Company	Middlebury	Vermont
Jenna Giandoni	Illinois Institute of Technology	Woodbridge	Virginia
Katherine DiMatteo	Sustainable Food Trade Association	New Castle	Virginia
Kristina Turner	The Bone	Manassas	Virginia
Valley Bennett	For Goodness Sake Natural Foods	Leesburg	Virginia

Brian and Nancy Deely	Pro Fit Ski and Mountain Sports	Leesburg	Virginia
Virginia Barlow	Encore	Alexandria	Virginia
Sola Pallotta	Very Virginia Shop	Leesburg	Virginia
Paul Modolo	LoCo Beans--Fresh Roasted Coffee	Leesburg	Virginia
Karl Ostrom	NBIS (Network for Business Innovation and Sustainability)	Vashon	Washington
James Baron	Arlington Inv. LLC	Arlington	Washington
Anna Porter	PorterWorks	Stanwood	Washington
Blaine Bartlett	Avatar Resources, Inc.	Coupeville	Washington
Julia Goldstein	Julia L F Goldstein Communications	Redmond	Washington
Corey E. Olsen	CEO Pipe Organs/Golden Ponds Farm	Delafield	Wisconsin
Chris Ranson	Lake Front Brewery	Milwaukee	Wisconsin

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 6,431 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in Times New Roman 14-point font type.

DATED: January 19, 2017

/s/ Heather A. Govern  
Heather A. Govern

## CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2017, I electronically filed a true and correct copy of the Brief of Elected Officials as *Amici Curiae* with the Clerk of Court using the CM/ECF system, which will send notification of this filing to parties in the case that are registered users of that system.

/s/ Heather A. Govern  
Heather A. Govern