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

MURRAY ENERGY CORPORATION, et al.	)	**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)**
Petitioners,	)	
	)	
v.	)	
	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.	)	**On petition for review from the Environmental Protection Agency and the U.S. Army Corps of Engineer**
Respondents.	)	
	)	
	)	
	)	

BRIEF OF ELECTED OFFICIALS 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 AUTHORITIES

Cases

Statutes

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

Amici Curiae are 79 elected local officials, each with a role in ensuring the health and safety of their residents (hereinafter "*Amici"*). A list of *Amici* is attached as an Addendum hereto. *Amici* have a strong interest in protecting the quality of their municipalities' water supplies and in protecting the quality of nearby watersheds. *Amici* seek to provide information regarding the beneficial impact that Agencies' definition of "waters of the United States" in the Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015), will have on their ability to promote health, welfare, and financial prosperity in their communities.

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.[1]

[1] 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. LOCAL ELECTED OFFICIALS ARE STRONGLY IN FAVOR OF THE RULE AND ITS PROTECTIONS.

All 79 of the local government *Amici* strongly support the Clean Water Rule and believe that its protection of intermittent and ephemeral waterways is important to their communities. The following examples, drawn from the experiences of some of the *Amici*, are representative of this support of, and interest in, the Rule.

Chelsa Wagner is the Controller of Allegheny County, Pennsylvania. In this role, she is responsible for holding the government of Allegheny County accountable to its taxpayers. She monitors the Allegheny County Health Department, which is responsible for ensuring that thirty-six water provider agencies in the county deliver safe drinking water to county residents. Ms. Wagner supports the Clean Water Rule because the protection of upstream tributaries and wetlands, both large and small, is essential to keeping pollutants out of the Allegheny River watershed. High levels of lead in the drinking water is a serious concern, in part because pollution within the watershed of the Allegheny River causes acid corrosion to the lead service lines that serve up to twenty percent of Pittsburgh homes.

For decades, the largest of the county's municipal water providers, the Pittsburgh Water and Sewer Authority ("PWSA"), has been forced to add soda ash to the water at significant expense to ratepayers just to keep the city's water safe to drink. When budgetary concerns instigated a shift to a cheaper substitute, lead levels spiked in Pittsburgh, endangering the health of the city's children. Troubling as this is, the PWSA is the most well-resourced and closely-overseen of any municipal water department in the county; smaller water providers struggle even more with these costs. The residents of Allegheny County depend on the protections of the Clean Water Act to prevent ratepayer dollars from being spent on treatment of pollution from upstream tributaries and wetlands. Water contamination has also undermined trust in the county's water providers and forces consumers to purchase water filters and bottled water. Purchases such as these add to the financial hardship of the twenty-two percent of Pittsburgh residents living below the poverty line.

In addition, Allegheny County is a flood-prone area due to its deep valleys surrounded by many miles of rivers and streams, and the Clean Water Rule is important for the protection of wetlands and ephemeral streams that absorb dangerous and damaging flood waters. For example, the small borough of Millvale, with an aging infrastructure and limited municipal resources, floods frequently due to increased development in the North Hills in the watershed of

Girty's Run. These floods disrupt life in the community, damage property, halt commerce, and cost residents and businesses money.

In summary, Ms. Wagner's experience has taught her that when we fail to extend Clean Water Act protections to Allegheny County's wetlands and small waterways, we risk the health of the citizens and place a heavy burden on municipalities and their taxpayers to mitigate the damage downstream.

Ruth Kelly is the City Commissioner of Grand Rapids, Michigan. Grand Rapids draws its drinking water from Lake Michigan, which is ecologically connected to numerous small upstream ephemeral and intermittent waterways and wetlands. Ms. Kelly and many of her constituents are concerned about the effect on their water and public health of pollution from overdevelopment. The Grand River is also vital to Ms. Kelly and the citizens of Grand Rapids, as it attracts tourism to the region and may one day develop into a mecca for water sports. Grand River is part of the Grand River watershed, which has several major tributaries, the Thornapple, the Maple, and the Flat Rivers, and many minor tributaries, including Sycamore Creek and the Looking Glass, the Rogue, and the Red Cedar Rivers. The upper Grand River watershed connects rural, upstream agricultural communities with sprawling suburban areas, diverse, industry-dotted urban zones, and Lake Michigan. Ms. Kelly supports the Rule because the

tributaries listed above, no matter how minor, are ecologically connected to the Grand River and Lake Michigan, and are deserving of federal protection.

Jim Carruthers, the Mayor of Traverse City, Michigan, is concerned about pollution affecting the tourism on Traverse Bay and Lake Michigan. Traverse City is a tourist town, and maintaining the influx of visitors is important to the city's economy. The Clean Water Rule's protections do not only ensure the beauty of the natural surroundings for out-of-towners, but they prevent pollution to some of the smaller waterways that are cherished by local residents.

Jennifer Julsrud, a former member of the City Council of Duluth, Minnesota, is concerned about the availability of safe drinking water for Duluth as well as the many other communities that currently rely on Lake Superior for their drinking water. Despite its immense size, Lake Superior is surprisingly vulnerable to pollution of small upstream tributaries and wetlands from development and urbanization. Ms. Julsrud believes it absolutely essential that Lake Superior and the Boundary Waters, and their related waters, are protected under the Clean Water Rule. These waterways also provide tourism that is vital for the economy and supply much-needed revenue for the city.

Pam Barberis is a member of the City Council of Whitefish, Montana, who works to protect the streams that feed Whitefish Lake through the Forest Legacy Program. She and her coworkers are working to revive a local creek that was once

a viable drinking water source but is now contaminated with E. coli. The integrity of the creek is important to the communities in and around Whitefish because its contamination can flow into other waterways that are used for recreational purposes. Ms. Barberis believes the Rule's inclusion of ephemeral and intermittent streams is an important protection since the health of small streams is critical to the health of the entire watershed network that feeds Whitefish Lake.

II. THE RULE IS WELL WITHIN THE SCOPE OF *RAPANOS* AND ITS PREDECESSORS.

A. The Rule May Properly Draw From Both the *Rapanos* Plurality and Justice Kennedy's Concurrence.

In *United States v. Cundiff*, 555 F.3d 200, 209 (2009), this Court left open the issue of how best to address the lack of a majority opinion in *Rapanos v. United States.*, 547 U.S. 715 (2006). As the Court noted in *Cundiff*, the guidance given by the Supreme Court in *Marks v. United States*, 430 U.S. 188 (1977), is inapposite to *Rapanos*, because neither the plurality opinion nor Justice Kennedy's opinion concurring in the judgment is a subset of the other. *See* 555 F.3d at 209 ("when one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic") (citation and internal quotations omitted). *Amici* believe that the appropriate approach, as discussed in *United States v. Johnson*, 467 F.3d 56, 62-66 (1st Cir. 2006), a case whose reasoning this Court described as "thoughtful in *Cundiff*," 555 F.3d at 208, is to find waters to be

"waters of the United States" if they meet either the plurality's test or Justice Kennedy's test. This approach has the advantage, as noted by Justice Stevens in his *Rapanos* dissent, of ensuring that a majority of the *Rapanos* Court would hold that the waters in question are within the jurisdictional reach of the CWA. *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting).[2] It also, as a practical matter, moves only a very short distance from the principles underlying *Marks*; as noted by the Seventh Circuit, it will only be the "rare case" in which waters meeting the plurality's test will not also meet Justice Kennedy's test. *United States v. Gerke Excavating, Inc.,* 464 F.3d 723, 725 (7th Cir. 2006). *See also Rapanos*, 547 U.S. at 810, n.14 (Stevens, J., dissenting) (deeming it "unlikely" that "the plurality's test is met but Justice Kennedy's is not").

B. All Portions of the Rule Are Consistent With Supreme Court Precedent.

In accordance with this approach, the Rule's definition of "waters of the United States" can be usefully divided into two parts. The following categories from the Rule are waters of the United States under the plurality opinion (and in all likelihood under Justice Kennedy's opinion as well)[3]:

---

[2] "Given that all four Justices who have joined this [dissenting] opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met."

[3] All quotations are from the Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015); 33 CFR § 328.3(a) (and, in the case of (6), 33 CFR § 328.3(c)(1)). Note that the last

"(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters" identified in paragraphs (1) through (3);

"(5) All tributaries… of waters identified in paragraphs [](1) through (3)," so long as those tributaries are relatively permanent; and

"(6) All waters adjacent to a water identified in paragraphs [](1) through (5)…, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters," so long as "adjacent" means "bordering" or "contiguous."

Although the opponents of the Rule fire several volleys of accusations and arguments in the course of multiple briefs, it can generally be said that there is very little debate as to whether these six categories of waters come within the jurisdictional scope of the Clean Water Act ("CWA" or "Act"). There is no dispute that the Act covers traditionally navigable or interstate waters, including the territorial seas (categories 1 through 3); *Rapanos* and *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985), both make clear that the scope of the act extends beyond such waters; *Riverside Bayview* holds (and the *Rapanos*

---

seven category numbers used here – (4) through (10) – do not correspond fully to those in the Rule (which lists only eight categories in total). The categories used here have been rearranged in certain cases to allow a more clear-cut division between the non-controversial and controversial designation of jurisdictional waters.

plurality confirms) that the act extends to wetlands and other non-navigable waters that abut such waters (category 6); and the *Rapanos* plurality affirms that "relatively permanent, standing or flowing" tributaries of such waters (categories 4 and 5) are also within the scope of the act, 547 U.S. at 732.

It is the following four categories – all of which are consistent with Justice Kennedy's concurrence – which are the primary focus of the arguments that the Rule is too expansive[4]:

> (7) Intermittent and ephemeral tributaries of waters identified in paragraphs (1) through (3), so long as they are "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark;"
>
> (8) Waters: within 100 feet of the ordinary high water mark of a water identified in paragraphs (1) through (7); within the 100-year floodplain of a water identified in paragraphs (1) through (7) and not more than 1,500 feet from the ordinary high water mark of such water; or within 1,500 feet of the high tide line of a water identified in paragraphs (1) or (3), or within 1,500 feet of the ordinary high water mark of the Great Lakes;
>
> (9) "Prairie potholes," "Carolina bays and Delmarva bays," "Pocosins," "Western vernal pools," "Texas coastal prairie wetlands," waters located within the 100-year floodplain of a water identified in paragraphs (1) through (3), and waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1) through (7) that are determined, on a case-specific basis, to have a "significant nexus" to a water identified in paragraphs (1) through (3); and
>
> (10) Impoundments of the waters identified in (7) through (9).

[4] All quotations are from the Rule, 33 CFR §§ 328.3(a) & 328.3(c).

Justice Kennedy's concurrence draws from the straightforward proposition, articulated in *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001) ("*SWANCC*"), that a waterway does not come within the jurisdiction of the Clean Water Act unless it has a "significant nexus" to core waterways (traditional navigable or interstate waters or the terrestrial seas). This is not a vague concept; the primary purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters," 33 U.S.C. § 1251(a), and the "significant nexus" test ensures that the act's jurisdictional reach extends no further than core waterways (traditional navigable and interstate waters and the territorial seas) and those that have a material impact on the chemical, physical, or biological integrity of such waterways. *See Rapanos*, 547 at 779 ("The required nexus must be assessed in terms of the statute's goals and purposes.") (Kennedy, J., concurring). Each of the four challenged categories comes within this "significant nexus" guideline.

The first two represent carefully-defined situations in which the Agencies' scientific analysis indicates that the requisite significant nexus is highly likely to exist. Such category-wide determinations are fully consistent with Chief Justice Roberts' suggestion in *Rapanos* that a comprehensive regulation defining the outer bounds of CWA jurisdiction would be "afforded generous leeway by the courts."

547 U.S. at 758. They are also consistent with Justice Kennedy's invitation to the Agencies to

> identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

Id. at 781.

"Intermittent and ephemeral tributaries" of core waters (category 7) simply extends the "relatively permanent" tributaries endorsed by the *Rapanos* plurality to less permanent tributaries that possess certain physical indicators ("a bed and banks and an ordinary high water mark") that the Agencies have determined are concrete evidence that "there is volume, frequency, and duration of flow" in an amount "sufficient…to qualify as a tributary." 33 C.F.R. § 328.3(c); *see also* 80 Fed. Reg. 37,057 ("The Science Report and the [Science Advisory Board] review…confirmed that [t]ributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters.").

Similarly, designation of the waters within category 8 – all of which are characterized by physical proximity to covered waters and thus come within the Rule's definition of "neighboring" waters, 33 C.F.R. § 328.3(c)(2) – is based on the Agencies' finding that "[t]he science is clear that a water's proximity to

downstream waters influences its impact on those waters," and on the Science Report's conclusion that "[s]patial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters." 80 Fed. Reg. at 37,089. The Agencies found "clear evidence waters within 1,500 feet of [traditionally navigable or interstate] waters, even when located outside the floodplain, perform critical processes and functions" for those waters. *Id.* at 37,086. The 1,500-foot threshold, the Agencies found, encompasses the waters that "most clearly significantly affect[] the integrity of the traditional navigable water or the territorial seas," *Id.*

Category 9 draws directly from Justice Kennedy's call for a case-by-case approach to significant nexus. The Agencies have identified (a) five specific, well-known aquatic features and (b) other waters within certain specified proximity measurements, and have allowed for case-by-case determinations as to whether those waters have a "significant nexus" to traditional navigable or interstate waters or the territorial seas. If so, they are covered waters; if not, they are not. And, in an effort to ensure predictability and scientific rigor in these case-by-case determinations, the Agencies have provided a detailed definition of "significant nexus" that both explains the context within which these determinations are to be made and identifies nine specific aquatic functions on which a waterway's "nexus"

to traditional navigable or interstate waters or the territorial seas is to be evaluated. *See* 33 C.F.R. § 328.3(c)(5) (including (i) – (ix)).

Finally, category 10 simply makes the common sense clarification that the waterways within categories 7 through 9 do not lose their status as jurisdictional waters if they are impounded. Thus, for example, if an intermittent tributary of a traditional navigable water is dammed, the impoundment behind the dam will remain a covered water.

III. THE RULE'S NUMERIC DISTANCE LIMITATIONS ARE REASONABLE.

A. The Rule's Distance Limitations are Due Substantial Deference Because They Stem From Agency "Line-Drawing" on a Technical and Elusive Subject.

This Court grants substantial deference to an agency's bright-line rules and is "unwilling to review line-drawing performed by the [agency] unless a petitioner can demonstrate that lines drawn … are patently unreasonable, having no relationship to the underlying regulatory problem." *All. for Cmty. Media v. FCC*, 529 F.3d 763, 780 (6th Cir. 2008) (internal quotations omitted). An agency need not "identify the optimal threshold with pinpoint precision." *Worldcom, Inc. v. FCC*, 238 F.3d 449, 461-62 (D.C. Cir. 2001). *See also Emily's List v. FEC*, 581 F.3d 21-22 n.20 (D.C. Cir. 2009) (holding that agencies may lawfully "employ bright-line rules for reasons of administrative convenience, so long as those rules fall within a zone of reasonableness and are reasonably explained"); *Stereo Broad.,*

Inc. v. FCC, 652 F.2d 1026, 1031 (D.C. Cir. 1981) ("Where the [agency] is engaged in the process of drawing lines, of making judgmental decisions . . . it is our duty to accord respect to the [agency's] expertise"). Here, the Agencies reasonably explained the distance limitations in the Rule's preamble and a 423-page technical support document, which was based on a comprehensive science report that reviewed more than 1,200 peer-reviewed publications. *See* EPA, U.S. Army Corps of Eng'rs, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015) ("*TSD*"); EPA Office of Reg'l Dev., *Connectivity of Streams and Wetlands to Downstream Waters: A Review of the Scientific Evidence* (Jan. 2015) ("*Science Report*").

Additionally, where an agency establishes bright-line rules with respect to "'elusive' and 'not easily defined areas,'" like the Rule's determination of the distance between two waters at which the waters are no longer "adjacent," the courts' "review is considerably more deferential, according broad leeway to the [agency's] line-drawing determinations." *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002) (internal quotations omitted) (granting heightened deference to the FCC's line-drawing as a means to achieve diversity in broadcast programming). Moreover, courts have granted EPA "an extreme degree of deference" when its line-drawing determinations require "[evaluation of] scientific data within its technical expertise." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d

1251, 1276 (D.C. Cir. 2004) (internal quotations omitted). The Agencies' explanations of their scientific reasoning in selecting the bright-line distance limitations in the Rule satisfy these deferential standards.

B. The Rule's Distance Limitations are Lawful Because They Are Rationally Related to the Science of Connectivity Between Waters.

There is ample evidentiary support in the record establishing the strong relationship between distance and connectivity of two waters. In particular, the Rule's numeric distance limitations are reasonable because connectivity between waters decreases as distance increases. *See*, *e.g.*, *Science Report* at 2-38 (as distance between two waters increases, intervening streams may absorb or transform material being transported downstream, resulting in material transported over long distances either not reaching downstream rivers or reaching the river in a different form); 3-34 (finding that bed sediment material concentrations in a river were inversely related to downstream distance); 3-39 (invertebrate richness in downstream waters is inversely related to distance from perennial streams); 3-43 (genetic connectivity, connecting populations by gene flow and reducing the incidence of inbreeding, "decreases with increasing spatial distance"); 4-31 (inferring from the similarity of plant communities in closer together waters that there is "biological connectivity between proximal lakes and wetlands").

These findings are similar to other types of evidence that have been held sufficient to survive arbitrariness review. For example, the Federal Energy Regulatory Commission ("FERC") is tasked with determining whether an energy source is an "economically practicable" alternative to natural gas. *Process Gas Consumers Grp. v. Fed. Energy Regulatory Comm'n.*, 712 F.2d 483, 484 (D.C. Cir. 1983). An energy source is less economically practicable as it becomes more expensive relative to natural gas. *See, e.g., id.* at 487-88. FERC determined that middle distillate fuel oil—which was 2.5 times as expensive as natural gas—was not an economically practicable alternative to natural gas but that low sulphur fuel—which was twice as expensive as natural gas—*was* economically practicable. *Id* at 484, 487-88. The District of Columbia Circuit upheld FERC's decision because of its general reasonableness, because of FERC's high level of technical expertise compared to the court, and because "the line had to be drawn somewhere." *Id.* at 488.

Additionally, just as it is impossible to specify with scientific precision exactly what oil price is economically impracticable, it is impossible to specify with precision the distance at which upstream waters should no longer be considered adjacent to downstream waters. *See* 80 Fed. Reg. at 37,057 (noting that, because "waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters," establishing distance limitations

requires "scientific and policy judgment, as well as legal interpretation"); *TSD* at 298 ("While these distance effects occur as a continuous function, it is a common scientific practice to use such variables to define discrete bins, which can then serve as a basis for a boundary"). The Agencies' decision to set the Rule's distance thresholds based on these principles thus was rationally related to the identification of waters that are sufficiently connected to navigable waters as to be considered adjacent.

Moreover, beyond the general relationship between connectivity and distance, the Agencies have presented substantial evidence supporting the Rule's specific numeric limitations establishing the reasonableness of these limitations. Support for drawing a line at "waters within 100 feet" of a traditionally navigable water can be found at, *e.g., TSD* at 295-96 (waters within 100 feet of the ordinary high water mark of a jurisdictional water are located in a position relative to that water that permits the upstream water to function as a sink, retaining and breaking down pollutants, sediments, and nutrients "that could otherwise negatively impact the condition or function of downstream waters"); 298 (most "water quality and habitat benefits will generally occur within a several hundred foot zone of a water;" creatures that use aquatic habitats "will use at least a 100-foot zone for foraging, breeding, nesting, and other life cycle needs").

The 1,500-foot distance limitation for waters within the 100-year floodplain is based on the Agencies' reasonable determination that these waters "lie within landscape settings that have bidirectional hydrological exchange with" jurisdictional waters. *TSD* at 300. And the limitation for waters within 1,500 feet of a high tide line or the ordinary high water mark is based on the following reasoning:

> Waters more closely located to [jurisdictional waters] are also more likely to be biologically connected to such waters more frequently and by more species, including amphibians and other aquatic animals. To protect tidal traditional navigable waters, the territorial seas, and the Great Lakes, the 1,500-foot threshold is a reasonable distance to capture most wetlands and open waters that are so closely linked to the [jurisdictional waters] that they can properly be considered adjacent as neighboring waters.

Id. at 304.

This evidence supporting the Rule's numeric distance limitations is distinguishable from the scant evidentiary basis supporting bright-line rules that the Sixth Circuit has invalidated in the past. In *Cincinnati Bell Telephone Co.*, for example, the FCC had adopted a rule prohibiting an entity with a twenty-percent ownership interest in a cellular licensee from acquiring a "Personal Communications License," in an effort to "prevent" that entity "from exerting undue market power" through control of the cellular licensee. *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 758 (6th Cir. 1995). This Court found the twenty-

percent rule arbitrary and capricious because the rule did not accurately gauge an entity's ability to influence a cellular licensee. *Id.* at 759.

In contrast, the science supporting the Clean Water Rule's distance limitations establishes that the vast majority of the waters within these limitations will have a significant nexus to traditionally navigable waters. Also, while the twenty-percent licensee share rule permitted or prohibited license acquisition solely based on percentage of ownership, the Rule allows for case-specific significant nexus determinations for waters beyond the distances used to determine adjacent waters. 80 Fed. Reg. at 37,059.

This Court also criticized the FCC for failing to provide any evidence for the twenty-percent rule beyond "common sense" and the Financial Accounting Standard Board's statement that twenty-percent ownership establishes a rebuttable presumption of corporate control. *Cincinnati Bell*, 69 F.3d at 759-60. In contrast, the Agencies' evidence in support of their distance limitations is robust. The Agencies relied exclusively on peer-reviewed studies to generative evidence for the relationship between distance and connectivity and for the wisdom of the particular numeric distance limitations that the Agencies selected. *Science Report* at 1-17. Because the reasonableness of the Rule's distance limitations is supported by robust, credible science, *Cincinnati Bell*'s criticism of bright-line rules is inapposite here.

Finally, it was lawful for the Agencies to decline to exercise case-by-case jurisdiction over waters lying more than 4,000 feet from traditionally navigable waters. *See* Fed. Reg. 80 at 37,071. The Agencies determined that the value of bright lines, which provide the Rule with additional "clarity, predictability, and consistency," outweighed the value of including case-by-case analysis of the slim minority of waters that have a significant nexus with navigable waters over 4,000 feet away. *Id.* at 37090-91. Courts have found such accommodations in bright-line rules to be lawful. *See Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 606 (3d Cir. 1996) (upholding NLRB's bright-line rule because it was appropriate for NLRB "to balance the need to make accurate determinations as to whether employees share a 'community of interest' against the necessity to make such determinations quickly and definitively."); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 531, 536-37 (D.C. Cir. 1983) (internal quotations omitted) (holding that, even though scientific evidence supported "banning lead from gasoline entirely," EPA's 1.10 grams per leaded gallon standard was permissible as an "accommodation" of health benefits and economic efficiency).

C. The Rule's Distance Limitations Treat Similar Entities Alike, and it is Lawful for Bright-line Rules to Treat Roughly Similar Entities Falling on Either Side of the Line Differently.

The fact that the Rule's distance limitations could theoretically result in differing regulation of similar waters on either side of the distance limitation does

not render the thresholds unlawful. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 397 (1999) (holding that, when an agency must engage in line-drawing, "there will always be cases on opposite sides of the line that are almost identical," but "[t]hat consequence . . . does not necessarily compromise the integrity of the line that the agency has drawn."); *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1029 (5th Cir. 1985) (holding that "such differing results are the inevitable result" of a bright-line rule and "indeed, decisions are the desired product"). These cases indicate that courts uphold bright-line rules despite disparate treatment of somewhat similar entities, provided the bright-line rule (here, the Rule's distance limitations) rationally relates to the rule's regulatory goals.

Moreover, the consequences of such disparate treatment in application of the Rule's distance limitations will be especially minimal because the distance limitations are designed to be under-inclusive of waters with a significant nexus to traditionally navigable waters. The Rule permits jurisdictional determinations on a case-specific basis for waters lying beyond the distance limitations used to determine adjacency, and the science indicates that those waters within the distance limitations have a significant nexus to jurisdictional waters. Therefore, the Rule treats similar entities similarly—for example, the Rule treats a person seeking to develop a significantly-connected wetland 105 feet from a jurisdictional

water in an identical manner to a person seeking to develop a significantly-connected wetland ninety-five feet from a jurisdictional water.

D. The Rule's Distance Limitations Provide Valuable Clarity, Predictability, and Consistency.

The Agencies established numeric distance limitations to lend clarity, consistency, and predictability to the Rule, as requested by numerous commenters. Fed. Reg. 80 at 37057, 37090. It is well-established that courts value an agency's decision to administer bright-line rules for these reasons. The District of Columbia Circuit has stated that bright-line rules enable regulated parties "to easily conform their conduct to the law and . . . enable [the agency] to take the rapid, decisive enforcement that is called for in the highly-charged political arena." *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986). Case-by-case tests, by contrast, can inundate agencies with advisory opinion requests and force agencies to spend scarce resources on case-specific inquiries for every complaint, "even those involving the most mundane" issues. *Id. See Universal Studios LLLP v. Peters*, 308 F. Supp. 2d 1, 10 (D.C. Cir. 2004) (upholding Copyright Office's bright-line rule requiring the Office to refuse to accept applications that arrive at the office even one day past the filing deadline, citing "the need for clarity, predictability, and efficiency that [the Copyright Office's] 'bright line' rule assures").

The Rule's distance limitations, like the rules at issue in *Orloski* and *Universal Studios*, provide clarity and predictability to the otherwise complicated

science of hydrology because, under the Rule, citizens can use measurable distances to determine whether certain waters are *per se* jurisdictional. Moreover, the burden of issuing jurisdictional determinations—both on the Agencies and the citizens—will be significantly reduced if the Agencies set clear delineations instead of always using a case-by-case analysis to determine those clearly jurisdictional waters.

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 ELECTED OFFICIALS AMICI

NAME	TITLE	CITY	STATE
Jim Prola	Former City Council Member	San Leandro	California
Randall Stone	Council Member	Chico	California
Jill Ryan	County Commissioner	Eagle	Colorado
Kathy Chandler-Henry	County Commissioner	Eagle	Colorado
Macon Cowles	Former Council Member	Boulder	Colorado
Tim Mauck	County Commissioner	Clear Creek	Colorado
Jorge Perez	Former Alderman	New Haven	Connecticut
Carol Bell	Council Member	Savannah	Georgia
Brendan Reilly	Alderman	Chicago	Illinois
Leah Goodman	Alder	Warrenville	Illinois
Matthew Goodman	Former Councilman	Ames	Iowa
Brad Fox	Councilor	South Portland	Maine
Anne Ferguson	Former Councilor at Large	Amesbury	Massachusetts
Gabe Leland	City Council Member	Detroit	Michigan
Jack Eaton	City Council Member	Ann Arbor	Michigan
Jim Carruthers	Mayor	Travers City	Michigan
Julie Grand	City Council Member	Ann Arbor	Michigan
Lois Richardson	City Council Member	Ypsilanti	Michigan
Melanie Piana	Council Member	Ferndale	Michigan
Ronnie Peterson	County Commissioner	Ypsilanti	Michigan
Ruth Kelly	City Commissioner	Grand Rapids	Michigan
Sabra Briere	Former City Council Member	Ann Arbor	Michigan
Steve Bieda	Senator	Lansing	Michigan
Cam Gordon	City Council Member	Minneapolis	Minnesota
Jacob Frey	City Council Member	Minneapolis	Minnesota
Jennifer Julsrud	Duluth Public Utilities Commissioner	Duluth	Minnesota
Jennifer Schultz	State Representative	St. Paul	Minnesota
Amy Brendmoen	City Council Member	St. Paul	Minnesota
Kevin Reich	City Council Member	Minneapolis	Minnesota

Kevin Woolstencroft	Council Member	Birchwood	Minnesota
Lisa Bender	Council Member	Minneapolis	Minnesota
Lisa Goodman	City Council Member	Minneapolis	Minnesota
Patrick Wortham	Council Member	Atwater	Minnesota
Mark Peterson	Mayor	Winona	Minnesota
Elizabeth Glidden	City Council Member	Minneapolis	Minnesota
Alondra Cano	Council Member	Minneapolis	Minnesota
Ellie Boldman Hill	Representative	Missoula	Montana
Ken Crouch	Former Councilman	Whitefish	Montana
Pam Barberis	Councilwoman	Whitefish	Montana
Linda Greenstein	Senator	Plainsboro	New Jersey
Bob Gordon	Senator	Fairlawn	New Jersey
Jim Wheldan	Senator	Atlantic City	New Jersey
Dan Benson	Assemblyman	Hamilton	New Jersey
Liz Muoio	Assemblywoman	Hopewell	New Jersey
Reed Gusciora	Assemblyman	Trenton	New Jersey
Andrew Zwicker	Assemblyman	Skillman	New Jersey
John McKeon	Assemblyman	West Orange	New Jersey
Mila Jasey	Assemblywoman	South Orange	New Jersey
Tom Eustace	Assemblyman	Maywood	New Jersey
Joe Lagana	Assemblyman	Paramus	New Jersey
Corazon Pineda	Council Member	Yonkers	New York
Dale Dowdle	Councilor	Plattsburgh	New York
Emily Svenson	Councilwoman	Hyde Park	New York
Chelsa Wagner	County Controller	Allegheny County	Pennsylvania
Donna Bullock	State Representative	Philadelphia	Pennsylvania
Michael Schlossberg	State Representative	Lehigh	Pennsylvania
Tom Murt	State Representative	Montgomery County	Pennsylvania
Deborah Gross	City Council	Pittsburgh	Pennsylvania
Natalia Rudiak	City Council	Pittsburgh	Pennsylvania
Dan Gilman	City Council	Pittsburgh	Pennsylvania
Blondell Reynolds Brown	City Council	Philadelphia	Pennsylvania
Ben Sanchez	Commissioner	Abington Township	Pennsylvania
Sara Hertz	Borough Council	Ambler Borough	Pennsylvania
Nina Sowiski	Borough Council	Forest Hills Borough	Pennsylvania
Dan Mandolesi	Borough Council	Hulmeville Borough	Pennsylvania
Greg Vitali	State Representative	Montgomery County	Pennsylvania
Brian McGuire	Commissioner	Lower Merion Township	Pennsylvania
Stephen P. McCarter	State Representative	Montgomery County	Pennsylvania
Tim Briggs	State Representative	Montgomery County	Pennsylvania
Carolyn Comitta	State Representative	Chester County	Pennsylvania
Jay Fisette	County Board Member	Arlington	Virginia

David Krump	Councilman	La Crosse	Wisconsin
Mary Solberg	Councilwoman	Menomonie	Wisconsin
Ryan Cornett	Councilman	La Crosse	Wisconsin
Ledell Zellers	Alder	Madison	Wisconsin
Sara Eskrich	Alder	Madison	Wisconsin
Heidi Oberstadt	Alder	Stevens Point	Wisconsin
Todd Wolf	Alder	Sheboygan	Wisconsin
Deb Lewis	Mayor	Ashland	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 5,071 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