IMPACTS OF THE PROPOSED "WATERS OF THE UNITED STATES" RULE ON STATE AND LOCAL GOVERNMENTS

House Committee on Transportation and Infrastructure
Serial No. 114–4

JOINT HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

AND THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

FEBRUARY 4, 2015

Printed for the use of the
House Committee on Transportation and Infrastructure and the
Senate Committee on Environment and Public Works

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Committee on Transportation and Infrastructure
U.S. House of Representatives

Bill Shuster
Chairman

Washington, DC 20515

Peter A. DeFazio
Ranking Member

Christopher P. Bertram, Staff Director

Katherine W. Dedrick, Democratic Staff Director

January 30, 2015

SUMMARY OF SUBJECT MATTER

TO: Members, Committee on Transportation and Infrastructure
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Joint Hearing on "Impacts of the Proposed Waters of the United States Rule on State and Local Governments"

PURPOSE

On Wednesday, February 4, 2015, at 10:00 a.m., in HVC-210 of the House Visitors Center, the Committee on Transportation and Infrastructure will hold a Full Committee joint hearing with the Senate Committee on Environment and Public Works on "Impacts of the Proposed Waters of the United States Rule on State and Local Governments." The committees will receive testimony from the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (Corps), and several state and local governmental stakeholder representatives on a joint EPA and Corps proposed rulemaking to redefine the regulatory term "waters of the United States" under the Clean Water Act.

BACKGROUND

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the "Clean Water Act" or "CWA") with the objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (*See* CWA § 101(a).) In enacting the CWA, it was the "policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority under this Act." (*See id.* at § 101(b).)

The Clean Water Act prohibits the discharge of any pollutant by any person, unless in compliance with one of the enumerated permitting provisions in the Act. The two permitting

authorities in the CWA are section 402 (the National Pollutant Discharge Elimination System, or "NPDES"), for discharges of pollutants from point sources, and section 404, for discharges of dredged or fill material. While the goals of the Clean Water Act speak to the restoration and maintenance of the "Nation's waters," both section 402 and 404 govern discharges to "navigable waters," which are defined in section 502(7) of the CWA as "the waters of the United States, including the territorial seas."

EPA has the basic responsibility for implementing the CWA, and is responsible for implementing the NPDES program under section 402. Under the NPDES program, it is unlawful for a point source to discharge pollutants into "navigable waters," unless the discharge is authorized by and in compliance with an NPDES permit issued by EPA (or by a state, under a comparable approved state program).

EPA shares responsibility with the Corps for implementing section 404 of the CWA. Under this permitting program, it is unlawful to discharge dredged or fill materials into "navigable waters," unless the discharge is authorized by and in compliance with a dredge or fill (section 404) permit issued by the Corps (or by a state, under a comparable approved state program).

In enacting the CWA, Congress intended the states and EPA to implement the Act as a federal-state partnership, where these parties act as co-regulators. The CWA established a system where EPA and the Corps provide a federal regulatory floor, from which states can receive approval from EPA to administer state water quality programs pursuant to state law, at equivalent or potentially more stringent levels, in lieu of federal implementation. Currently, 46 states have approved NPDES programs under section 402 of the Act, and two states have approved dredge or fill programs under section 404 of the Act.

HISTORICAL SCOPE OF CLEAN WATER ACT JURISDICTION

Neither the statute nor the legislative history on the definition of "navigable waters" in the CWA definitively describes the outer reaches of jurisdiction under the Act. As a result, EPA and the Corps have promulgated over the years several sets of rules interpreting the agencies' jurisdiction over "waters of the United States" and the corresponding scope of CWA authority. The latest amendments to those rules were promulgated in 1993.

Because the use of the term "navigable waters," and hence, "waters of the United States," affects both sections 402 and 404 of the CWA, as well as provisions related to the discharge of oil or hazardous substances, the existing regulations defining the term "waters of the United States" are found in several sections of the Code of Federal Regulations. The current regulatory definition of the term "waters of the United States" is:

"Waters of the United States" or "waters of the U.S." means:

(a) 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;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(*See, e.g.*, 33 C.F.R. § 328.3; 40 CFR 122.2; 40 C.F.R. § 230.3 for the definition in the agencies' regulations.)

SUPREME COURT CASES ON CWA JURISDICTION

There has been a substantial amount of litigation in the federal courts on the scope of CWA jurisdiction over the years, including three U.S. Supreme Court cases.

In the first case, *United States v. Riverside Bayview Homes, Inc.*[1] (*Riverside Bayview*), the Supreme Court unanimously upheld the Corps' jurisdiction over wetlands adjacent to jurisdictional waters, and held that such wetlands were "waters of the United States" within the meaning of the Clean Water Act.

In the second case, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*[2] ("*SWANCC*"), the Court issued a 5-to-4 decision that overturned the authority of the Corps of Engineers to regulate intrastate, isolated waters, including wetlands, based solely upon the presence of migratory birds.

In the third case, *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*[3] (hereinafter collectively referred to as "*Rapanos*"), the Court issued a 4-1-4 opinion that did not produce a clear, legal standard on determining jurisdiction under the CWA. Instead, the *Rapanos* decision produced three distinct opinions on the appropriate scope of federal authorities under the CWA: (1) the Justice Scalia plurality opinion, providing a "relatively permanent/flowing waters" test, supported by four justices; (2) the Justice Kennedy opinion, which proposed a "significant nexus" test, and (3) the Justice Stevens dissenting opinion, supported by the remaining four justices, advocating for maintenance of existing EPA and Corps authority over waters and wetlands.

ADMINISTRATIVE INTERPRETATIONS OF THE SUPREME COURT CASES

Following the *SWANCC* and *Rapanos* decisions, EPA and the Corps issued several guidance documents interpreting how the agencies would implement the Supreme Court decisions.

In January 2001, immediately following the Supreme Court's decision in *SWANCC*, the agencies published a guidance memorandum that outlined the agencies' legal analysis of the impacts of the *SWANCC* decision. (See *Supreme Court Ruling Concerning CWA jurisdiction over Isolated Waters*, dated January 19, 2001.)

In January 2003, the agencies published a revised interim guidance memorandum that amended the agencies' views on the state of the law after the *SWANCC* case as to what waterbodies are subject to federal jurisdiction under the CWA. (*See* 68 Fed. Reg. 1991 (Jan. 15, 2003).)

Subsequent to the Supreme Court decision in *Rapanos*, the agencies developed interpretative guidance on how to implement the *Rapanos* decision. In June 2007, the agencies issued a preliminary guidance memorandum aimed at answering questions regarding CWA regulatory authority over wetlands and streams raised by the Supreme Court in *Rapanos*. (*See* Joint Legal Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's*

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[1] *See* 474 U.S. 121 (1985).
[2] *See* 531 U.S. 159 (2001).
[3] The Supreme Court granted *certiorari* in both *Rapanos v. United States*, No. 04-1034, and *Carabell v. Army Corps of Engineers*, No. 04-1384, and consolidated the cases for review. *Rapanos v. United States*, 126 S.Ct. 2208 (June 19, 2006).

Decision in Rapanos v. United States & Carabell v. United States (June 5, 2007).) Then in December 2008, the agencies issued an updated guidance memorandum on the terms and procedures to be used to determine the extent of federal jurisdiction over waters, building upon the previous guidance issued in June 2007. (*See* Updated Joint Legal Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008).)

The December 2008 guidance provided that CWA jurisdiction over navigable waters would be asserted if such waters meet either the Scalia ("relatively permanent water") or Kennedy ("significant nexus") tests. According to the 2008 guidance, individual permit applications must, on a case-by-case basis, undergo a jurisdictional determination, based on either the Scalia or Kennedy tests. The 2003 and 2008 guidance remains in effect today.

In May 2011, EPA and the Corps published in the Federal Register proposed guidance regarding identification of waters subject to jurisdiction under the CWA. (*See* 76 Fed. Reg. 24,479 (May 2, 2011) (notice entitled *EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act*").) This guidance would have replaced the 2003 and 2008 guidance. In September 2013, the Corps and EPA announced their withdrawal of the proposed guidance before the 2011 guidance was finalized.

THE AGENCIES' PROPOSED REVISED CWA JURISDICTION RULE

On April 21, 2014, EPA and the Corps published in the Federal Register a proposed rule on the regulatory definition of the term "waters of the United States" under the CWA. (*See* 79 Fed. Reg. 22188.) The proposed rule was subject to a public comment period, which closed on November 14, 2014.

Under the proposed rule, the Corps and EPA would define the term "waters of the United States" as follows:

"Waters of the United States" or "waters of the U.S." means:

(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this definition, the term "waters of the United States" means:

(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 (a)(1) through (3) and (5) of this definition;

(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this definition;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this definition; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this definition.

(b) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this definition—

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this definition.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

(vi) Groundwater, including groundwater drained through subsurface drainage systems; and

(vii) Gullies and rills and non-wetland swales.

The proposed rule also provides new definitions of certain terms used in the proposed rule, including "adjacent," "neighboring," "riparian area," "floodplain," "tributary," "wetlands," and "significant nexus."

Stakeholders have expressed both concern with and support of the proposed rulemaking.

Those expressing concern with the proposed rulemaking have criticized the process by which the agencies have moved forward with the proposed rulemaking, as well as the substance of the rule itself, which they suggest fails to provide reasonable clarity, is inconsistent with Supreme Court precedent, and could broaden the scope of CWA jurisdiction, thereby triggering greater permit obligations for discharges to waters that currently may not be subject to the Act.

Those expressing support for the proposed rulemaking have suggested that this effort will provide greater clarity and certainty in the confusing jurisdictional/regulatory requirements following the Supreme Court decisions, as well as provide a scientifically based means for protecting headwater and intermittent streams, while preserving existing regulatory and statutory exemptions for certain activities.

The current regulatory agenda for EPA identifies a date of April 2015 for issuance of the final rule. (*See* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=2040-AF30.)

WITNESSES

Panel I

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
for Civil Works

Panel II

The Honorable E. Scott Pruitt
Attorney General
State of Oklahoma

The Honorable Adam H. Putnam
Florida Commissioner of Agriculture
Florida Department of Agriculture and Consumer Services
[On behalf of the National Association of State Departments of Agriculture]

The Honorable Sallie Clark
Commissioner, District 3
El Paso County, CO
[On behalf of the National Association of Counties]

The Honorable Timothy Mauck
Commissioner, District 1
Clear Creek County, CO

Lemuel M. Srolovic
Bureau Chief, Environmental Protection Bureau
Office of New York State Attorney General Eric T. Schneiderman

IMPACTS OF THE PROPOSED "WATERS OF THE UNITED STATES" RULE ON STATE AND LOCAL GOVERNMENTS

WEDNESDAY, FEBRUARY 4, 2015

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
JOINT WITH THE
U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committees met, pursuant to call, at 10:06 a.m., in Room HVC–210, Capitol Visitor Center, Hon. Bill Shuster (Chairman of the Committee on Transportation and Infrastructure) presiding.

Mr. SHUSTER. The hearing will come to order.

I want to first take the opportunity to welcome everybody here today and especially our witnesses, Administrator McCarthy and Assistant Secretary Darcy. Thanks for being here today.

And, again, welcome to the "waters of the United States," the proposed rule, on how it is going to work with State and local governments.

Before we get started, I would like to explain how we will begin our hearing today. And, first of all, full disclosure: I have never run a bicameral hearing before today. So if I stumble and bumble a little bit, please bear with me.

As I mentioned, on the House side, when the gavel goes down, everybody's name has been logged in, and we will go in the order of seniority if you were here at the gavel. The Senate will follow with Chairman Inhofe's direction.

Opening statements will be limited to 5 minutes, and there will just be four: both full committee chairs and both full committee ranking members. Other Members wishing to make statements may use their questioning time to do so, or they can have their statements entered into the record.

There will be a single round of questioning on each panel. We have two panels. The 5-minute rule will be strictly enforced. I have a quick gavel hand, so when you hear me tapping, please wrap up. Please try to watch.

Again, there is a lot of interest here today. There were 59 members of our committee, which is the entire committee, who said they will be attending today. I believe all the Senators also said they would be, so potential for 79 people to be here asking questions. So, again, I would encourage you to watch the time so I don't have to gavel you down.

Again, Members will be recognized—we will be alternating between the Senate and the House, Republicans and Democrats—Senate Republican, House Republican, Senate Democrat, House Democrat. That doesn't sound like the way we worked it out. I will figure it out as we go along.

OK. Again, as I mentioned, Members arriving for the gavel will be recognized first, and those that arrived after the gavel will be put in the queue.

Again, I want to thank Senator Inhofe and Senator Boxer for agreeing to hold this bicameral hearing. Senator Boxer has experience with this. We held a bicameral hearing in Los Angeles that I took part in a couple years ago. So she is the pro at this.

As we all know, last April, the administration proposed a rule that would expand the reach of the Federal Government under the Clean Water Act. This proposal is troubling for a variety of reasons, but I will sum up my biggest concerns.

The rule undermines the Federal-State partnership under the Clean Water Act. This partnership is the basis of the act's success over the last four decades in improving our water quality. Let me repeat again: Our water quality has continued to improve over the last four decades. And Republicans as much as Democrats, people at the Federal level as much as State and local, care about clean water deeply. And that is a positive thing, that we have seen our water continue to become cleaner and cleaner.

Many States and local governments, including my State of Pennsylvania, are objecting to this erosion of the partnership and the authority. This rule wrongly assumes that States and local governments, including Pennsylvania, don't know how or don't care about protecting the waters. And, as I mentioned, I think we all deeply care about that.

And while the agencies have had an opportunity to develop a reasonable rule, they instead chose to write the proposed rule vaguely in order to give the Federal regulators free rein to claim Federal jurisdiction over most any water or wet area.

This rule was developed by the administration without consulting State and local authorities, without considering their rights, their responsibilities, their liabilities, and their budgets, and without realistically examining the potential economic and legal impacts on agriculture and other stakeholders.

If this rule goes into effect, it will open the door for the Federal Government to regulate just about anyplace where water collects and, in some cases, regulate land use activities. This will cause serious consequences for the economy. It will threaten jobs and result in costly litigation. It will negatively impact businesses, farmers, homes, roadbuilders, and other job creators. And, most importantly, it will negatively impact hardworking, middle-class Americans.

It will trample the rights of State and local governments and their ability to make economic development decisions and, more importantly, public safety decisions. It will restrict the rights of private citizens to decide what they do on their own land.

Make no mistake, as I said, it will hurt the middle class, driving up the cost of food, driving up the cost to own a home. And, again, hardworking, middle-class Americans will be affected.

This rule is an end-run around Congress and another example of overreach by the administration. It was twice rejected by Democratic majorities. It was twice rejected by the Supreme Court. This proposal tries to force Federal control over the lives of our citizens, and not all water needs to be subjected to Federal jurisdiction. States should have primary responsibility for regulating waters within their individual boundaries.

Instead of racing to pass down another Federal edict, these agencies should collaborate with the States and local governments and other affected stakeholders.

I am pleased that we are having this hearing today.

And, once again, I want to make note to my colleagues that the 5 minutes just expired and I am finished with my statement. So, with that, I would now like to recognize Chairman Inhofe for an opening statement.

Senator INHOFE. Thank you, Chairman Shuster.

It is an honor to be here with our witnesses also.

I have a number of the same concerns that you do and that you stated in your opening statement, which I will not be redundant, but my concerns stem not only from the substance of the rule but also from the thought process employed by your agencies in developing it, I say to Ms. McCarthy.

And let me also make this statement too. The other day, Senator Boxer and I, we remembered, recalled, that the Clean Air Act was successful, that we were both in the House at that time, and we both were cosponsors of the amendments of 1990, was it?

Senator BOXER. Uh-huh.

Senator INHOFE. And so we have had successes. But we have some problems right now that we are looking at that do concern me.

First, I take issue with the fact that the proposed rule, if finalized, would significantly expand Federal authority under the Clean Water Act beyond what was intended both by the act and by the amendments. Agencies can only carry out the authority that Congress gives them; they can't create it unilaterally. And that is what I believe is happening now.

I am troubled by the fact that, for many years, the EPA and the Corps have embarked on what seems to be a relentless quest to expand the definition of "waters of the United States" and, therefore, Federal authority under the Clean Water Act. This agenda has been advanced in individual permit decisions by the Corps districts across our country.

But the Supreme Court drew the line when you tried to claim jurisdiction over isolated ponds and wetlands because birds could fly there and again when you tried to claim jurisdiction over wetlands adjacent to ditches and dry channels. The Supreme Court expressly rejected broad assertions over regulatory authority and made it clear that all water is not subject to Federal jurisdiction under the Clean Water Act.

Instead of respecting these limits on your authority, you then tried to memorialize the most extreme examples of bureaucratic overreach, first in the 2011 guidance document and now in this proposed rule.

If this rule is finalized without change, few water bodies and, indeed, few areas of land would escape the regulatory grip of the Federal Government, an outcome the Supreme Court deemed unlawful and impermissible.

We all remember what happened in other efforts legislatively. They made an effort to try to change this and, at that time, take the word "navigable" out. As I recall, that was Senator Feingold and Congressman Oberstar. We defeated their efforts. In fact, they were both defeated at the polls shortly after that.

So I think that this is an issue that certainly has everyone's attention, and I think it is really wise to have this first hearing. This is the first time I remember in 8 years that we have had a joint hearing, but it is that significant.

Now, granted, I am from a rural State, I am from a farm State, and they are very much concerned, in an arid State like Oklahoma, that we could end up with jurisdiction of the Federal Government coming in and doing things that are very punitive. And we are going to do everything we can to see that that doesn't happen.

So I thank you for joining us and having this as a joint hearing today.

Mr. SHUSTER. Thank you, Mr. Chairman.

And, with that, we will recognize Mr. DeFazio for an opening statement.

Mr. DEFAZIO. Thank you, Mr. Chairman.

Broadly, we are here because I remember this, and many of the Members sitting on this panel are old enough to remember this: The Cuyahoga River actually burned. They used to have signs on the bridges, "Do not throw lighted object from bridge. Flammable object below." That is good.

So, you know, we passed the Clean Water Act. Good start, based strongly in 20th-century, mid-20th-century science. But Congress has failed to revisit the Clean Water Act meaningfully since 1987. Science has advanced. Our understanding of waters and their value and their permeability over artificial boundaries between States has grown during that time period. Yet Congress hasn't acted.

The Supreme Court has. We have confusing, conflicting guidance, a 4–1–4 decision by the Supreme Court. They basically begged Congress to act or the agencies to clarify when they put forward that ruling.

Yet what we have had is, you know, we had the Bush administration attempting to put forward guidance, 2003 and 2008. And their guidance was said to be, quote, "a hodgepodge of ad hoc and inconsistent jurisdictional theories." That was a comment by the Farm Bureau at the time.

I think their guidance failed on two counts. One is to give us the protections we need and, secondly, to give us the regulatory certainty that the economy needs and those who are working in and around waters of the U.S. Failed on both counts. I think there is some agreement on that, yet last year the House passed a bill that would have locked us into the 2003/2008 guidance forever. No changes could be made, no matter what was brought forward.

And that is what brings us here today. The issue is, was the rule as proposed initially confusing? Yes. Did it raise concerns, tremendous concerns? Yes. They have had about 1 million comments. The

question is, what has happened since? Has the Agency heard from those million comments? Have they clarified? Have they modified it? I hear they have and they are working on that, and yet there are some who want to bring that process to a halt before it is mature.

If the Agency goes forward with a rule and it is not stopped by Congress—Congress has many tools at its disposal, including the 60-day regulatory review process where, if it is found to be objectionable, Congress can register its objections by overturning the rule. Or we have other tools at our disposal.

But I believe we should let the Agency go forward. I believe they have heard the concerns. I mean, I am going to be questioning on the issues of ditches, on the issues of agriculture practices and erosional features and those sorts of things. Have those things been clarified?

You know, I believe that, in acting, they need to do three things: It should be conducted more transparently. They should post all the comments that have been submitted. They should continue to meet with stakeholders. The final rule should be guided by science and the law. It should not expand Federal authority over waters never before covered by this act. And, third, they need to move quickly to end the confusion and the uncertainty and get the rule out.

So I think what we are here today is to figure out if they are on that path or not. And if they are on that path, I believe we should let them proceed. If they are not, then perhaps further action is warranted.

Thank you, Mr. Chairman.

Mr. SHUSTER. Thank you, Mr. DeFazio.

Now I will recognize Senator Boxer.

Senator BOXER. Thank you so much, Mr. Chairman, for this joint hearing, where I think if everyone shows up maybe half the Congress will be here. It is great for me to be with my House colleagues. I served proudly there for 10 years. I have the ultimate respect for the House as well as, of course, for the Senate.

Mr. Chairman, as you know, I have been around a while. I have never had a constituent of either party come up to me and say, Barbara—or Senator Boxer, depending on how well they knew me—Barbara, the water is too clean, you know, the air is too pure. Never. On the contrary, they want their families protected. And this goes for people of every party. And it has been kind of my mantra for so many years to protect them.

And I want to remind folks that the Senate committee is called the Environment and Public Works Committee, not the anti-environment public works committee. And so my concern here today is that we are focusing on the wrong thing. I want to focus on what we need to do to keep our families safe.

We heard eloquently from all my colleagues. Congressman DeFazio reminded us that a long time ago, decades ago, the Cuyahoga River in Cleveland was on fire. Lakes were dying from pollution. Why do you think Congress, in the most bipartisan way, passed the Clean Water Act? Because the people demanded it.

And, unfortunately, the beat goes on. Even with our landmark laws—and my colleague is correct. We agree that the Clean Air Act

was successful. He doesn't love it so much now, but he liked it then, and I liked it then. And I think we need to keep on top of the challenges.

Let me tell you one. Recent events in Toledo, Ohio, on the shores of Lake Erie remind us that the battle to protect our Nation's water continues. Last summer, a half-million Toledo residents went without drinking water for days because nutrient pollution washed into Lake Erie, causing toxic algae to bloom. Because what happens is what goes on upstream and flows into our recreational lakes and our drinking water is what this rule is all about, how do we protect that water.

Now, 1 in 3 Americans, 117 million people, get some or all of their drinking water from water systems that rely, in part, on small streams, including many that may not flow year-round.

The point is, what we do here—and I want to compliment the Obama administration, represented ably by two fantastic women, I might say—what they are doing is in the tradition of bipartisanship. Because when you look back, defending our waterways from pollution used to be bipartisan. The Reagan administration and the George W. Bush administration defended the broad scope of the Clean Water Act before the Supreme Court. And, for decades, Members of both parties understood that wetlands, lakes, and small streams are interconnected and water pollution must be controlled at its source.

This is not hyperbole. I would not be here were it not for Republicans in my State who support a clean environment. That is the truth.

Now, I guess what I need to tell you is that a variety of stakeholders support the proposed clean water rule. A September 2012 poll found that, regardless of political affiliation, 79 percent of hunters and anglers favor restoring Clean Water Act protections to wetlands and waterways, including smaller creeks and streams. A 2014 poll found 80 percent of small-business owners support protections for upstream headwaters and wetlands in the proposed clean water rule.

There has been a lot of misinformation. When I heard my colleagues say, "Oh, my God, the Obama administration wants to protect a puddle," I thought, "That can't be." Well, it isn't. You don't, at all. A puddle, swimming pools, stock ponds are not regulated. We know that for a fact. And isolated ponds that were mentioned by my friend, my dear friend Senator Inhofe, they are not involved in this at all.

So let's set aside fact from fiction. Let's work together on a rule that makes sense. So many people have spoken and given their opinions. I have it in this testimony, which I ask unanimous consent to include in the record.

Mr. SHUSTER. With no objection, so ordered.

[The collection of op-eds and articles submitted by Senator Boxer is available at the Government Publishing Office's Federal Digital System (FDsys.gov) at https://www.gpo.gov/fdsys/pkg/CPRT-114JPRT95074/pdf/CPRT-114JPRT95074.pdf on pages 1–83.]

Senator BOXER. And I am going to ask about some of their comments.

But it is time to restore much-needed certainty, consistency, and effectiveness to the Clean Water Act and put our Nation back on track toward clean and healthy waters for every one of our constituents.

Thank you very much.

Mr. SHUSTER. I thank the Senator.

And, again, it is my pleasure to welcome our first panel again. Today, it is the Honorable Gina McCarthy, who is the Administrator of the U.S. Environmental Protection Agency, and the Honorable Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works.

I ask unanimous consent that our witnesses' full statements be included in the record.

Without objection, so ordered.

And since your full statements are part of the written testimony, I would ask you to limit your testimony today to 5 minutes.

And, with that, Administrator McCarthy, you may proceed.

TESTIMONY OF HON. GINA MCCARTHY, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY; AND HON. JO-ELLEN DARCY, ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

Ms. MCCARTHY. Good morning, Chairman Inhofe, Ranking Member Boxer, Chairman Shuster, Ranking Member DeFazio, and members of both committees. I am very pleased to be here to testify with Assistant Secretary Jo-Ellen Darcy to discuss EPA and the U.S. Army Corps of Engineers proposed clean water rule.

Our goal in this rule is very straightforward. It is to respond to requests from stakeholders across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, to make it more predictable and more consistent with the law and peer-reviewed science.

We believe the result of this rulemaking will be to improve the process for making jurisdictional determinations under the Clean Water Act by minimizing delays in costs, to make protections of the Nation's clean waters more effective, and to improve predictability and consistency for landowners.

The foundation of the agencies' rulemaking effort to clarify protections under the Clean Water Act is the goal of providing clean and safe water for all Americans.

Consider these facts about the value of clean water to Americans: Manufacturing companies use 9 trillion gallons of freshwater every day. Thirty-one percent of all water withdrawals in the U.S. are for irrigation. About 40 million anglers spend $45 billion annually to fish in U.S. waters. The beverage industry uses more than 12 billion gallons of water annually to produce products valued at $58 billion. And approximately 117 million people get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams.

In recent years, several Supreme Court decisions have raised questions regarding the geographic scope of the Clean Water Act. In response to these questions as well as significant stakeholder requests for our rulemaking, the agencies began developing a proposed rule. The agencies' proposed rule provides continuity with ex-

isting regulations where possible. And we can reduce confusion and transaction costs for the regulated community and the agencies as we move forward with the final rule.

To that end, the agencies proposed specific categories of rules that are and are not jurisdictional. The proposed rule also discusses several regulatory alternatives that would reduce or eliminate the need for case-specific evaluations and provide greater clarity.

Using the input from our discussions with the agriculture community, EPA and the Corps are coordinating with USDA to ensure that concerns raised by farmers in the agriculture industry are effectively addressed in the final rule. The final rule will not change in any way existing Clean Water Act exemptions from permitting for discharges of dredged and/or fill materials into the waters of the U.S. associated with agriculture, ranching, and forestry activities.

I also want to emphasize that farmers, ranchers, and foresters who are conducting the activities conducted by the exemptions, like plowing, tilling, planting, harvesting, building and maintaining roads, ponds, and ditches, and many other activities, can continue these practices after the new rule without the need for any approval from the Federal Government.

Additionally, we expect to clarify for the first time in regulation that groundwater is not subject to the Clean Water Act. The proposed rule reduces jurisdiction over ditches and maintains the longstanding exclusions of prior converted cropland and waste treatment systems, including treatment ponds and lagoons.

In preparation for the proposed rule, the EPA reviewed and summarized more than 1,200 peer-reviewed scientific papers and other data, and the EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of public peer-reviewed scientific literature. This draft report informed the agencies' development of the proposed rule.

The draft report itself underwent independent peer review, led by EPA's Science Advisory Board. And the final report was published in the Federal Register on January 15, 2015. The final rule will carefully reflect the SAB's recommendations and all the data and information presented in the final report.

We also want to emphasize that EPA responded to a request from the Science Advisory Board to review the effectiveness in basing the agencies' proposed rule on the best available peer-reviewed science, and that conclusion is also part of the docket and supportive of this rulemaking moving forward.

So let me conclude by emphasizing my strong belief that what is good for the environment is good also for farmers, ranchers, foresters, manufacturers, homebuilders, small businesses, and everyone in the United States. We all want clean water, and this rule will help ensure that we can identify the waters necessary to protect with clarity so that all these activities can continue.

So I look forward to answering your questions.

Mr. SHUSTER. Thank you, Administrator McCarthy.

And now I will recognize Assistant Secretary Darcy for her statement.

Ms. DARCY. Thank you, Mr. Chairman.

Chairman Shuster, Chairman Inhofe, Ranking Member DeFazio, Ranking Member Boxer, thank you for the opportunity to testify today alongside my friend and colleague Gina McCarthy.

We believe that the proposed rule provides the clarity, consistency, and predictability that Members of Congress and the regulated public have requested. It balances the protection of our Nation's aquatic resources while allowing fair and reasonable development. Most importantly, our proposal is based upon science, including a peer-reviewed report on connectivity and the recommendations of EPA's Science Advisory Board.

Under section 404 of the Clean Water Act, the Corps regulates discharges of dredged or fill materials into waters of the United States, including wetlands. Nationwide, the Corps makes final decisions on over 81,000 permit-related activities and approximately 56,000 jurisdictional determinations annually, so efficiency is very important to us as well as to the regulated community that we serve.

The proposed rule is fully consistent with several Supreme Court decisions regarding the Clean Water Act jurisdiction, specifically the *Riverside Bayview Homes*, regarding adjacent wetlands; the *SWANCC* decision, having to do with isolated water bodies; and the *Rapanos* decision, which dealt with waters that are not navigable in the traditional sense. It was in the *Rapanos* decision that Justice Kennedy stressed the notion that waters that possess a significant nexus to navigable waters could reasonably be made, so are subject to Clean Water Act jurisdiction.

Based upon policy guidance that was promulgated in 2003 and in 2008, we have been doing case-specific significant-nexus analysis determination for many categories of nonnavigable streams and wetlands. These determinations require extensive documentation and fieldwork, requiring significant resources and time.

Permit applicants have expressed concern about how significant-nexus determinations are being made. We have received comments from Congress, business, industry, agriculture interests, scientists, other stakeholders, and the public urging us to pursue a notice-and-comment rulemaking. Chief Justice Roberts himself, in the *Rapanos* decision, stated that the agencies would be in a better position if they had conducted a notice-and-comment rulemaking.

As noted by the Administrator, the proposed rule retains much of the structure of the agencies' longstanding definition of "waters of the United States," including many of the existing provisions not directly impacted by *Rapanos* and *SWANCC*. The agencies are not proposing to substantively change the provisions of traditional navigable waters, interstate waters, and the territorial seas.

For the first time, we are proposing a regulatory definition for the term "tributaries." Only those waters that flow into a traditional navigable water, interstate water, or territorial sea are jurisdictional as tributaries. We also propose that the term "adjacent" cover both adjacent wetlands and other adjacent water bodies.

These new definitions will significantly clarify what waters are jurisdictional by rule using well-understood ecological concepts. For some categories of waters, no additional site-specific analysis would be required for certain adjacent waters.

Our decision to regulate by rule all tributaries and adjacent waters and wetlands is based on our understanding that these waters, alone or in combination with similarly situated waters in a watershed, have a significant nexus to a traditional navigable water, interstate water, or territorial sea. And this is based on the currently available science.

By decreasing the number of jurisdictional determinations that require a case-specific significant-nexus analysis evaluation, the proposed rule is expected to reduce documentation requirements and processing times for these.

The agencies propose for the first time to exclude by rule certain waters and features over which the agencies have a policy to assert jurisdiction, such as certain ditches. Waters and features that are determined to be excluded from the jurisdiction will not be jurisdictional under "waters of the U.S."

Over 1 million comments were received, as the Administrator indicated, and we intend to consider each of those comments when we develop the final rule.

I see my time has expired. Thank you.

Mr. SHUSTER. Thank you, Madam Secretary.

And, with that, again, we are going to go to questions. And the way we are going to run it, again, is I will go to a Senate Republican, Senate Democrat, then back to a House Republican and House Democrat.

So, with that, I yield 5 minutes of questions to Chairman Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

Ms. McCarthy, when you first opened up, you said that you were responding to the stakeholders across the country. And as I read the statements from the stakeholders across the country, they all seem to be on the other side of this. I would almost have to ask you who you are referring to.

The Small Business Administration Office of Advocacy states, "Advocacy recommends that the agencies withdraw the rule" and conduct a small business review panel prior to promulgating the rule.

And I would ask unanimous consent that that letter be placed in the record at this point, Mr. Chairman.

Mr. SHUSTER. Without objection, so ordered.

[The information is on pages 239–248.]

Senator INHOFE. The Regulatory Flexibility Act requires the examination of impacts of proposed rules. This is something that wasn't done.

Groups like municipal groups, the U.S. Conference of Mayors, National League of Cities, National Association of Counties, National Association of Regional Councils—all of them are very much on the other side.

Now, we are going to hear, I know, from our attorney general, Scott Pruitt, and from others in the second panel, and I am anxious to get to that second panel.

Let me make one comment, Mr. Chairman, that we are having, right now, our confirmation hearing on Ash Carter to be Secretary of Defense. I may have to be leaving from time to time for that purpose.

Ms. McCarthy, our attorney general, Scott Pruitt, believes that your proposal exceeded your authority under the Clean Water Act and points out in his testimony that the Supreme Court stopped the Corps from regulating nonnavigable isolated intrastate water, but your proposal would bring all of these under Federal control because of use by the birds and animals.

Can you explain to us how the use of water by a bird or animal can be a legal basis for regulating water under the Clean Water Act, briefly?

Ms. MCCARTHY. Senator, it is my understanding that that is not sufficient as a sole reason for jurisdiction. And that was indicated——

Senator INHOFE. All right. That is——

Ms. MCCARTHY [continuing]. By the Supreme Court. But that is not what this rule intends to do or specifically does.

Senator INHOFE. All right.

Adam Putnam, the Florida commissioner of agriculture, says that on farms in Florida there are low spots, ditches, irrigation channels that capture, store, and carry water from rainfall.

Will your final rule make it clear that these features are not "waters of the United States"?

Ms. MCCARTHY. In this final rule, we actually reduce the jurisdiction of the Clean Water Act relative to ditches by making clear that there are a variety of other ditches that should be excluded from jurisdiction.

And we do the best we can to explain those from erosional features, but I will say that there has been a lot of comment that indicate confusion there. And we are really looking forward to clarifying that, because in no way do we intend to reduce the exclusions or exemptions that are currently in the Clean Water Act.

Senator INHOFE. Thank you.

The EPA has described concerns about Federal control over fields and industrial facilities, really any piece of land that is not flat, because when it rains, that water runs downhill and forms drainage features such as—and they declare that as a myth.

Now, this thing here is from Tennessee. It is a picture of a farmer's field in Tennessee. The State of Tennessee said it was a wet-weather conveyance. In other words, it only had moving water when it rains. But the Corps called it a stream, subjecting it to your proposed new regulation.

Do you agree with the Corps?

Ms. MCCARTHY. I am sorry, sir. I can't, on the basis of a picture, make a science determination.

Part of the reason to do this rule is to look at the current science and to try to provide the clarity that people need so that the determinations are clear, the reasons why are clear, and people can actually do farming and agriculture and ranching with much more certainty.

Senator INHOFE. Ms. Darcy, was that an accurate representation of your or the Corps' comments?

Ms. DARCY. Yes, sir.

Senator INHOFE. All right.

And you also said in a press conference, you said that the increase—talking about the President's budget—the increase that

would be going to the Corps was linked to the proposed rule that we are talking about today. Was that accurate?

Ms. DARCY. Yes.

Senator INHOFE. So if this proposed rule goes final, are you going to need those additional resources to regulate more waters?

Ms. DARCY. We will need those additional resources to implement the rule, sir.

Senator INHOFE. Thank you, Mr. Chairman.

Mr. SHUSTER. Thank you, Mr. Chairman.

And, with that, Senator Boxer is recognized for 5 minutes for questions.

Senator BOXER. Thank you, Mr. Chairman.

I would like to place into the record letters that I have received at the committee from over 1,000 groups from 44 States supporting this proposal.

And I am going to read just some of them to give colleagues an idea of the broad support this rule is receiving: America's Great Waters Coalition, American Fisheries Society, American Public Health Association, American Rivers, American Sustainable Business Council, Association of State Floodplain Managers, Great Lakes Coalition, Outdoor Alliance, Outdoor Industry Association, Rural Coalition, Society of Wetland Scientists, Southern Environmental Law Center, U.S. Shorebird Conservation Partnership, Waterkeeper Alliance, Alaska Independent Fishermen's Marketing Association, EPA Region 10 Regional Tribal Operations Committee, the Alabama Rivers Alliance.

In California, just to name a few: the California Association of Sanitation Agencies, California State Water Resources Control Boards, the Golden Gate Salmon Association.

In Colorado, a joint comment letter from 43 elected officials.

In Oklahoma, the Conservation Coalition of Oklahoma, the Groundwater Protection Council, the Indian Country Agriculture and Resource Development Corporation, a number of others.

In Oregon, a number, including the city of Portland.

In Pennsylvania, a joint letter from 74 Pennsylvania NGOs, a whole list from Pennsylvania, including a Philadelphia resolution in support of the rule, League of Women Voters of Pennsylvania, and it goes on.

So I want to put those letters in the record, if there is no objection.

Mr. SHUSTER. Without objection, so ordered.

[The information, except for letters from Southern Environmental Law Center and Waterkeeper Alliance, is on pages 249–343. Letters from Southern Environmental Law Center and Waterkeeper Alliance, as well as over 1,000 pages of additional letters of support, are available at the Government Publishing Office's Federal Digital System (FDsys.gov) at https://www.gpo.gov/fdsys/pkg/CPRT-114JPRT95074/pdf/CPRT-114JPRT95074.pdf on pages 1–1022.]

Senator BOXER. Ms. McCarthy, we have heard claims that many waters would be regulated that are actually exempted from your rule.

So can you clarify? If you can do it with a "yes" or "no" or a "maybe." And then if you say "maybe," we will go into it.

Isolated puddles.

Ms. MCCARTHY. Exempted.

Senator BOXER. I can't hear you.

Ms. MCCARTHY. I apologize. They continue to be exempt.

Senator BOXER. So isolated puddles are not regulated. Is that correct?

Ms. MCCARTHY. That is correct.

Senator BOXER. Isolated ponds not connected to other waters, are those going to be regulated under your rule?

Ms. MCCARTHY. No.

Senator BOXER. Artificially irrigated areas, will they be regulated under your rule?

Ms. MCCARTHY. No, Senator.

Senator BOXER. Reflecting pools and summer pools, will they be regulated under your rule?

Ms. MCCARTHY. No, Senator.

Senator BOXER. What about water-filled depressions that are incidental to construction, will they be regulated under your rule?

Ms. MCCARTHY. No.

Senator BOXER. Jo-Ellen Darcy, do you agree with that?

Ms. DARCY. I do, Senator.

Senator BOXER. OK.

I would ask unanimous consent to place into the record a very interesting press release from business leaders who support this rule, the American Sustainable Business Council. So I would ask permission to get that into the record.

Mr. SHUSTER. Without objection, so ordered.

[The information is on pages 344–345.]

Senator BOXER. And, finally, I wanted to talk about the many comments that were received. Could you tell us how many comments were received approximately? My understanding is about 1 million, but I am not sure I am right on that.

Ms. DARCY. Yes. The last number I saw was over 900,000, so we are talking nearly 1 million comments.

Senator BOXER. OK.

And I want to make sure, because Congressman DeFazio talked about transparency. Have you extended the rulemaking time so that even more people could get their comments in? And are these comments open, and can we all read the comments?

Ms. DARCY. We extended the comment period this fall. I believe the public comment period closed November 14th of 2014. We had added an additional 45 days from the initial comment period, so there was additional time given. The proposed rule went out last spring.

Senator BOXER. And the comments will be published; is that correct?

Ms. DARCY. Yes.

Senator BOXER. For all to see?

Ms. DARCY. Yes.

Senator BOXER. Well, Mr. Chairman, you know, I am confused because I think people are arguing against some mythical rule. And I do think the Obama administration has been very careful not to overreach on this.

And we keep hearing about how this President issues more Executive orders. Now, this is a rule, but, just for the record, President Obama has issued fewer Executive orders than President Reagan, both Bushes, President Clinton.

And I think this rule is an example of your ability—two leading voices here, who have common sense. We don't want to regulate a puddle. That is ridiculous. That doesn't hurt anybody. We want to regulate a body of water that has pollutants in it and those pollutants wind up in the drinking water system in Ohio or California or Pennsylvania or Oklahoma or Oregon or any other place.

So I want to just thank you so much.

And, again, Mr. Chairman, thank you for this opportunity.

Mr. SHUSTER. Thank you, Senator Boxer.

With that, I am up first. And the chairman's prerogative, I am going to go first to the gentleman from Ohio, the gentleman who is the chairman of the Subcommittee on Water Resources and Environment, also a farmer, also the former chairman of the Ag Committee in the Ohio State Legislature. So he is not only a policy expert, he knows practically what this means to farmers out there.

So, with that, I yield 5 minutes for questions to Mr. Gibbs.

Mr. GIBBS. Thank you, Mr. Chairman.

Just to clarify from some of the opening statements, everybody in this room wants clean water and clean drinking water and to protect the environment. But, unfortunately, this rule, as proposed, doesn't get us there, and we do need clarification. And I am going to try to demonstrate that in a couple minutes.

Assistant Secretary Darcy, I want to start where we left off in my committee last year. We were talking about the erosional feature, and I actually gave an example on my farm, and you said that would not be under "waters of the United States."

And I happen to have the same picture; it is just a little bit smaller than Senator Inhofe's, but I want to bring that up. I won't even ask the question. I will just start.

This is in Tennessee, like Senator Inhofe said. This was declared a tributary of "waters of the United States." This was declared a "waters of the United States."

Now, it looks like to me it is an erosional feature. OK? And maybe it looks like to me it should be a grass waterway. But if they are going to already make that—and the reason it was already declared, because this landowner had to go get a permit. And here is the permit. And they spent a pile of money getting through that.

Now, the problem is, when that kind of land feature or farmland layer is declared "waters of the United States," that means they have to get a section 404 permit to fill that in or to put in a grass waterway. They would have to get a 402 permit from the EPA if they are going to spray herbicides or pesticides.

This is where I think you go backwards a little bit. If farmers are working with the Soil Conservation Service, trying to do the right thing, like I did on my farm, but now, if it is already declared "waters of the United States" by the interconnectivity rule, the neighbors in that watershed are automatically declared that. Then they have to go get a 404 permit to fix that. And that might take

some time, it is going to overburden the agencies, and I don't think we are going to enhance the protection of the environment.

That is the first concern I have on that aspect. Then, if you the Corps are going to declare that "waters of the United States," obviously, then, township road ditches are going to be declared "waters of the United States," if you are going to declare an ephemeral like that. That is my first concern.

Now we have a second picture. This was done by an engineering firm who are experts in this field, and this is the current jurisdiction of "waters of the United States" on some property just south of Ohio and Kentucky. You can see the creeks there in the blue and some of the intermittent streams. There are 96 miles of intermittent streams, 47 miles of perennial.

Then the next picture—hold that up—is what it would be under the proposed new rule. We now have 384 ephemeral streams. And that just opens it up to the whole thing and causes a lot of concern. That is where the agriculture community is really concerned.

I think the pictures say what the issue is here. And if you want to comment, Assistant Secretary, quickly, you can, because I want to move on.

Ms. DARCY. I would say, Congressman, that the picture you showed earlier, similar to the one from Senator Inhofe, that it was determined jurisdictional under the current rule; however, under the proposed rule, it would not be jurisdictional.

Mr. GIBBS. OK. Do we have your commitment that those wouldn't be in the——

Ms. DARCY. Under the proposed rule——

Mr. GIBBS. OK.

Ms. DARCY [continuing]. They would not be jurisdictional.

Mr. GIBBS. Administrator McCarthy, you put out a press release today and said that 60 percent of the streams and millions of acres of wetlands across the country aren't clearly protected from pollution and destruction. And you went on to say that your agencies have proposed to strengthen protections to clean water. I thought this was all about clarifying, not strengthening.

But I want to back up here, where you say clearly—aren't clearly protected. It is my understanding that the State EPAs have to, every 3 years, submit a plan of action to your agency. And that is where the oversight and the guidance creates the cooperative federalism to work together.

When I read your press release, I would have to assume that maybe your agency is not doing what you are supposed to be doing.

Ms. MCCARTHY. Well, Congressman, it is our intent in this rulemaking to make sure that the confusion that has arisen from earlier Supreme Court decisions are clarified. And I think it is incredibly important that we minimize delays and we minimize costs associated with the implementation of this rule, that we make our protections more effective.

Mr. GIBBS. Well, I would also——

Ms. MCCARTHY. And we are going to do that by——

Mr. GIBBS. Excuse me. Reclaiming time, let me go on. Let me go back here to this example in Tennessee. Tennessee, on stormwater and the picture we had, had actually more stringent rules than what the EPA currently has. So they are doing their job. And now

you are going to add more cost, because they are going to have to redevelop their plans, and it is going to add more cost.

When you look at some of the 900,000 comments, a lot of them are by Governors, majority of the States, and they question—the process is inadequate. You did not consult the States, you did not consult the State EPAs. They say that in their comments.

You know this process is broken. You need to stop the process and go back, and let's start over.

I yield back my time.

Mr. SHUSTER. And, with that, I will allow the witness to respond to that.

Ms. MCCARTHY. Well, I think we have been working very closely with the States for many years, and it is, in fact, the States, as well as stakeholders and the Supreme Court, who told us we needed to go back and take a look at the science and make this on much more sure footing in terms of what the science tells us today about what waters are essential for protection.

But I would just reinforce the fact that I understand that everybody here wants clean water. I also understand that the agriculture community is sincere in wanting to have clean water but also certainty that they can continue to farm and ranch and do the silviculture that we all rely on.

That is what we are trying to clarify with this rule. That is the predictability. That is how we are going to get better and enhance our relationship with the States and our effectiveness as Federal agencies.

Mr. SHUSTER. Thank you.

And, with that, I would like to ask unanimous consent that the permit that Mr. Gibbs had be submitted to the record.

So, without objection, so ordered.

[The information is on pages 346–370.]

Mr. SHUSTER. And, with that, I recognize Mr. DeFazio for 5 minutes.

Mr. DEFAZIO. Assistant Secretary Darcy, as I understood your response to this case in Tennessee, you said, because of what has been referred to as the Farm Bureau view, the hodgepodge of ad hoc and inconsistent jurisdictional theories in the Bush rules, that was ruled, apparently, as a wetland. But you are saying, under the new clarified rules, it would not be. If it is a farming activity, it would be exempt.

Is that correct?

Ms. DARCY. That is correct.

Mr. DEFAZIO. OK.

So if we are stuck with the Bush guidance, then that farmer is stuck with that ruling. If we move beyond the Bush guidance, that farmer and other farmers would be exempt, given similar circumstances——

Ms. DARCY. Correct.

Mr. DEFAZIO [continuing]. With erosional features. OK. Excellent.

You know, you have received 1 million comments. I assume that, you know, as we heard, they are all going to be posted. They haven't been. I think that would be useful. You don't have to post 108,000, 200,000, 300,000 identical postcards but at least an exam-

ple of one thing. There are 300,000 postcards like this. But it should all be posted.

Now, have you listened? Are we going to have clarifications and changes in the final rule, Administrator McCarthy?

Ms. MCCARTHY. Yes, sir.

Mr. DEFAZIO. OK. So we are going to have changes.

Ms. MCCARTHY. Yes.

Mr. DEFAZIO. Has any member of this panel seen those proposed changes?

Ms. MCCARTHY. Not as yet, no.

Mr. DEFAZIO. OK. Have any of the advocacy groups on either side of the issues seen those proposed changes?

Ms. MCCARTHY. Not as yet, no.

Mr. DEFAZIO. OK.

So you are going to be responsive to concerns that have been raised about ditches, about erosional features, and other major, you know, consistent, persistent concerns that I have heard in this rule. You are going to clarify. And you go on to say that, in fact, ditches will be—there will be more clarification and exemption for ditches than under the Bush rule.

Ms. MCCARTHY. That is correct.

Mr. DEFAZIO. OK. So why would we want to stop that?

Ms. MCCARTHY. I think one of the reasons to go to rulemaking, which was a judgment that this administration made, was to listen to all of the people who said that this is important enough. And the transparency and certainty of the rulemaking process is what we need. We put a proposal out specifically to generate comment——

Mr. DEFAZIO. Right. But the comment——

Ms. MCCARTHY [continuing]. To learn from that.

Mr. DEFAZIO. You will admit that the initial rule did create a good deal of confusion.

Ms. MCCARTHY. Yes.

Mr. DEFAZIO. You had to keep issuing statements saying, it doesn't do this, it doesn't do that, it doesn't do this, it doesn't do that.

And then now people think—and please clarify this; this is a major objection—that if you haven't specifically exempted something in this rule or with your clarifications, that everything else is covered. Will you please clarify that that is not true?

Ms. MCCARTHY. That is not true.

And you are absolutely right; we are looking to provide more clarity on the basis of the comments we received. We are not expanding the jurisdiction of the Clean Air Act. We are not taking away current exemptions. We were making an attempt to take a look at the science and provide as much clarity as we could.

And we are going to listen to those comments, and we are going to make changes in a variety of areas where the comments have been very robust and clear, and we will respond to those. We are intending to use this rulemaking process in the way we described it. We are going to protect what we need to; we are going to leave alone what we don't.

Mr. DEFAZIO. Former subcommittee Chairman Bishop offered an amendment last year which prohibited the rule from going into ef-

fect if it expanded the authority over waters never before covered by the act.

Do you have any problem with that? Would that affect this rule? Are you covering waters never before covered?

Ms. MCCARTHY. We cannot expand the jurisdiction of the Clean Water Act. We are simply trying to provide clarity in terms of what that is with this rulemaking.

Mr. DEFAZIO. OK. So if we passed an amendment or statute that said that, it wouldn't affect this rule because you are not expanding the authority.

Ms. MCCARTHY. We are not expanding the authority of the Clean Water Act. We cannot do that.

Mr. DEFAZIO. OK.

Let's get back to ditches. To Ms. Darcy, you mentioned roadside ditches. All exempt?

Ms. DARCY. The particular exemptions in the proposed rule relate to upland ditches, which are dry ditches going from dry land to dry land. I am going to have to check my notes here as to the other specific exemption for ditches.

However, within the public comment period, we have had a great deal of focus on ditches and how do we define those for possible further exclusion. We will be looking at the "ditches" definition in the proposed rule as well as those recommendations of clarification from the public.

Mr. DEFAZIO. You mentioned agricultural practices. How about a quarry that creates a pool of water within the quarry because as you mine down you hit the water table? Is that going to become jurisdictional?

Ms. DARCY. The way you define it, it sounds as though it is an isolated——

Mr. DEFAZIO. It is groundwater that is bubbling up. It is not flowing out.

Ms. DARCY. We do not regulate groundwater in this rule.

Mr. DEFAZIO. OK. And even though there is a pond or whatever body of water within the quarry that was artificially created, not covered.

Ms. DARCY. Not covered.

Mr. DEFAZIO. OK. Thank you.

Thank you, Mr. Chairman.

Mr. SHUSTER. Thank you, Mr. DeFazio.

Now, just to give you a heads-up on the lineup so people know who is in the queue to ask questions—OK, the Senate just through a curve at me.

First, we are going to go to Senator Barrasso, then Senator Whitehouse. Then I am going to take my turn questioning, and then Ms. Norton will be fourth.

So, with that, I recognize Mr. Barrasso for 5 minutes.

Senator BARRASSO. Thank you very much, Mr. Chairman.

Ms. McCarthy, thank you for being here.

I want to show you a map of the State of Wyoming, my home State. And this states it was prepared by INDUS Corporation under contract with the U.S. Environmental Protection Agency. The map has at the bottom the symbols of the U.S. Geological Survey, the EPA, and the U.S. Forest Service.

And this map depicts surface-water features in Wyoming, including perennial, intermittent, and ephemeral streams, which are all color-coded here. That means that everywhere in this map that isn't white is a potential "water of the United States," requiring communities, requiring ranchers, requiring small-business owners to obtain costly permits to do any sorts of activities.

Now, Wyoming is a High Plains State. It is considered an arid State. So I can't understand how the EPA can determine with this map that most of the State of Wyoming is a potential "water of the United States." I can only conclude that the Agency is counting Wyoming land covered in snow during the winter.

In 2014, one of my constituents was threatened with fines of $75,000 a day—$75,000 a day—for building a stock pond that the Corps said was somehow connected to a "water of the United States." And under this map, the entire State of Wyoming would be subject to threats of fines for even putting a shovel into the ground.

So both Congress and the Supreme Court said that the Federal control over water should be limited. This map proves this rule would be doing exactly the opposite.

And that is why I will once again introduce legislation, working with Chairman Inhofe, to stop this bureaucratic overreach. So I urge my colleagues to once again join me in this effort with this legislation impacting the "waters of the United States."

Now, Ms. McCarthy, in a March 27, 2014, hearing before the House Appropriations Subcommittee on the Interior, Environment, and Related Agencies, you told Chairman Rogers that the EPA has, quote, "some mapping in the docket associated with this rule that people can access at this point." You went on to say that there had been no mapping before and that you had taken the opportunity to map water bodies that you felt the Federal Government needed to protect.

Now, can you explain to me why these maps that you obviously considered significant were never made available for public comment?

Ms. MCCARTHY. I am sorry, Senator. I think the maps that you are holding up are maps that EPA has worked with both USDA and Fisheries to take a look at water bodies across the U.S. They were, as far as I know, not used to determine jurisdiction and not intended to be used for jurisdiction. They are entirely different, with different data sets. They were not used specifically for the purpose that we are here to talk about, and they are not relevant to the jurisdiction of the "waters of the U.S."

Senator BARRASSO. Well, you said there had been—your actual quote is there had been no mapping before, there has been no certainty, so we are identifying the rivers and streams and tributaries and other bodies that science tells us is really necessary to protect the chemical, physical, and biological integrity of navigable waters.

So I would say, then where are the maps that you are referring to?

Ms. MCCARTHY. Senator, I don't know what the specific quote was referring to. But I do know that those maps were commissioned to have a better understanding of waters across the U.S., which I am very happy my water office wants to do. But those were

not done specifically to inform this rulemaking, as far as I know. And I was the decisionmaker on this proposal, and those were not called to my attention in any way, shape, or form. And they are not consistent with how we look at the jurisdiction of the Clean Water Act.

Senator BARRASSO. So my question is this: If these maps don't show the scope of the waters protected, could your proposed rule capture even more than what is on this Wyoming map and other State maps? You know, more specifically, is this map, is this a ceiling of what you intend to capture, which would be terrible, or is this map a floor of what may be captured? Then this is actually catastrophic for people all across the country. What is your——

Ms. MCCARTHY. It is neither of those. This proposed rule speaks to what characteristics water bodies need to have in order to be jurisdictional. Those are in no way related to the maps that you have behind you.

And, again, we are not expanding the jurisdiction of the Clean Water Act. We are not eliminating any exemptions or exclusions from the Clean Water Act in this proposal. We are in fact narrowing the jurisdiction of the Clean Water Act, consistent with sound science and the law.

Senator BARRASSO. So if you are not going to use these maps, can you commit to me and to this committee that the final rule will rely on actual field observations to identify Federal jurisdiction as opposed to EPA and the Corps establishing Federal jurisdiction over Wyoming's water from your desks in Washington using some other tool?

Ms. MCCARTHY. This proposed rule actually identifies what we believe should be jurisdictional, what we believe should not be jurisdictional, and then, on a case-by-case basis, you make determinations.

Senator BARRASSO. Thank you, Mr. Chairman.

Mr. SHUSTER. Thank you, Senator.

With that, we will go to Senator Whitehouse.

Hold it a second. Somebody else is——

Senator WHITEHOUSE. Thank you very much, Mr. Chairman.

Mr. SHUSTER. Hold on 1 second, Mr. Whitehouse. We are operating on your side under Senate rules, so I have to defer to Mr. Inhofe. And I believe that since Mr. Cardin is senior, he gets the 5 minutes now.

Mr. Cardin?

Senator WHITEHOUSE. Works for me.

Senator CARDIN. I think there will be virtually no difference between Senator Whitehouse and my view on the work being done by EPA on the "waters of the U.S."

So let me first, though, welcome the Administrator and thank her very much.

The Administrator knows my concerns for the Chesapeake Bay. All of our stakeholders have been involved in cleaning up the bay. The Clean Water Act is a critically important part of everyone working together.

The headwaters are critically important to the efforts, and our farmers are making a real effort to help us clean up the bay. Our developers are making efforts. Our local governments, private sec-

tor—all working together in a collaborative way to deal with the challenges of the Chesapeake Bay, the largest estuary in our hemisphere.

The concern is, if we don't deal with the headwaters, it is a huge problem. Now, before the *Rapanos* decision, I think it was pretty clear as to what was regulated waters and what were not. The *Rapanos* decision put that in question. And then there was a desire for clarification.

Congress should have acted. Congress did not. The opponents of these rules didn't really want Congress to act. And now we need regulation, and they are saying there is confusion, but they are fighting regulation.

So I just really want to give you a chance to tell us what these regulations are all about. Are we trying to do something different than we have done in the past? Or are we trying to have clarity on waters that affect water qualities in bodies of water such as the Chesapeake Bay, that we have sensible definitions for what is included—but it seems to me you have gone to an extreme, to exclude those areas that may be of concern. Which, quite frankly, I think you probably pulled it back further than we had before the *Rapanos* decision.

Ms. MCCARTHY. Well, thank you for a few minutes.

First of all, thank you for your commitment to the Chesapeake and other beautiful areas that are so important to us.

This rule is really about responding to the confusion that has arisen over the years. And it is a conversation we have been having, frankly, for decades.

And what we really need to do with this rule is to clearly explain what waters the Clean Water Act was intended to protect. And those are waters that are most important to protecting drinking water supplies, that are most important to protect us from flood damage, that are most important in many different ways for both fishing as well as the recreational opportunities that we all enjoy.

And so we have used the opportunity to spend many years looking at the science, telling us what waters we need to protect, so that we can minimize our focus and our resources in areas where it is not critically important.

So this rule is about clarifying what is in, about maintaining the examinations, in fact, expanding the exemptions based on what we know now on the science, and making it abundantly clear so that people can go about their business with more clarity and more certainty.

We won't have to spend the resources. Stakeholders won't have to spend the resources. But, frankly, this is all about the science. They told us, the Supreme Court told us, get the science right. And we are doing that with this rulemaking.

Clearly, there is work to do between proposal and final. We are up to this task. And one of the reasons to do this with a rulemaking instead of guidance is to gather the information we need to get it right. And we will.

Senator CARDIN. You have given some clarity, some detail in the regulation. As you pointed out, it is open for comment right now——

Ms. MCCARTHY. It is.

Senator CARDIN [continuing]. So people who have concerns can express those concerns.

And in our conversations with EPA, we have seen a willingness to make sure that is a very open process. You want to be judged by the best science, but you want to make sure you get it right.

Now, you have given a lot of detail. So if people have questions about the details, it is up to them now to comment, is it not? Isn't this an open process?

Ms. MCCARTHY. It is. And if you look at the comments, you know, nobody is going to say, I think you got it all right or all wrong. They are very good, substantive comments.

And so when we raised issues of did we get the definition of "tributary" right, did we narrow it appropriately—we looked at how do you define "adjacent waters." We set up ideas for how to do that. We solicited comments on alternatives. We tried to narrow where the uncertainty was, limit the amount of case-by-case analysis that would need to be done. And we teed up these issues specifically to get these comments.

We have had over 400 meetings, met with 2,500 people, had a local government advisory committee going across the U.S. We are doing what we need to get this right.

Senator CARDIN. I will just make one final comment, if I could, and that is, there needs to be action.

Ms. MCCARTHY. Yes.

Senator CARDIN. If Congress wants to pass a law, fine. If not, we need to have regulation on clarity. That was very clear from the Supreme Court decision. And I thank you very much for carrying out the responsibility that you have by proposing these regulations.

Ms. MCCARTHY. Thank you, Senator.

Mr. SHUSTER. Thank you, Senator.

Now I will recognize myself for 5 minutes for questions.

First, Administrator McCarthy, did you say on that map that Senator Barrasso put forth that you weren't aware of that map?

Ms. MCCARTHY. No, not specifically. I was made aware of it after last summer.

Mr. SHUSTER. OK. Well, that is a huge concern of mine, that the Administrator—and it is not just the EPA; it is all these departments across the Federal Government. The political appointees don't get the real information from folks down below. When these laws come out, they are significantly changed and interpreted in a different way.

And, you know, my good friend talked about the mythical rule. Well, but history shows us that it is mythical to have a view that the EPA or the Corps is not going to interpret these things in a much different way as we go down the road. So that is the huge concern we have here today. There is a lot of uncertainty for all of us.

Ms. MCCARTHY. Well, Mr. Chairman, I——

Mr. SHUSTER. Well, let me finish.

Ms. MCCARTHY. Oh, I am sorry. I apologize.

Mr. SHUSTER. My good friend from California, she had a list. Well, I want to give you my list, and it is 34 States: Colorado, Georgia, Maine, Michigan, Missouri, Montana, New York, Ohio, South Carolina, Tennessee, Wisconsin, Wyoming, Arkansas, Ala-

bama, Arizona, Iowa, Indiana, Pennsylvania, on and on. There are 34 States that oppose and want this revised or oppose and withdraw. That is a real list of people that have to deal with these, and that brings us to why we are here today.

And the question is, why haven't we included the States in this? And why do we have 34 States, two-thirds of the States, saying, revise or withdraw? They oppose with a revise or oppose and withdraw. Can you answer that question?

Ms. MCCARTHY. Mr.——

Mr. SHUSTER. About the States.

Ms. MCCARTHY. Mr. Chairman, the States have been very actively involved in this and other issues. In fact, the States wrote to us and said, stop using guidance, get to a rulemaking process.

The only thing I am asking this joint committee is to take a look at how we are going—have we proposed this, the robust outreach. The comments we have received, you say two out of three don't like everything? Two out of three gave us robust comments that will inform the final.

Mr. SHUSTER. I have——

Ms. MCCARTHY. This is a partnership with the States that we are going to maintain.

Mr. SHUSTER. Two out of three want this—they oppose this with significant revisions, and almost half the States, 22, say they want you to withdraw it.

Ms. MCCARTHY. It depends on who you are talking to, Mr. Chairman.

Mr. SHUSTER. I don't believe you are consulting, and the States aren't full partners in this, in this rulemaking. And it is based upon what they are telling us.

Also—it was mentioned in Mr. Gibbs' questioning—I wanted to know if both of you would commit to explicitly stating in the rule that erosional and ephemeral features on farm fields are exempt from the regulation. Are you willing to put that in the regulation?

Ms. MCCARTHY. We have actually made a very good attempt to identify those erosional features, not——

Mr. SHUSTER. That doesn't sound——

Ms. MCCARTHY. No, no——

Mr. SHUSTER. That sounds to me like——

Ms. MCCARTHY. We have maintained the exemption, and we are trying to explain it more so that people will have more certainty.

Mr. SHUSTER. That sounds to me like that an "attempt," you are "trying" to—when the rule goes in and it is that vague, as it trickles down to the middle management of the EPA or the Corps, over the years, this is where the reach is going to come from. This is what the farmers, this is what the developers, this is what people that do things around this country, this is what they are concerned about. And this rule I do not think makes it clear.

Another question.

Ms. MCCARTHY. Mr. Chairman, we will clarify——

Mr. SHUSTER. Let me ask one other question. I will let you answer after——

Ms. MCCARTHY. Yeah.

Mr. SHUSTER. You can answer any way you want to.

Ms. MCCARTHY. OK.

Mr. SHUSTER. Are we defining navigable waterways as tributaries? We are going from navigable to tributaries; that is sort of what my understanding is of the rule.

Ms. MCCARTHY. OK.

Mr. SHUSTER. Is that actual?

Ms. MCCARTHY. Actually, we are helping to apply the Supreme Court's understanding that navigable waters include tributaries.

Mr. SHUSTER. OK. So water, doesn't it eventually, maybe it takes years and years, but doesn't it eventually seep into bigger bodies of water that are navigable under today's definition?

Ms. MCCARTHY. I think that is the challenge, is for us to recognize what tributaries are significant contributors enough that they can impact navigable waters.

Mr. SHUSTER. So you would say that in a farm field that was shown earlier, there is water laying there; eventually, 2 years, 10 years, 20 years, it eventually seeps into navigable waters. Is that true or not? I am not a scientist, so I am asking the question.

Ms. MCCARTHY. The science establishes connections, but it is on a gradient. And what the Supreme Court made clear to us and what this rule attempts to do is to identify only those that could significantly impact the physical, chemical, and biological integrity of downstream waters. So just because you are connected, it does not mean you are jurisdictional.

Mr. SHUSTER. But it could mean it does.

Ms. MCCARTHY. If that connection is significant for drinking water protection——

Mr. SHUSTER. That is the basis why I believe these 34 States are opposing this rule. That is why my colleagues believe—and what Mr. Cardin said. I think it is time for Congress to act. I think it is time for us to come forth and help to clarify the rule, because there is no doubt it needs to be clarified.

And I do not believe that this rule is going to clarify it. It is going to make it vague. And I would predict, if this rule goes into effect, 5, 10 years down the road, it will cost working and middle-class Americans more to buy homes, more to buy food, because of the EPA and the Corps and the regulations that they are putting out there, making it far more difficult for them to do their work.

Ms. MCCARTHY. Mr. Chairman, I am sorry that I interrupted you earlier. I just——

Mr. SHUSTER. That is all right.

Ms. MCCARTHY [continuing]. Wanted to let you know that I understand this confusion between tributaries and erosional features. We are going to tackle that confusion head-on.

Mr. SHUSTER. I appreciate it. And I am sorry I got exercised, but this rule is of great, great concern to me, my constituents——

Ms. MCCARTHY. I appreciate that.

Mr. SHUSTER [continuing]. And 34 other States.

Ms. MCCARTHY. I appreciate that.

Mr. SHUSTER. So, with that, I recognize Ms. Norton for 5 minutes.

Ms. NORTON. Thank you, Mr. Chairman.

And I do want to say you, Administrator McCarthy and Assistant Secretary Darcy, in less than an hour of testimony, you have already exploded some of the major myths surrounding the rule.

And I want to say that we already know that our roads and our transit and our underwater infrastructure and our ports are falling apart. Congress is letting it happen as we speak. Please spare us our clean water.

Mr. Chairman, I want to ask that a letter from the Department of the Environment of the District of Columbia be included in the record.

Mr. Chairman? I ask that a——

Mr. SHUSTER. I am sorry about that.

With unanimous consent, so ordered.

Ms. NORTON. Thank you.

[The information is on pages 371–373.]

Ms. NORTON. I have a question that is fairly representative, I think, of urban jurisdictions around the country.

Administrator McCarthy, as you know, because we appreciate that you came out to the District of Columbia to tour our own efforts to revise our stormwater overflow system, these systems around the United States are often a century or more old, and they are being remodeled, I must say, with almost no Federal help.

Now, these rules are being criticized both for being too vague and too broad. For myself, I think rules ought to have some breadth, particularly in this area where we are dealing with the waters of the United States of America in the most diverse landmass in the world.

So this is my question, and I apologize because it is particular. I am trying to find out whether the kind of work we are doing and is being done all over the United States with stormwater overflow, under the rule, would include piped sections of streams in the definition of "tributary."

As you know, many of these pipes run under tributaries, and if they are required to go through the permitting process for municipal stormwater, then, of course, there would be considerable delay and considerable cost.

My question really goes to clarification. I think the way the rule is structured I don't have any criticism of, but I want to clarify whether or not such underwater, don't-see-the-daylight streams, pipes under streams, would need to be permitted.

Ms. MCCARTHY. Thank you. And I am actually glad you raise the issue because there has been some confusion about this.

And let me be very clear that EPA has not intended to capture features as you described them that have already been captured in what we call MS4 permits, which was part of, I think, what you and many other urban areas are concerned about. It is our intent to continue to encourage and to respect those decisions and to also encourage water reuse and recycling, which very much is consistent with the Clean Water Act and our overall intent.

I would also mention green infrastructure. It was never our intent to——

Ms. NORTON. So does that mean that the projects to repair these under water would be subject to——

Ms. MCCARTHY. No. It means they would not.

Ms. NORTON [continuing]. To permitting?

Ms. MCCARTHY. It means we are trying to make very clear in the final rule, working with these urban areas that have these issues,

what features that are involved in the capture of stormwater in urban areas, what features would be specifically not jurisdictional under the Clean Water Act, because people are concerned that it doesn't have the specific clarity.

We will build that in. They will not be jurisdictional. And we will be outlining those with much more specificity just to avoid any additional concerns.

Ms. NORTON. Thank you for that clarification.

I yield back, Mr. Chairman.

Mr. SHUSTER. I thank the gentlelady.

And, with that, I now recognize Senator Crapo for 5 minutes for questioning.

And just a heads-up, Mr. Whitehouse. I assume you will be next, as long as no Senator more senior to you comes in, so stay on your toes.

Senator WHITEHOUSE. Stand by.

Senator CRAPO. Thank you much, Mr. Chairman.

And, Administrator McCarthy, welcome here to the hearing. I appreciate your being here and our conversations that we have had privately about this regulation.

As you know, I am one of those who is very, very concerned about the regulation. And the concern I have is that, as we have gone through now several Supreme Court cases trying to provide some clarity on what the actual jurisdiction of the Agency is over the Clean Water Act, it has become clear that the word "navigable" is in the statute and that the courts intend to insist that that be the definition and the nexus of what we are trying to deal with here.

It seems to me that where the Agency is headed in interpreting what the Supreme Court has required, however, is beyond what I read as the Court's approach.

And what I am asking you is this. In the case in which—excuse me. In the *Rapanos* case, the four-Justice plurality held that, to be subject to the Clean Water Act, water must be relatively permanent surface water. There was a concurring opinion by Justice Kennedy that said that water must have a significant nexus. And then there were four Justices who dissented, who would have applied a broader jurisdiction based on intertwined ecosystems.

Am I correct about that legal analysis?

Ms. MCCARTHY. I hate to play lawyer, especially here, but I understand the point you are making, and it is very challenging.

Senator CRAPO. I think that is a fair general explanation of where we were.

And, as I see it, where the Agency is heading right now is to identify significant connections between intertwined ecosystems, in essence. And if that is the case, then it appears that the Agency has flipped the Supreme Court case and is essentially pursuing the rationale of the minority and the dissenting opinions.

And I would just like you to comment on that.

Ms. MCCARTHY. Well, let me be clear what our intent was, and hopefully that intent is reflected in the proposal.

We are trying to be very clear. And I think the one thing that everybody did agree to on the Supreme Court was that the definition of "navigable" is not the traditional one, and so we had to do

a better science job at defining the connections between these upstreams and downstreams that would have a significant—potentially a significant impact on navigable waters.

So we tried really hard to basically use the science to further define what we knew, based on science, would be the types of waters that would be in. We tried to make sure that we proposed additional exemptions or exceptions where we could based on science. And then the third area was where we were looking at what are the other waters.

But you are absolutely right that the challenge for us is to look at individual tributaries and adjacent waters but, also, to look at where we may have systems that, because of their geography and function, may work as a system.

So it is challenging, but we tried not to make assumptions there, as opposed to propose a number of alternative ways to try to narrow this case-by-case resource——

Senator CRAPO. Well, let's take a—because we have run out of time very quickly in this, let's take a specific example.

Ms. MCCARTHY. Yeah.

Senator CRAPO. Evaporation. If water can evaporate from a relatively arid area after a rainstorm and by evaporating and going into the clouds and then ultimately raining on a navigable water or an ocean, does that mean that the water is navigable?

Ms. MCCARTHY. It has to have a connection to downstream that is certainly more than evaporation. It has to be a significant connection where that water supply or that water body, wetland, or system would be able to significantly impact and degrade the downstream waters.

Senator CRAPO. But I guess the question is, is evaporation significant?

Ms. MCCARTHY. No. No, sir.

Senator CRAPO. Would the Agency conclude that the evaporated water that went——

Ms. MCCARTHY. No, sir.

Senator CRAPO [continuing]. That could have rained on a navigable water was significant?

Ms. MCCARTHY. No, sir.

Senator CRAPO. So you are saying that would not be a jurisdictional claim under the rule.

Ms. MCCARTHY. No, sir. It would not. And we tried to make this very clear, specifically for ditches. We tried to make this very clear, but we know there is additional work that needs to be done.

Senator CRAPO. Well, what about—let's go to the—well, not the reverse, but another example. What about water that seeps into the groundwater from a ditch or from a puddle or a rainstorm and then, eventually, over time, moves through the groundwater and ends up in a navigable river? Is that going to be a jurisdictionally claimed significant connection or nexus?

Ms. MCCARTHY. Well, groundwater is not regulated under the Clean Water Act, but it can be a—establish a connection between upstream and downstream. It can be.

Senator CRAPO. So I am hearing you say, yes, it could be.

Ms. MCCARTHY. Well, there are conditions that you need to look at, sir. But, again, it doesn't need to just be connected; it needs to

be a really significant connection sufficient to warrant Federal jurisdiction.

Senator CRAPO. I see my time is up.

Mr. SHUSTER. I thank the gentleman.

And we have Senator Whitehouse, 5 minutes.

Senator WHITEHOUSE. Thank you very much, Chairman.

It is kind of interesting, we seem to have two hearings going on here, one on a mythical rule that would regulate any place where water collects or most any water or any wet place and doesn't consult with States and local officials, and then this actual rule, which is in the middle of a very robust Administrative Procedure Act process with millions of comments and a very active role taken by the States.

With respect to the latter hearing on the actual rule, I would like to ask unanimous consent that a letter from Rhode Island's Trout Unlimited, along with the Massachusetts Trout Unlimited, and a letter from Rhode Island Attorney General Peter Kilmartin, along with several other attorneys general, in favor of the actual proposed rule be entered into the record.

Mr. SHUSTER. Without objection, so ordered.

Senator WHITEHOUSE. Thank you.

[The information is on pages 374–378.]

Senator WHITEHOUSE. Ms. McCarthy, in Rhode Island, as you know, we take the health of Narragansett Bay very, very seriously. And, as you know, we have spent an enormous amount of effort and money to protect Narragansett Bay, specifically through the combined sewer overflow project, which is the biggest public works project in Rhode Island's history, all to protect the bay. As a result, our current threats to the bay primarily come from nonpoint sources.

How frequent a problem around the country are nonpoint sources at contributing to water pollution?

Ms. MCCARTHY. Well, point-source pollution—we have, I think, done a good job at regulating point-source pollution. Then, by comparison, it continues to be one of the more challenging issues.

Senator WHITEHOUSE. And return flows from irrigated agriculture, for instance, would qualify as a nonpoint source.

Ms. MCCARTHY. Return flows from irrigation would actually be exempt under the Clean Water Act.

Senator WHITEHOUSE. Well, that is precisely my point.

Return flows from irrigated agriculture could well contain fertilizer, pesticides, chemicals, manure, all of the above?

Ms. MCCARTHY. It could, sir, but it is not regulated under the Clean Water Act today, and it wouldn't be under the proposal.

And one of the good things about working with the agriculture community is I recognize that they are taking great efforts to both conserve land where it can help as a filter for those pollutants, but they are also looking at erosional features. Because it is essential to not have runoff for a couple of reasons, not just because it spreads pollution potentially, but it is also important to keep soil on the land enriched.

And so there are many efforts that are underway with USDA and EPA to enrich that relationship and partnership and to recognize that.

Senator WHITEHOUSE. But it is clear and it is a matter of record that this rule would allow pesticides, fertilizers, manure, and other types of runoff to come off of return flows from irrigated agriculture, to flow through ditches that have less than perennial flow, and to allow leakage from settling basins all to go into our waters.

Ms. MCCARTHY. The Clean Water Act exempts stormwater from agriculture from regulation.

Senator WHITEHOUSE. Irrespective of whether it is carrying pesticides and other fertilizers, manure and other contaminates.

Ms. MCCARTHY. There is. But, as I indicate, I think there are many programs that seek to make sure that those issues are resolved in a collaborative way with the agriculture community, and I am confident we can expand those partnerships.

Senator WHITEHOUSE. Yeah. I just want to make the point that no rule is perfect.

Ms. MCCARTHY. Yeah.

Senator WHITEHOUSE. And there are arguments, frankly, on both sides. And for those of us who have vital bays—Chesapeake Bay is another one that Senator Cardin just talked about—where the greatest vulnerability is nonpoint-source pollution, then the failure of this proposal to deal with that will have environmental consequences.

Which isn't to say that I am going to oppose it, because I think the perfect doesn't necessarily always have to be the enemy of the good. But hearing the criticism about the extent of the regulation, at least when not imaginary, causes me to raise the concerns on the other side, that this will allow a significant amount of contamination to flow into waters that we would otherwise want to see protected.

And, with that, I will yield back my time.

Mr. SHUSTER. I thank the Senator.

And, with that, the next three up, just to give you a heads-up, we will go next to Mr. Hanna, then Ms. Johnson will be after that, then Senator Capito after that.

So I recognize Mr. Hanna for 5 minutes.

Mr. HANNA. Thank you, Chairman.

And thank you both for being here.

It strikes me this conversation is not really about clean water. It is absurd to suggest that anybody here or in this country isn't interested in that. And the 36,000 farms that are in New York certainly are vested in that, and I have complete confidence in the New York State DEC.

For me, when you talk about this and you say to us we have nothing to worry about and it is based on science, I think the fundamental concern is, what do you mean by "science"? And the subjective nature and the kind of flow of this conversation is more around the fact that people don't believe it, that people are uncomfortable with whatever outcome you might produce, because, frankly, no one trusts big agencies and big government. And where I live, we don't need—you know, the theme would be, we don't need you.

So how do you separate that distrust, moving forward, to come up with a rule that is based on science, knowing the subjective nature and the suspicion that, with all due respect, because we are

all—and Mr. DeFazio did a great job of laying out the concerns that people have. They are legitimate, they are real.

And the pushback you feel is not a function of people who aren't interested in having a great outcome. It is a function of people not trusting the process, not trusting the rule, not being comfortable. It is a huge credibility gap that I am concerned that, no matter what you do, you can't get through that. And yet I would like to believe that the outcome will be in the direction that you want it to go.

But, saying that, I am perfectly comfortable with New York State and what we have going on now.

With that, I would just give you a chance to speak to that.

Ms. MCCARTHY. Well, let me just say that, first of all, I really appreciate your raising this issue, because you are not wrong. I think we have a communication challenge.

We did a very good job on the science. And it wasn't us; it is scientists all over the country and, frankly, the world who have looked at this issue. But the current situation is, at least as we have been told by all of the stakeholders and the States, untenable. Because it takes too long, it costs too much money, there is no predictability, there is inconsistency across the U.S., and, as a result, we are overprotecting in some areas and under in others.

And so we are trying very hard to bring certainty to make the situation better. And you are not wrong that we have received a lot of comments that said we didn't get it right, and they are really concerned about whether we are going to listen to those comments.

And what I would ask you is to look at the history of EPA in terms of how we are listened—we listen to comments that have come in. This is a robust dialogue with the States. This is not just criticism; it is dialogue back and forth. And the proof will be in the pudding, which is, does the final rule clarify this? That is how rulemaking works. I want to get to that.

Mr. HANNA. I couldn't agree with you more. The difficulty is people don't trust the Agency. People don't believe what—generally, they are concerned. The 36,000 farmers in New York, in my district, they are in somewhat of a panic. Now, you could say to me, there is a lot of misinformation, wrong information. So what you said is true; the proof is in the pudding.

I am deeply concerned that we—the notion of Government overreach and the Federal Government impugning all this on a State like New York that does a great job is not only not helpful but not necessary and adds a degree of additional burden that people are going to always reject. And I don't blame them.

Ms. MCCARTHY. Congressman, I just don't want to overstate our—leave the impression that we have not received tremendous support for this rule. Because I don't think—I think that is correct. We have received both tremendous support and comments that question whether or not we got it right. But you have to remember that folks like the Association of State Wetland Managers have actually written in support of the rule. They are trying to make it better.

What should be untenable to this body is leaving the uncertainty on the table today that is costing everybody time and money.

Mr. HANNA. I think some of the absurd things that we have seen, like we saw on the photograph, you really have to push back on that, if you can. And if it is real, I think that also has to be addressed.

But thank you very much for being here.

Ms. MCCARTHY. Thank you, sir.

Mr. SHUSTER. I thank the gentleman.

Mr. HANNA. I yield back.

Mr. SHUSTER. And, with that, we go to Ms. Johnson, 5 minutes of questions.

Ms. JOHNSON. Thank you. Thank you very much, Mr. Chairman and Chairman Inhofe and Ranking Members Boxer and DeFazio.

In my home State of Texas, the EPA estimates that upward of 11.5 million Texans receive some of their drinking water from some of the small streams and wetlands that could be protected by the proposed rule.

This is important to all of our communities, and that is why I would ask unanimous consent to enter into the record a letter from 25 State elected and local elected officials and another letter from 25 NGOs in support of the rule.

Mr. SHUSTER. I am sorry. What——

Ms. JOHNSON. I ask unanimous consent——

Mr. SHUSTER. Without objection, so ordered.

Ms. JOHNSON. Thank you.

[The information is on pages 379–385.]

Ms. JOHNSON. Administrator McCarthy, your agency has been criticized on the science used to support the agencies' rulemaking, including the science behind protecting clean water in this proposed rule.

However, last month, the EPA's Office of Research and Development completed the "Connectivity of Streams and Wetlands to Downstream Waters" report, which noted that the scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function.

Mr. Chairman, I would like to ask unanimous consent again to make a summary of this report available to the record.

Mr. SHUSTER. Without objection, so ordered.

Ms. JOHNSON. Thank you.

[The information is on pages 386–403.]

Ms. JOHNSON. And, in addition, EPA solicited input from EPA's Science Advisory Board, the SAB, on this report before it was finalized, and the SAB completed its review of the Agency's draft report in October of 2014.

Again, Mr. Chairman, I ask unanimous consent to include a letter from the SAB to EPA that outlines the board's recommendations and advise that—in this hearing record.

Mr. SHUSTER. Without objection, so ordered.

Ms. JOHNSON. Thank you.

[The information is on pages 404–406.]

Ms. JOHNSON. I would like to read, Ms. McCarthy, some excerpts from these documents and ask for your comments.

First, in commenting on the connectivity report, the SAB finds that the review and synthesis of the literature described in

"Connectivity of Streams and Wetlands to Downstream Waters" reflects the pertinent literature and is well-grounded in current science.

In addition, the connectivity report notes that the scientific literature strongly supports the conclusion that incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream water should be evaluated within the context of other streams and wetlands in the watershed.

Now, Ms. McCarthy, I am not a scientist, but it appears that the scientific literature supports the broad protection of rivers and streams as a necessity to protect the downstream water quality and quantity, as well as a host of other benefits, such as flood control, aquifer protection, and habitat protection.

Can you comment on the connectivity report and whether this science supports what your agencies are proposing as part of this clean water protection rule?

And then, secondly, are there areas where the Science Advisory Board review of this report urged the Agency to change the report to reflect the best available scientific information on protection of clean water?

Ms. MCCARTHY. Thank you for raising the question.

As I indicated in some of my opening statements and beyond, I am very proud of the work that the Agency did to develop the science that the Supreme Court asked us to look at so that we could have a more certain and secure way of determining what waters were jurisdictional and necessary to protect.

Our Office of Research and Development looked at 1,200-plus peer-reviewed scientific literature. They also conducted their own peer-reviewed process. It was also peer-reviewed by our Science Advisory Board. I think the science is very strong.

The real question is, how well have we reflected the science in the rule itself? And I think the Science Advisory Board was very supportive of what we did, but we need to make sure that we look at comments and know all of the nuances that are in the outside world and we are cognizant of those as we draft the final report.

Ms. JOHNSON. Thank you very much.

I think my time has expired.

Mr. SHUSTER. I thank the gentlelady.

It is now my pleasure—I didn't know I would get to do this this soon—to recognize my former colleague, the Senator from West Virginia, Mrs. Capito, for 5 minutes.

Senator CAPITO. Thank you, Mr. Chairman.

And thank you all for being with us here today.

Administrator McCarthy, first of all, I would like to say, living in the Kanawha Valley in Charleston, West Virginia, we suffered, a year ago, a catastrophe in our drinking water. And I know you are well aware of it. I would like to thank the EPA's help in trying to mitigate that disaster.

But I would caution all my colleagues here, don't take your clean drinking water for granted. I know we don't. But it has a lot more ramifications than just putting the tap on and being able to have a nice glass of water.

So thank you for that.

One of the more alarming provisions, I think, that I am concerned about in the State of West Virginia is the authority over lands that are wet only—and I have heard some of the conversation before—when it rains, called ephemeral streams.

My concern is that "ephemeral" appears over 75 times in your preamble to the proposed rule, yet it is not clearly defined. And it says it is a stream—and your connectivity report defines "ephemeral stream" as a stream or river that flows briefly in direct response to precipitation.

Well, I have a map that the EPA created, and it is a high-resolution map of the streams of West Virginia. Here it is. You really can't see it too well, but it is the green and the blue. It is basically covering the entire State, which is designated streams and waters.

So, in West Virginia, we have a lot of land, as you know, that is not flat, so when it rains the water runs downhill. We have more real streams per square mile than any other State, which I think a lot of the larger States would find remarkable.

But this map, that is almost totally covered in color that was done by the EPA to show water, does not even cover any of the ephemeral drainages. And if you bring these so-called ephemeral waters into the rule—and I noticed in your statements that you are going to try to exempt that—I think it really brings a lot of confusion and uncertainty.

And so, I guess, this is unacceptable in a State like West Virginia. You can't let the whim of a particular Corps or EPA employee decide which private property is now federally regulated.

I have another picture of a gully here. I call it a West Virginia gully, but is it a West Virginia gully or is it an ephemeral stream? We have yet to figure that out, and how can you tell?

So I guess I would ask from you a commitment, a solid commitment, that the final rule will not take control over these ephemeral streams that are ill-defined and, for a State like ours, could have great impact.

Ms. MCCARTHY. I just dropped my pen. Sorry.

First of all, thank you, Senator, for the thank you. And my heart goes out to West Virginia, and it did during the spill and beyond. So thank you for working with us on that, and I was happy to be able to help.

On the ephemeral-stream question, I think people may not be aware, but ephemeral streams are often found to be jurisdictional today. And so the intent of this rule was to try to provide much more certainty on the basis of the science so that we could be clearer about what streams are important to protect and what were not as important and wouldn't have a significant impact on those downstream waters that we are seeking to protect.

You have my absolute word that we are going to try to narrow what we are claiming jurisdiction over so that we are consistent with the law and the science and we are as clear as possible about what is in and what is out.

Senator CAPITO. Well, I think that is going to be a bureaucratic nightmare for you and, thus, a bureaucratic nightmare for anybody who is trying to get a definition. Because, as you know, there are millions of these all throughout probably our State and across the country. And it is exceedingly important.

Ms. MCCARTHY. I think——

Senator CAPITO. The other question, if I could ask one more question real quickly, much of our manufacturing is small and medium-sized.

Ms. MCCARTHY. Yeah.

Senator CAPITO. You know, the last thing a small or medium-sized manufacturer or business needs to get caught up in is a bureaucratic maze of, am I registered, am I not? How are you going to mitigate that?

And I would sort of echo what one of my colleagues said. The trust factor here with your agency is not as good in our State as I am sure we would all like it to be. And that is a real question I have from my employers in the State.

Ms. MCCARTHY. Well, we have done an extensive amount of outreach to the small-business community, and we feel obligated and, actually, honored to be able to spend a lot of time with them.

There are a lot of small businesses that have written in in support of this rule for the very reason you are talking about, is they rely on clean water, and sometimes their voice isn't as loudly heard. So we have brought them into the system. We have some great comments, and we will resolve these issues and make this more certainty.

Because the last thing a small business needs to do is ask questions about their obligation when we could have spoken more clearly in the rule to tell them what their obligation was. I don't want to waste their time and money, nor ours and others', and I think we can do a better job.

It is a difficult process, but we will work with the small-business community, and we will make sure that we eliminate confusion as best we can.

Senator CAPITO. Thank you.

Mr. SHUSTER. I just want to point out that the question was asked before about these ephemeral features, and you still haven't declared that you will exempt them. I don't know how we are going to make it more consistent and put certainty out there if you are not willing to do those types of things.

Second question, just a quick—were you aware of that map of West Virginia and all the color that was there? It appears as though the entire State of West Virginia——

Ms. MCCARTHY. It was hard for me see, but, again, Senator, we—I mean, Congressman, we have not——

Mr. SHUSTER. No, don't do that.

Ms. MCCARTHY. Chairman.

Mr. SHUSTER. They will get upset if you——

Ms. MCCARTHY. Chairman. Chairman. How about if I say "chairman"?

Mr. SHUSTER. People on both sides of the Capitol will get upset if you call me a Senator.

Ms. MCCARTHY. Yeah, yeah. I will get in deep trouble.

Again, if that is a map similar to the one that Senator Barrasso raised, that has nothing to do, as far as I know, with any decision concerning jurisdiction of the Clean Water Act.

Mr. SHUSTER. That answer really concerns me, but we will go on to Mr. Webster for 5 minutes.

Mr. WEBSTER. Thank you, Mr. Chair.

And thank you all for appearing today. I am over here on your left.

Ms. MCCARTHY. Oh, thank you.

Mr. WEBSTER. Hi.

And I am from Florida. Florida is basically a wetland. If you dig down about a foot and a half just about anywhere you are, it is a wetland. And so you can have these maps, but our map may be the entire State, in some cases, if we thought about it.

I serve three counties. One of those is named Lake County. It has thousands of lakes. They are all interconnected with all kinds of canals and other things that could be above water, above the surface, could be below. And, again, because of the aquifer being so close to the top of the ground level, a lot of the flows happen there.

So I think the big concern that I am hearing, especially from our agriculture community, is maybe some nondefinitive words. And those words mean a lot.

So I was looking at the economic analysis, which, in there, in several places, it says that the agencies project that the proposed action to change the definition of "waters of the U.S." would increase assertion of the CWA. So the jurisdiction is going to increase. I mean, you have said that several times in this report that was done jointly by the EPA and the Army Corps.

But inside that, these words were what disturbs most of the people in my area that have contacted me, and that is it says that it is not—these things, these examples of these cost estimates and so forth are not definitive but merely illustrative.

The fear is this. The fear is that maybe the data is incomplete because the scope is not fully determined within this proposal, in that the scope could increase just on a whim. And I think that is the fear of these words that are used, especially the one that just says "merely illustrative." That is a scary statement, as opposed to something definitive.

Ms. MCCARTHY. Let me try to explain it, because I totally appreciate the fact that you are right, words do matter, and explaining this better will be hopefully what we are able to do.

First of all, relative to the idea that the economic analysis indicates that we are going to get more water into the system of Federal regulation, it doesn't change the jurisdiction of the Clean Water Act. And, in fact, what we have tried to do is narrow the applicability here based on sound science.

But the most important thing to remember is that we wouldn't be here if there weren't confusion about what is in and what is out. And when we took a look at in practice what is happening, we believe that this will clarify it, and some of the waters that are essential to protect for drinking water and other resources will end up being better protected.

The word "illustrative" is the one I want to explain most, is this is a jurisdictional rule, and because it is a jurisdictional rule, it doesn't have a direct and immediate impact where we can estimate the economics, for example, like other kinds of rules that directly impact industry and set standards.

So the reason why we say it is illustrative is that it is all about whether or not somebody wants to pollute or destroy a wetland, and, if you do, there are costs associated with that. But what we are trying to do is reduce the cost and time to ask the question about what is jurisdictional so, if you actually do want to pollute or destroy a wetland, you have a better idea of what needs a permit, what doesn't, and how go about getting that defined.

Mr. WEBSTER. OK. Well, and I appreciate that answer. All I will tell you is "merely illustrative" is not as good as definitive. And if that can change, I would very much appreciate it, because there are just fears out there when you see words like that.

Thank you very much. I yield back.

Mr. SHUSTER. I thank the gentleman.

With that, I recognize Mr. Cummings for 5 minutes of questioning.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Ladies, it is very good to see both of you.

And, Administrator McCarthy, it was good to be at EPA a few weeks ago. I want to thank all of your employees for what they do every day and both of your employees for trying to make our environment safer and cleaner.

Let me begin by saying that one of my highest priorities is supporting the restoration of the Chesapeake Bay. Restoration of the bay has been and will continue to be a long-term project.

Furthermore, our work is made easier because we know what is harming the bay. The Chesapeake Bay is one of if not the most studied water bodies in the world. We understand in great detail how nitrogen, phosphorous, and sediments enter the bay from runoff that flows across impervious surfaces through eroding urban streams and aging storm sewers and across farm fields. We understand how the discharges that are produced by wastewater treatment facilities and that leach from septic systems flow into the bay. We also understand the impact of the atmospheric deposition.

We do not need more studying. We need to stop the inflows of pollutants harming the bay, and we need to ensure that we have clean water throughout the Nation.

And I just have two questions, Administrator McCarthy.

Under section 303(d) of the Clean Water Act, the EPA has encouraged some States to put into place total maximum daily load. Maryland and other States in the Chesapeake Bay watershed have led that charge. What gains do States like Maryland and, by extension, the Chesapeake Bay watershed, stand to receive from an updated "waters of the U.S." rule?

And my second question is: The Chesapeake Bay region has for decades been working to identify and address ongoing sources of pollution to the bay. How does this proposed rule affect these efforts? Has the current confusion surrounding the scope of clean water protections complicated these cleanup efforts?

And I will listen for your answer.

Ms. MCCARTHY. Well, first of all, thank you for coming to EPA and for your congratulations and thanks to the staff, who are working very hard.

First of all, let me thank you for all the work that Maryland and others have done on TMDL. Let me explain to you what I think the benefits of this rule are.

We are faced with significant uncertainty at the moment, which means that people are asking sometimes questions that take a long time to answer about whether or not something is an important water to protect, whether if they intend to pollute it or destroy it in some way, what process they need to go through. And so people are focusing their resources sometimes and money on areas where they don't need to look, and they are missing areas that are significant in terms of our ability to protect clean water and safe water for everyone.

So this is an ability to try to look at the science, cut through some of that uncertainty, focus people where the attention ought to be focused, allow our agriculture community to farm and allow folks to ranch and do all of the work that is so important to us, but also make sure that we are focusing on the waters that we really need to protect. It will save everybody time, everybody money, and it will also be respectful of what the law requires us to do and the science is telling us is most important.

Mr. CUMMINGS. And, you know, one of the things that Senator Cardin talked about is that—and we find it a major problem in Maryland; I am sure they find it throughout the United States—is the trying to make sure that our farming community is protected and, at the same time, trying to make sure that we keep our water clean.

You talked about it a little bit, but, I mean, tell us a little bit more about your interaction with the Secretary of Agriculture. And how do we strike that balance?

Ms. MCCARTHY. Well, the USDA and EPA have been working hand-in-hand in terms of understanding the concerns of the agriculture community so we can better address those concerns in a final rule.

We are working closely, as you know, with how we align what we need to do to protect water, especially beautiful resources like the Chesapeake, and how does USDA craft programs that work with the agriculture community to support conservation efforts, to support the building of buffer zones that connect as filters that can protect water quality.

And so we are working hand-in-hand to understand what we need to do to ensure that this is clear so that the agriculture community recognizes that the exemptions in the law are indeed protected, that they recognize that this rule is all about narrowing the jurisdiction of the Clean Water Act based on what science is telling us is important and not important, and that we continue to work hand-in-hand with them so they can produce the food, fuel, and fiber we all really rely on——

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Ms. MCCARTHY [continuing]. And do it in a way that is certain.

Mr. CUMMINGS. Thank you.

Mr. SHUSTER. Thank you very much.

And just to give everybody a heads-up, we are going to go to Senator Boozman next and then Senator Sullivan, Congressman Massie and then Congresswoman Napolitano.

So, with that, I recognize for 5 minutes Senator Boozman.

Senator BOOZMAN. Thank you very much, Mr. Chairman.

Thank you for being with us, Administrator McCarthy.

I am concerned that the EPA is putting out misleading information to justify its efforts to take control of almost all the water in our country away from State and local communities' jurisdiction.

Last summer, EPA's Acting Assistant Administrator for Water posted a blog on your agency Web site explaining which ditches the EPA wanted to control. The blog described such ditches as, quote, "generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters," end quote.

And I would ask unanimous consent that this be included in the record.

Mr. SHUSTER. Without objection, so ordered.

[The information is on page 407.]

Senator BOOZMAN. Also, you used the connectivity report to justify this power grab. And it has a graphic where the only example of a ditch is an altered natural stream.

The EPA is clearly trying to convince Americans and Arkansans that this is no big deal and not a massive increase in Federal jurisdiction. However, your proposed rule goes far beyond human-altered streams when it comes to regulating ditches and other channels and water conveyances built by people.

I would really ask three things.

First of all, will you commit to us that your final rule will actually match the rhetoric that the Agency is coming out with, posted on such things as the Water Administrator's blog?

Specifically, will you commit that the only artificial channels that would be jurisdictional under the final rule will be channelized natural streams?

And, lastly, I want to clarify, I don't mean streams that were channelized historically. Constitution Avenue, a major road in Washington, DC, used to be Tiber Creek. Potentially, your final rule could make the curbs along Constitution Avenue into federally controlled waters of the United States.

Ms. MCCARTHY. Senator, I am glad you brought up the issue of ditches, because the proposal actually expands exclusions to the jurisdiction of the Clean Water Act. It doesn't cut jurisdiction. And I can explain that, but let me go right to the heart of the matter.

What we are really most concerned about are ditches that are actually channelized tributaries, that actually were tributaries and look and smell and taste like them. The other issue, though, however, is that there are ditches that are directly connected to the tributary system that actually have the flow and the duration in them, where they have features that are consistent with how we define tributaries.

So there are those two concerns that we need to address in the final rule more clearly, but we are doing our best to indicate what is in and what is out. And we, in fact, have very clearly reduced what we are considering to be the jurisdiction under the Clean Water Act in this proposal. And I can explain that if you would like me to take the time.

Senator BOOZMAN. So you are committing that the only artificial channels that would be jurisdictional under the final rule would be channelized natural streams?

Ms. MCCARTHY. I think there is a flow component here that I want to make sure that I don't miss.

What is happening today is that, if you construct a ditch in dry land and it flows less than intermittent, it is excluded. What we are trying to say and what we have said in this proposal is that ditches constructed in dry land and flow less than perennial would be excluded. So it expands the exclusion.

So there is a flow component that needs to be considered.

Senator BOOZMAN. Along a separate issue, will you commit to Congress that your final rule will not regulate groundwater or groundwater withdrawals that affect flows to surface waters?

Ms. MCCARTHY. Groundwaters are exempt from jurisdiction under the Clean Water Act, and we——

Senator BOOZMAN. Groundwaters or groundwater withdrawals?

Ms. MCCARTHY. Both. We are not impacting groundwater withdrawals either.

Senator BOOZMAN. OK.

Thank you, Mr. Chairman.

Mr. SHUSTER. Thank you.

I now recognize Senator Sullivan for 5 minutes.

Senator SULLIVAN. Thank you, Mr. Chair.

Administrator McCarthy, nice to meet you here. I look forward to working with you, meeting with you and your staff in a respectful fashion.

As you can imagine, in Alaska, we have a lot of concerns. We love our environment—most pristine environment in the world.

Ms. MCCARTHY. Yes.

Senator SULLIVAN. We are really good at taking care of it, the State is, our people are. But Alaska is also home to 63 percent of the Nation's water subject to Clean Water Act jurisdiction and 65 percent of the Nation's wetlands. So, as you can imagine, this is a very big deal for the people I represent, many of whom oppose this rule.

The Resource Development Council in Alaska believes, looking at this rule, that it could expand that already incredible jurisdiction in Alaska by one-third.

So I just want to ask a few important questions to start out with.

As you know, Ms. McCarthy, the EPA is a creation of Congress, and all regulations promulgated by the EPA must have a substantial basis in the law. Do you agree with that?

Ms. MCCARTHY. Yes. The regulations should reflect what is in the law. Yes.

Senator SULLIVAN. So one request I had, kind of going forward, is a commitment, out of respect for this committee and the Members of Congress, from you and your staff that any action, any regulations going forward, that every time you are testifying, that you or your staff specifically point out the specific provisions of the law that you are acting under, whether it is action or regulation.

Will the EPA commit to doing that in the future?

Ms. MCCARTHY. I am sorry, Senator. I don't exactly know what you are asking——

Senator SULLIVAN. But just——

Ms. MCCARTHY [continuing]. Me to commit to. But, certainly, we will——

Senator SULLIVAN. A regulation like this——

Ms. MCCARTHY. Yes.

Senator SULLIVAN [continuing]. When we start out——

Ms. MCCARTHY. Yes.

Senator SULLIVAN [continuing]. Come to the committee of Congress that has jurisdiction and say, here is the exact provision in the statute that gives us the power to promulgate this reg.

Ms. MCCARTHY. We make it clear, when we propose a rule, what the actual rule language is and how it changes. And we certainly discuss what the law says and our interpretation of the law——

Senator SULLIVAN. OK.

Ms. MCCARTHY [continuing]. And how the regulations are consistent.

Senator SULLIVAN. Great.

So let me get to a little bit of the specifics on this regulation. So, just in terms of chronology, how I understand it, the Clean Water Act defines "waters of the U.S." Several Supreme Court cases—*Riverside*, *Rapanos*—defined it, further limited it.

In May 2009, the EPA came to Congress, urged Congress to expand the jurisdiction of the Clean Water Act to the furthest extent possible. And, from my perspective, that is so far, so good. When you want to expand the jurisdiction of the EPA, you have to do it through the Congress, not through regulations.

Congress didn't do this. And, in the meantime, the EPA was sued by several States on a Clean Air Act regulation, and the Supreme Court reprimanded the EPA for what it viewed as a significant Federal overreach in terms of separation of powers in the *Utility Air Regulatory Group* v. *EPA*.

Did you have an opportunity to read that case, the Supreme Court case?

Ms. MCCARTHY. Yes, I did.

Senator SULLIVAN. So there was a provision in that Supreme Court case where the Justices said the "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."

I am quoting that because I think that is exactly what is happening here, a significant expansion of EPA jurisdiction over the U.S. economy, over certainly my State, and I don't think that the Congress has authorized that authority to the EPA.

So I will just be a little bit frank. I don't even think this is a close call. I don't think the EPA has the power to issue this regulation under the Constitution and the statute. I think you are trying to change the statute, and that clearly is a power that belongs to the Congress.

So I want to work with you on this, but I want to request that you withdraw this regulation, start over. There are 22 States that have made a similar request. And I think that that is an important way that you show respect not only to the States but to Congress.

Ms. MCCARTHY. Senator, I very much respect Congress as well as your opinions, and I will do my best to work with you. I would say that I don't think the Agency is in any way seeking congressional action or otherwise to expand the jurisdiction of the Clean Water Act. What we are just trying to do here is to better define that in a way that everybody can be more sure of its implementation and we can save everybody time and resources.

And I know this is a big issue in your State, Senator, and I am happy to sit down with you. I think we worked very hard to align ourselves with a good government in Alaska, and we are trying to continue that partnership. And if there is anything that we can do to address your issues more specifically, I would enjoy working with you on it.

Senator SULLIVAN. Well, I look forward to working with you as well.

Mr. SHUSTER. The gentleman's time is expired.

Senator SULLIVAN. Thank you.

Mr. SHUSTER. Thank you, Senator.

And, with that, just to give everybody the lineup, we are going to go to Congressman Massie, then Napolitano, then Meadows and Edwards, in that order.

So we have 5 minutes for Mr. Massie.

Mr. MASSIE. Thank you, Mr. Chairman.

After sitting here for 2 hours in this hearing talking about "science-based rules," I am reminded why a lot of people think that Washington, DC, is a 10-mile square surrounded by reality.

You know, I studied science and engineering at MIT for 6 years, but you don't have to be a scientist or an engineer to understand you can't do science without numbers and you can't do science without units.

I have heard terms like "flow," "duration," "wet," "dry," "intermittent," but these things have not been defined today and are not defined in your rule. I have read the rule. It uses terms of art, but it doesn't use terms of science.

And that is why we are going around the bush here chasing our tails, is because we are not talking about numbers and units. The units we should be using and the units that I see in State law are acre-feet, gallons per minute, 100-year flood, 500-year flood. Let me give you an example.

Here is a definition of "flood plain" from your rule. It means "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows."

What the heck does "moderate to high" mean? Could you put these rules—you say they are based on science. A science-based rule would say 100-acre flood or a—I am sorry—a 100-year flood or a 500-year flood. That is what I see missing from these rules, and that is why we are concerned.

Why are there no numbers or units in the rule?

Ms. MCCARTHY. Actually, we put both definitions as well as we teed up a number of potential ways to actually bring more bright lines into the system. We actually took comment on whether or not it should be 100-year flood plain. So we really were paying attention to the science.

Mr. MASSIE. Well, I would recommend that you heed those comments and use them. This is the fourth hearing we have had on this. Mr. Perciasepe answered a few questions for me.

I believe he was your Deputy Administrator. Is that correct?

Ms. MCCARTHY. That is correct.

Mr. MASSIE. I asked him about the cost of implementing this rule, and he once testified it was $100 to $200 million. And then he later clarified it to say it was $160 to $280 million.

Do you agree with those numbers to implement it?

Ms. MCCARTHY. If you give me 1 second, I can tell you what the numbers are. I see the costs identified in the proposal as $162 million to $278 million.

Mr. MASSIE. OK. I am glad you agree with him.

Because on page 5 of your written testimony today, you say, "The rule provides continuity with existing regulations where possible, which will reduce confusion and"—I am quoting you here—"will reduce transaction costs for the regulated community and the Agency."

So how can you say it is going to reduce transaction costs for the community and the agencies and then testify that the cost is $160 to $280 million?

Ms. MCCARTHY. Well, because we are looking at the overall cost of implementation and then looking at how effective we are in reaching those waters that are necessary to protect.

And I think I made it clear earlier that part of the implementation challenge is that there are some waters which we are failing to protect that need to be protected and there are others where we are spending significant costs and money to go after waters that are not essential for protection. And we are trying to clarify that.

Mr. MASSIE. Well, you know, outside of this 10-mile square, that sounds like Washington, DC-speak. You are saying it is going to save money in your testimony, but you are testifying that it will cost money.

I have one final question. This has to do with the farmers.

We have a lot of farming in Kentucky. I farm myself. And on page 6 of your testimony, you say, "This rule maintains the longstanding exclusions for prior converted cropland." And I am glad for that. That sounds generous.

But anybody who farms knows that you don't always plow that cropland every year. Some years you have good years. Some years you have bad years. Some years you use it for pasture. Some years you merely let it go fallow.

And one concern that I have seen with the Army Corps and the EPA is this term called "naturalization" or "renaturalization," where, if something is untended for a period of time, they say it is reverted back to its natural state, and now this exemption no longer applies.

Will this exemption apply if somebody hasn't farmed that cropland or has used it for some other farming purpose or just let it go fallow for some period of time?

Ms. MCCARTHY. You know, I would—I don't think that I can specifically answer your question other than to say this doesn't change the way in which the Agency has been working with the farming community. And the definition——

Mr. MASSIE. Assistant Secretary Darcy, would you care to answer that?

Ms. DARCY. I concur with the Administrator. The prior converted cropland exemption remains. I think your question is how far out does prior converted cropland extend.

Mr. MASSIE. Correct.

Ms. DARCY. What we have done historically with prior converted cropland would still be the case under the proposed rule.

Mr. MASSIE. What is that? What period of time?

Ms. DARCY. I would have to get back to you on that because I don't know if that——

Mr. GIBBS [presiding]. The gentleman's time is expired.

Mr. MASSIE. Thank you. My time is expired.

Mr. GIBBS. Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

And I do ask unanimous consent to include in today's hearing for the record——

Mr. GIBBS. So ordered.

Mrs. NAPOLITANO [continuing]. Comments from the California State Water Resources Control Board, which I quote, "Strongly support the agencies' intent to adopt regulations to provide clarity to the definition of 'waters of the United States' in order to improve efficiency, consistency, and predictability while protecting water quality, public health, and the environment."

Mrs. NAPOLITANO. Mr. Chairman?

Mr. GIBBS. Without objection, so ordered.

[The same letter from the California State Water Resources Control Board was submitted by Senator Boxer and is on pages 317–326.]

Mrs. NAPOLITANO. Thank you.

And, also, Senator Boxer has already included in the record a letter from California Association of Sanitization Agencies, which generally is supportive of the administration's efforts. Also, they are requesting greater clarity on certain points.

And they state that the CWA is a "40-year-old statute that has not been updated to address the needs and realities of today's water quality problems." For the record.

Mr. GIBBS. Without objection, so ordered.

[The letter from the California Association of Sanitization Agencies submitted by Representative Napolitano is on pages 408–411 and differs from the one submitted by Senator Boxer.]

Mrs. NAPOLITANO. Thank you.

I applaud these and many other groups that recognize this proposed rule in an attempt to undo confusion and uncertainty created by the former administration so that we may protect both the Nation's economy as well as its water-related environment.

Bush guidance comments, which this rulemaking will replace, are simply unsustainable. They fail to live up to the congressional framework of the Clean Water Act as well as the framework outlined by the courts.

Simply put, this guidance fails to protect our Nation's water, especially our drinking water. Rulemaking is necessary because nearly 125 million Americans, over one-third of the population, rely on public drinking water systems that draw from surface waters.

Of that number, 117 million Americans obtain their drinking water from intermittent ephemeral or headwater streams. In California alone, my State, over 7 million rely on intermittent ephemeral and headwater streams for their daily drinking water supply.

So we feel we must all do what we must to protect these water resources because this is the only resource we all have. So when this water dries up, our way of life and our local, regional and State economies will dry up with it.

Opponents of the clean water rulemaking frame is an attack on private interest, calling it a land grab fueled by Federal greed. However, our Nation has never recognized a right to pollute, which is what opponents of this rule are asking for.

Polluters would rather preserve the regulatory shadows created by the former administration where they can fill wetlands or destroy waters with little to no accountability, as was the case in San Gabriel Valley, where we have a polluted area the size of a small State that has taken over $95 million to start working to just get it cleaned up. And we have got another $95 million or more to go. This is because of fertilizers, pesticides, et cetera, that have seeped into the groundwater, into our drinking water.

If private interests are successful in blocking this rule, it is the public who will suffer. In my State, it will mean less publicly available drinking water, less protection over those drinking water sources that remain, and an increased likelihood of flooding for our communities.

So we need to let the administration finish what they started. Protect the waters of the U.S. with this current rulemaking.

I do have a couple of things that I do have—in June of last year, I did ask some questions in regard to stormwater drains and, also, water recycling, which you have addressed, and I hope that you will continue working with our agencies throughout the Western States, which are heading into drought cycles again, to be able to protect recycled water. As you say, stormwater cleanup is very important to the whole Nation.

There are many other things that we have discussed ad nauseam, I am sorry to say. We need to put it in language that people will understand and publicly let the people know that EPA is there to help clean the water, but do so in a way that is going to help business, going to help farming.

And I applaud your effort to be able to clarify and reach out to everybody. And I noticed in the reports there is not as much outreach to California as I would have liked to see insofar as the water agencies that I know are very critically involved in this.

So thank you very much for all the work you do. And let's work together, hopefully, to be able to ensure that the proposed rule-

making comes before Congress and we can all agree to disagree, but agree on the things we need to agree on.

Thank you very much.

Ms. MCCARTHY. Thank you.

Mr. GIBBS. I have two quick questions to the witnesses.

You keep saying that you will fix things in the final rule, that the questions have been raised.

Will you do a supplemental proposal so the public will have a chance to review that before you do the final rule, then, since there has been so many questions raised about what sort of things are going to get fixed in the final rule?

Ms. MCCARTHY. Well, we received a number of comments, as you know, and we are working with the stakeholders on the issue. But a supplemental would only be required if we certainly go outside the boundaries of what we have already teed up in the proposal. And at this point we intend to finalize the rule.

Mr. GIBBS. OK. Mr. Meadows, you are recognized for 5 minutes.

Mr. MEADOWS. Thank you, Mr. Chairman.

Thank each of you for being back with us.

Ms. McCarthy, I wanted to wear my Boston Red Sox hat today just so you would know that——

Ms. MCCARTHY. We did, too.

Ms. DARCY. I am from Massachusetts, too.

Mr. MEADOWS. And I do want to say that there are elements where some of the issues that we are talking about today that we do hear a responsive ear. I am troubled, however, by some of the testimony, as you would probably be well aware.

I have in the past received permits from the EPA from our State, and, as I deal with that, the ambiguous nature of rules and guidelines for those permits, I don't see that being clarified in this rulemaking.

So can you tell me today, how much quicker are those permits going to get issued?

Ms. DARCY. Congressman——

Mr. MEADOWS. Because I don't see anything in the rule. I read it and——

Ms. DARCY. Could I answer that one, Congressman?

Mr. MEADOWS. Sure.

Ms. DARCY. We think that by getting more clarity as to what is in and what is out is going to be able to inform our regulators within the agency.

Mr. MEADOWS. But this doesn't do that. I mean, going back to what Mr. Massie just said, the definitions are still ambiguous.

How in the world can you say, well, medium flow, moderate flow? Moderate flow, to me, is very different, maybe, than moderate flow to you. The definitions even in the rules are not specific.

So how can the average person look at those and say that they can implement it any faster?

Ms. McCarthy?

Ms. MCCARTHY. Well, I think we have done a good job at teeing up opportunities for narrowing where there is uncertainty and, also, narrowing where you have to do case-by-case study based on what the science tells us is in and what the science tells us isn't.

And I would just ask you to take a look at that as well as alternatives we have teed up, because it is clearly our intent to reduce uncertainty here, which will, in essence, reduce costs associated with it.

Mr. MEADOWS. All right. So you mentioned the cost.

Ms. MCCARTHY. Yes.

Mr. MEADOWS. And my good friend from Kentucky mentioned the cost.

Ms. MCCARTHY. Yes.

Mr. MEADOWS. So if we are regulating and making rules on less water, how could that be more costly? How could it cost $200 million?

Ms. MCCARTHY. Well, let me try to clarify it because I frankly think I did not do a very good job at that. So let me take another shot at it.

The cost increase that we see relates specifically to what we believe to be mitigation impacts and what would need to be done to reduce pollution and impact on sensitive waters that we believe will identify——

Mr. MEADOWS. So you are going to increase the mitigation cost?

Ms. MCCARTHY. No.

Mr. MEADOWS. Because I have gone through mitigation and we already have a two-for-one, one-for-one, four-for-one kind of mitigation.

What mitigation are you talking about?

Ms. MCCARTHY. I explained before that I think there are areas—they are small, but there are areas where we are not sufficiently protecting water that should be. We are being very clear, I think, about what is in and what is out.

But when you apply that to what is being implemented today, there are some areas where they would actually require a permit and require mitigation associated with that.

That is not to increase the per capita transaction—the transaction cost, but it is just a reflection that it will be clearer about some areas that should be protected because they are significant and what areas are not.

Mr. MEADOWS. All right. So maybe dumb it down for me.

How do we make it clearer and easier and it becomes more costly? I don't—explain it to the American people.

Ms. MCCARTHY. Well, we have made, I think, an opportunity available to take a look at how you define tributaries. Right now, that is not well defined. We have defined that——

Mr. MEADOWS. Yeah. Because I live on the Continental Divide. Everything is downhill for me.

Ms. MCCARTHY. We have increased exclusions and exemptions. We have done at least a step forward on ditches, what is in and what is out.

We have tried very hard to identify this adjacency question, which the Supreme Court told us we had to define. We defined it by proposing a variety of options to take care of that.

We have actually identified opportunities to take these other water sections and to try to find ways of doing more categorical exemptions or inclusions——

Mr. MEADOWS. All right. So let me reclaim my time real quickly because I have got one last question.

Ms. MCCARTHY. OK.

Mr. MEADOWS. Ms. Darcy and you and Mr. P, as I would call him before he retired——

Ms. MCCARTHY. Bob Perciasepe.

Mr. MEADOWS. Yes—mentioned that this would not affect farmers, that, really, they are kind of quasi-grandfathered in, and, yet, I assume that the American Farm Bureau, the North Carolina Farm Bureau—none of them have come out to endorse this.

So if stakeholders are not endorsing this rulemaking, what is the problem?

Ms. MCCARTHY. Well, it is a complicated rulemaking, and some areas are clearer than others. And we will be working with them on it.

But the agriculture community deserves to have more certainty than what is available to them today, and we are going to try to do that in working with the agriculture community.

And we have not done anything to narrow exclusions or exemptions in the Clean Water Act. In fact, we are expanding those exemptions and exclusions in this rule.

Mr. MEADOWS. I appreciate the patience of the Chair.

Mr. GIBBS. The gentleman's time is expired.

Ms. Edwards, you have 5 minutes.

Ms. EDWARDS. Thank you, Mr. Chairman.

And I thank the witnesses as well for your patience.

I would ask unanimous consent to enter into the record letters of support and resolutions from various of our small municipal jurisdictions out in my congressional district in our State—well, one of those is not small, the city of Baltimore—but cities like College Park, Capitol Heights, Edmonston, Forest Heights, Mount Rainier, New Carrollton, and the city of Rockville—letters of support from them as well as from Clean Water Action supporting their efforts, from more than 30 of our State senators and legislators who have deep experience in working on these issues in the State of Maryland, a letter from Union Craft Brewing Company, Heavy Seas Brewing Company, and the small bed and biscuit—Hereford Bed & Biscuit in Parkton, Maryland. And I would offer those for the record.

Mr. GIBBS. Without objection, so ordered.

[The information is on pages 414–440.]

Ms. EDWARDS. Thank you.

And, again, thanks to the witnesses.

Because I have heard from you numerous times. And, to me, it seems fairly, you know, clear. And I am no expert. But I think, like most Americans, I want to just get up, turn on the water, know that I can drink it, wash with it, and that it is clean, my children aren't going to get sick, my immune system won't be jeopardized. And we depend on the Government to do that. We depend on the EPA and on the Army Corps.

And so, with the two Supreme Court decisions and the guidance documents that were issued in 2003 and 2008, it is my understanding that the regulated community, conservation, and environmental organizations, several States, concede that the current proc-

ess that has been in place—and, really, you know, for the better part of a decade, that kind of uncertainty that has been in place is confusing, it is inconsistent, it is costly, and it has provided little environmental benefit. And from what I have heard, entities really just want certainty, and I think that is what I have heard from the witnesses today.

The two agencies released in March 2014 a proposed rule that would clarify the jurisdiction of the Clean Water Act and requested certainty. And so, to me, quite simply, it is a proposed rule. It is not a final rule. There is a lot that has gone into the process. You have already explained that there have been a couple of extensions to allow for additional comments and consideration. I can't actually think of a more public process than has been engaged in this rulemaking.

And from what I further understand about the rulemaking process, agencies take the comments that are received like you are doing. You have hearings and consultations with a broad swath of interested parties and then you make modifications to the proposed rule before you issue the final rule.

That is where we are right now. And I think we have heard from some of my colleagues that the gross exaggerations that have been made about the scope of the rule are, in fact, that. They are exaggerations. And so I am glad that you are here again today to clarify for us what is in consideration and what is not.

I just want to point out that, in Maryland, 59 percent of our streams have no other streams flowing into them, 19 percent don't flow year-round. And under the varying interpretations of the recent Supreme Court decisions, these smaller bodies are among those for which the extent of Clean Water Act protections has been questioned. And so the EPA says that, basically, nearly 4 million Marylanders—and that is about 70 percent of our population—receive some of our drinking water from areas that contain these smaller streams.

And, as I said, 70 percent of Marylanders get our drinking water from sources that rely on headwater or seasonal streams. We, in fact, in our State are welcoming this clarity.

And so, in view of that fact, I am proud that Maryland joined over 30 States—I am a little confused—30, 34. Like we have 64 States. But 30 States have joined in asking the Supreme Court to uphold broad legal protection through small tributaries and their adjacent wetlands.

And so I share with Senator Whitehouse that this is not a perfect scenario, but we shouldn't let the perfect be the enemy of the good.

And I wonder if you could just comment for me in the brief time that I have left the agricultural exemptions that you have told this committee about before and the fast-tracking process that the Army Corps will put into place to make sure that discharges associated with agricultural activities will not have the kind of impact that some of our farmers perceive.

Ms. DARCY. I will take that one, Congresswoman.

The agricultural exemptions that currently exist in the Clean Water Act are still there. That is unchanged by this rule. They include agriculture stormwater discharges, the return flows that the Administrator talked about earlier, construction and maintenance

of farm and stock ponds, maintenance of drainage ditches, upland soil and water conservation policies. These are all in place, and they continue to be in place as a result of this rule.

Mr. GIBBS. Your time is expired.

Senator Fischer, you have 5 minutes.

Senator FISCHER. Thank you very much.

Nice to see you again, Administrator.

Ms. MCCARTHY. You, too, Senator.

Senator FISCHER. I have here many, many comments that were filed by the League of Nebraska Municipalities, and I want to make sure that their concerns are heard and not ignored, as I believe you rushed to issue a final rule by April, assuming a 60-day OMB review period instead of the usual 90 days. And it would give you then only 3 months to review and address over the 1 million comments you have received.

These comments provide a good overview of concerns about your proposal because Nebraska municipalities not only run wastewater, stormwater, and flood control systems, they also provide drinking water, electricity, and natural gas to their citizens.

So I ask unanimous consent that these comments be placed in the record.

Mr. GIBBS. Without objection, so ordered.

[The information is on pages 441–455.]

Senator FISCHER. Thank you.

Administrator, I also have a copy for you here, if you would take that, and I hope that you will take the time to read through it.

My communities are deeply concerned about the proposal. You know that. The reason they are so concerned is that your proposed rule could regulate all waters in the State of Nebraska.

First of all, you are proposing to regulate all water that has a shallow subsurface hydrologic connection or subsurface hydrology. As you can see from a chart that I have, in large areas of Nebraska, the groundwater table is only 50 feet below the surface. All water located in these areas could be automatically regulated under this proposal.

Second, you are proposing to regulate other water on a case-by-case basis that includes consideration of connections through deeper groundwater systems, and you are proposing to look at all waters in the aggregate in a watershed or in an ecoregion. Most of Nebraska falls in one of the ecoregions that you have identified. Therefore, all water in these ecoregions would be reviewed collectively to determine that they have connections through groundwater. That makes them all waters of the United States.

I want you to understand that municipalities and landowners in Nebraska cannot engage in development activities or construct and maintain wastewater, stormwater, and flood control systems without creating some form of open water that would be regulated under this proposal. I don't believe that is a myth. These are real impacts of the proposal that you are putting forward.

So I would ask: Will you commit that your final rule will not assert Federal control over water based on groundwater connections?

Ms. MCCARTHY. Well, first of all, Senator, thank you.

We actually are working very hard to identify and resolve the issues that you have raised. I would agree with you that there are

many legitimate issues that have been raised, and I will also agree that we are not rushing to finalize the rule until we resolve these issues to our satisfaction and so that we can explain to the stakeholders how we listened to them. So I would appreciate walking home with the comments that you have provided.

I am going to fall short of answering your specific question until the dialogue with the stakeholders is concluded and we see how we—we understand that groundwater, while it is not regulated under the Clean Water Act, there are connections that may be important for the quality of downstream waters. But, clearly, folks are asking for a lot more clarity on this and this is one area where we need to work hard together.

Senator FISCHER. Also, I would say to you that many of my stakeholders feel that your staff has refused to provide them with some clear answers during outreach sessions and they are concerned about the intended scope of the proposed rule.

Cities and counties have repeatedly asked your staff if they intend to include the municipal storm sewer systems in the definition of "waters of the United States," and, instead of clearly disavowing any such intent, your staff seems to be very evasive and will only say, "If you don't need a permit today, you don't need one under the proposed rule." I would hope that is correct, but we need clarification on that.

I think that answer is unacceptable. It suggests to me that some storm sewers are going to be considered "waters of the United States." The storm sewers and other water management ditches and canals are not waters of the U.S., but I think your proposal is broad enough that it would bring them under Federal control. And we definitely would have issues with that. We have many issues that come up with industrial facilities, with farmers, wastewater treatment facilities, drinking water utilities, because they all manage water in manmade conveyances.

Mr. GIBBS. The gentlelady's time is expired.

Senator FISCHER. I see my time is up. Thank you.

Mr. GIBBS. Do you want to respond quickly?

Ms. MCCARTHY. Only that, Senator, I would really appreciate it if our staffs could work together. And if there is clarity that we can provide and additional outreach, I would be more than happy to do that.

Senator FISCHER. I appreciate your openness on that, Administrator, and, hopefully, we can get answers to my stakeholders.

Ms. MCCARTHY. Thank you.

Senator FISCHER. Thank you.

Mr. GIBBS. Mr. Woodall, you are recognized for 5 minutes.

Mr. WOODALL. Thank you, Mr. Chairman.

I appreciate you all being here, particularly for those of us at the bottom end of the dais.

I wanted to follow up on Senator Fischer's question, though. I have been a staffer for a decade or so, and I appreciate that you don't always—if your name is on the door, you don't always want the staff disavowing things, because that is the job for the men and women whose names are on the door.

But if it is clear that stormwater clearly is not within Federal jurisdiction, why can't those with their names on the door go ahead

and disavow that today and let us take that off the worry list for folks back home?

Ms. MCCARTHY. Well, I would like to take anything off the worry list that I can. So we will do whatever outreach we need to do to be as clear as we possibly can. Staff are obviously conservative in giving opinions during the middle of a rulemaking process, but we need to be a little less so so that we can be frank and build confidence in one another.

Mr. WOODALL. But it would be easy to—I think about the Assistant Secretary. We have had conversations about water treatment facilities in our district. They are built above and beyond. They are just spectacular, a great expense to my constituents, because we are invested in the environment. In fact, I would take issue with anyone who says we are not doing more than our fair share.

And it would be easy to go ahead and disavow a whole string of things that you have no intention of creating, but folks are talking about exaggerations and people being worried for nothing.

I would tell you this. Waters of the U.S. is issue number one for folks in my district. Water, in general, is issue number one. And it seems that we do a disservice, as legislators and regulators, if we have an opportunity to say, "Let's focus on what really is important, what really is a stakeholder contention, and let's move these red herrings off the table."

Why should we be concerned with that?

Ms. MCCARTHY. We had an earlier question about these facilities, these MS4s and others, and I was, I think, very clear that there will be exclusions articulated for those in the final rule.

I think what we see has happened here is our interest in expanding exclusions wasn't our intent to cover everything. And if we didn't articulate everything, people felt that we were specifically narrowing those exclusions. We will do a job at articulating what is in and what is out better than we certainly did it before.

And you will have my assurance that these things that have never been in before, that we have never talked about, will not be in the final rule. We will clarify these so that people will see in writing what they have been asking us about.

Mr. WOODALL. I think about your goals of clarity, cost reduction. These are all goals that every stakeholder in my district shares and, I would argue, stakeholders across the Nation share.

And, yet, amongst your million comments will be letters from our attorney general taking issue with the proposal, citing the very same case law that you cite to promulgate the proposal. Our attorney general would cite to negate it, our Chamber of Commerce, our Council for Quality Growth, our ag commissioner, on and on and on.

I am very proud of Georgia's record of environmental stewardship, particularly water stewardship. I am one of those anglers who spends $50 billion a year in U.S. waters.

Can you tell me something that, in your collective experience, that we have failed on in Georgia that—again, sharing the desire that everyone has for clean water, I feel like we are meeting that standard locally today. No one is asking for Federal help today.

Can you talk to me about some failures that we have had in my State that this rulemaking would seek to train us up.

Ms. MCCARTHY. I don't think—and, Jo-Ellen, I am sorry. I am going to be very quick.

I don't think that this should be looked at as an indication of failure on the part of any State. This is trying to respond to States telling the Federal Government that, "It is time that you were clearer so that we can do our business, which is to co-regulate with you in a way that is effective and efficient."

They are asking us to be clearer. So I would not want folks to go thinking that this is a reflection of any failure on the part of any State.

Mr. WOODALL. And so I am looking at a handout from the Water Advocacy Coalition that lists 11 States submitting comments to say, "We oppose the rules that are promulgated. We need lots of revisions," another 22 States that say, "We oppose it. We want it withdrawn altogether."

You are saying that this process began as a response to these State stakeholders. But given that the majority of those folks have some degree of—or a substantial degree of concern today, would we still say that the rulemaking has addressed those concerns that it set out to address or have we gone far afield?

Ms. MCCARTHY. I think we still have work to do before the final rule, and the final rule will respect that work getting done. I think that it is incredibly important that we retain the partnership we have with States working collaboratively together.

We went through this process specifically to tee up a range of ideas that the States and stakeholders could respond to in the rulemaking. That is what you see has happened.

This is not an easy rule, and I won't suggest it is. But we will get this done in a way that we are supposed to, and we will listen and respond to the comments effectively.

Mr. WOODALL. I appreciate that recognition of Georgia's success.

And, Mr. Chairman, I yield back.

Mr. GIBBS. Administrator McCarthy, I have a quick clarification.

You told Senator Fischer you will not rush to finalize the rule, but your Web site, EPA's Web site, says you plan to issue a final rule in April.

Is that still the plan?

Ms. MCCARTHY. Well, certainly our goal is to issue it this spring. I am not going to give you a specific timeline more than that because I want to make sure that we are respectful of the full range of comments that came in and we have——

Mr. GIBBS. I just wanted a clarification for what your Web site says. OK. Thank you.

Ms. Titus, you are recognized for 5 minutes.

Ms. TITUS. Thank you.

And thank you, Administrator, for being here.

I represent the First Congressional District of Nevada. That is basically Las Vegas. We live in the desert. If you have ever been there, you know our biggest body of water is the fountains in front of the Bellagio. So we are kind of in a unique situation.

Ms. MCCARTHY. And they are beautiful.

Ms. TITUS. We get about 4 inches of water a year, but we also depend on one source primarily. Ninety percent of our water comes

from the Colorado River. It serves 2 million people who live there in the valley and 42 million people who come as tourists.

So protecting that river is very important to us. And so I am very supportive of your efforts and generally think what you are doing is right on track.

I have talked to some of the local government agencies, however, and they have a bit of a concern about the definition of "ephemeral tributaries."

And I would like to enter their letters in the record, if I may. One is from the Regional Flood Control District of Clark County, and one is from the Las Vegas Valley Watershed Advisory Committee, if that is all right.

Mr. GIBBS. Yes. Without objection, so ordered.

[The information is on pages 456–461.]

Ms. TITUS. Thank you.

The Flood Control District is concerned about the definition of "ephemeral washes" in the desert throughout the Southwest because oftentimes they won't carry water for years, but, when they do, it may be a flash flood. So the water level is very high. We would like to figure out how they will fit into the scheme of things.

And the second concern from the Las Vegas Watershed Advisory also is about that same definition, and they would like to know if some facilities that they construct for water projects will actually be included, things like ditches, canals, ponds, manmade features used in the operation of wastewater treatment and supply systems.

So could you address those two things or give me something that I can take back to them——

Ms. MCCARTHY. Sure.

Ms. TITUS [continuing]. To assure them that these things are being considered in this process.

Ms. MCCARTHY. Yes. Let me answer two.

One is let us know who you would like us to talk to, because we will be very clear, as we answered before, about the MS4 issues, which is one of your issues. All of the construction that is done to protect stormwater from urban areas and others is extremely important for us to recognize and continue to incent that and not to confuse that issue.

Let me mention the ephemeral washes, because the significant issue for us is: When does an ephemeral flow? When is it sufficient duration and intensity and frequency that it has an opportunity to impact the quality of the water that is downstream? That is the question.

So what we are doing in this rule is trying to define the very water features that you can articulate in the field that reflect a water flow in those washes that indicate that it is of sufficient flow, duration, and frequency that it would have created a bed, a bank, and a high water—well, I am sorry—ordinary high-water mark—thank you very much—the "O" always eludes me—which are actually features that reflect that it flows sufficiently and frequently enough that it could significantly impact the biological and chemical and physical integrity of the waters that it flows into.

So we are doing our best to define that in a way that you can see it and you can know what is in and what is out and would certainly find it an opportunity to talk to anybody about why we are

making those connections and why we think it is respectful of the science and why it will also minimize confusion in a way that will be helpful to everybody.

Ms. TITUS. I appreciate that.

If I can get them in touch with your office, then, to kind of reassure them along——

Ms. MCCARTHY. We are happy to reach out to your office as well.

Ms. TITUS. Thank you so much.

I yield back.

Mr. GIBBS. Mr. Hardy, you are recognized for 5 minutes.

Mr. HARDY. Thank you, Mr. Chairman.

I, too, am from Nevada. I have the north portion of the Las Vegas area and, also, further north to the rural counties. We come from an area, like the Congresswoman said, where I have 7-year-old frogs that don't know how to swim. So it is a dry area.

So, with that, I want to go back to a comment that was made earlier about the $162 million to $280 million number. Can you elaborate on this analysis? And did you take into account the sheer mitigating factors? Were there second- or third-layer effects of the supply chain included in this analysis?

Let me go ahead and put it into perspective. As a former businessperson, owner, trying to expand my company, I was not only concerned with the immediate internal facts, like my products, my employees, but I also had to look at the long-term external environment and the legal and socioeconomic and political factors.

Have you looked into those to see what the costs of those would be with this mitigation? You say it significantly outweighs the benefit.

Ms. MCCARTHY. To the extent that we—we followed the Office of Management and Budget guidelines and EPA's guidelines, and we have done an economic analysis for this rule that is consistent with what we believe our obligation is and to the extent that science allows us to do this effectively.

There are benefits that we cannot capture in this cost that we have estimated to the best of our ability. So we think we have done a very thorough economic analysis. But times change.

We are going to relook at that economic analysis and, when we issue the final rule, we will do the best we can to talk about all of those, the benefits and costs associated with this rule not just short term, but long term as well.

Mr. HARDY. OK. I would also like to read a comment from Nevada's Department of Conservation and Natural Resources and the Nevada—Colorado Commission of Water. I would like to hear your reaction to it.

"Nevada has very strong laws and regulations to preserve and protect the waters of the State, which are defined as waters situated wholly, partly within or bordering upon the State. The State has the authority to protect all waters, whether or not they are subject to the CWA jurisdiction, and has carried out authority effectively and efficiently for decades."

I would like to hear your thoughts on this statement and why we continue to need your authority within our State when we are doing a great job.

Ms. MCCARTHY. Well, the States and EPA work with one another in partnership to protect waters. Again, I do not want this rule to look like it is an indication of a lack of diligence on the part of Nevada or any State. Frankly, it is just making sure that the Federal Government does its job to be as clear as we can.

The States have asked for this because they want to eliminate challenges to some of their decisions and they want clarity on what they should be paying attention to. We are just trying to be the best partners we can with the States.

Mr. HARDY. And I think that is where this comes into effect. You know, the Federal Government has a tendency to one-size-fits-all. I don't think one size for Nevada fits anybody else. It doesn't fit the West, nor does it fit any State in the United States.

We have 50 significant different States and different environments. So this one-size-fits-all—we have to be very open on how we are going to deal with this.

Another of the comments that was made here, if you wouldn't mind reading it: "The EPA has attempted to collaborate with the States and other affected parties after the fact and address issues of concern that have already been proposed."

That is a concern to me when you say you—you have specifically said yourself that you have worked with the States, but they are telling us it is after the fact you come to them with this—with your proposal.

Ms. MCCARTHY. These are issues that EPA and the States have been working on, literally, for decades. But no matter how you perceive the pre-proposal work that we did, there is no question, I don't think, that the docket will reflect that we have done significant outreach with the States on this. We have reached out to them through our regions and through headquarters. We are going to continue that discussion.

Mr. HARDY. One final question before my time runs out.

"The CWA has not intended to apply the management of groundwater. While we applaud the proposed rule exclusion of groundwater, the issue becomes blurred when the shallow subsurface hydraulic connections are used to establish jurisdiction between surface waters. This opens the door to interpretation and the argument of extension of the CWA jurisdiction to groundwater resources."

Any comment on that?

Ms. MCCARTHY. That was the exact same issue that Senator Fischer raised, and we are happy to continue that discussion.

Mr. HARDY. Thank you.

I yield back.

Mr. GIBBS. Mr. Huffman, you are recognized for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman.

And I want to thank Administrator McCarthy and Assistant Secretary Darcy for your patience and testimony here today and, really, for your good work over the course of several years.

It is remarkable how much public process you have brought to this issue, how much science, and how many iterations of peer review and analysis have gone into this, the fact that we have had drafts and revisions and a listening tour that really is more extensive than anything I have seen in my short time here in Congress.

And I think the real story of what you have done here is a story of the way a serious rulemaking ought to work. You have, frankly, just done good work, and I want to commend you for that. And you have maintained your patience in the face of, I think, some pretty outlandish accusations about this proposed rulemaking.

In fact, I think there is—if there is any story from today's hearing, I think it has to be how weak and unfounded and just plain wrong some of the claims about this rulemaking are.

We have seen a map that was never intended to depict Clean Water Act jurisdiction or even jurisdictional expansion, but it was represented that way. And then, when you clarified that the map appeared to be prepared for fisheries' purposes or for completely unrelated purposes, some of my colleagues across the aisle said they were very troubled by your answer. It is really rather remarkable what passes for congressional oversight sometimes.

We saw a photo of something that seemed to be represented as a bit of a smoking gun, an erosion feature in a farm field. And, yet, when we had a chance to listen to you, we found that that is actually something that was found to be jurisdictional under the current rules, not under your proposed rulemaking, sort of illustrating the problem, the problem we have with the status quo that comes to us not through the exhaustive science and public process that you have brought to this issue, but it comes to us from policy guidance that was handed down without any process, without any science, without any advanced notice or comment from the Bush administration in response to some Supreme Court decisions.

And the guidance that we are left with draws from two different Supreme Court Justices' opinions who had two different ideas about how one ought to find jurisdiction under this matter and leaves with us a case-by-case analysis that is cumbersome, that has been litigation prone, that frankly leaves us with a status quo that nobody should be very satisfied about.

So I am glad you have taken on this tough issue at the request, we need to always remember, of stakeholders, of the Supreme Court, of so many folks that have asked you to do this. And, again, I think you have done very good work.

I represent a lot of farmers and ranchers, a lot of forestry in the north coast of California, and I do continue to hear some of these concerns that you have very clearly, I think, spoken to on many, many occasions.

But I just want to ask you one more time: Are there any farming, ranching, or forestry discharge activities that are exempt from permitting today that would lose that exempt status because of anything you are doing in this rulemaking?

Ms. DARCY. No, Congressman.

Mr. HUFFMAN. All right. And I know we continue to hear concerns about dry washes and even truck tire ruts and things that you have clarified many, many times. But I want to ask you where you are going with that process of clarification.

Because, clearly, no matter how many times you say it, it doesn't appear to satisfy the folks who keep trotting out these examples. And I think I understand that you are going to try to address this through defining the term "bed and bank."

We saw a picture, I think, from Senator Capito that was represented as a dry wash. But, to me, it looked like it might have had a bed and bank. I don't know. But I think we have heard that you may be in the process of providing some real definition of this "bed and bank" standard, science-based definition.

Can you just tell us what we might expect in the final rule on that point?

Ms. DARCY. Because of the public comment on that issue in particular—because that is part of the definition of "tributary," which is being defined for the first time ever in the Clean Water Act and in regulation; and because it was the first time the definition was out there and the definition is that it has to have a bed and bank and ordinary high-water mark, that is getting a lot of comment.

Part of the comment is, "So further define that." I think, in response to public comments, that is probably a challenge for us to address in the final rule.

Mr. HUFFMAN. So you think we can expect some specific definition of this "bed and bank" standard?

Ms. DARCY. I think we need to consider it, especially because it has raised concerns. And, again, we are trying to get certainty and, if we can get better certainty, that is the way to do it.

Mr. HUFFMAN. All right. Thank you.

Mr. GIBBS. Senator Carper, you are recognized for 5 minutes.

Senator CARPER. Thanks, Mr. Chairman.

It is great to be here with all of you at FedEx Stadium. This is a big room. And it is nice to be with my—some of my former House colleagues with whom I served a number of years ago.

It is nice to see you from afar, from all the way up here to down there. To our Administrator and to our Assistant Secretary, thank you for coming today and for hanging in here for all of this time. I think you are just the first panel, which has been a pretty long morning, I am sure, for you.

I have just come from a hearing on Homeland Security and Governmental Affairs Committee and we focused on the President's action with respect to immigration and providing some protections, if you will, for those that are here in certain status as opposed to others that are not allowed to stay any longer.

And one of the messages that came out of that hearing was the reason why we are having that hearing in the Homeland Security and Governmental Affairs Committee is because the Congress hadn't done its job, that we didn't pass comprehensive immigration reform, and if we had, the issues that we were discussing would have been moot.

And I think there is a parallel here. And I think the parallel is, if we had done our job, if we had actually passed legislation to provide for the clarification that was needed following some Supreme Court intervention, we wouldn't be holding this hearing. Is that correct?

Ms. MCCARTHY. It could have reduced some of the existing confusion, that we can and will reduce the regulatory action as well.

Senator CARPER. All right. I am really tempted to ask what is a question that you wish had been asked you. Let me ask that. What is a question you wish had been asked? Out of all of the questions

fielded today, what do you wish you had been asked that never was asked? Anything at all? Did we exhaust everything?

Ms. MCCARTHY. I actually was going to say: Would you like a bathroom break? But I thought that would be too rude at this point in time.

Senator CARPER. Well, in that case, I will hurry this up.

All right. Can both of you name for us two concerns that you have heard from stakeholders that you intend on addressing in the final rule. Each of you, two. A double shot, if you will. Two concerns that you heard from stakeholders that you intend on addressing in the final rule.

Ms. DARCY. The continued lack of clarity, which is what we are attempting to do in the rule, was to be more clear and definitive about, as Gina has continued to say, what is in and what is out. And I think that is what we have to continue to look to improve upon in the proposed rule.

That, as well as how we can better cut down the time that permits take. And I think, by providing some more clarity and definition, we might be able to get after that as well.

Senator CARPER. All right. Thank you.

Ms. MCCARTHY. Let me just add, the definition of "tributary" and how it relates to ephemeral streams is extremely important, how that all relates to erosional features that are exempt, are excluded, from the Clean Water Act jurisdiction. I think people have asked for more clarity on significant nexus. I think we need to provide it.

And the ditch issue, it drives me crazy, as it does everybody else. So there is a lot of issues that have been raised around ditches, and we need to be very clear about the fact that we are not just respecting the current exemptions, but we are expanding on those. But we are also defining those unique ditches that actually deserve to be protected from pollution and destruction through a normal permit process.

Senator CARPER. All right. Good. Thank you for that.

It is my understanding that attorney generals from, I think, a half dozen or more States, including my own State, former Delaware Attorney General Beau Biden who just stepped down a month or so ago. But I understand that they sent a letter to the EPA and the Army Corps—I want to say last September—and in their letter they were in support of the waters of the U.S. proposal.

In that letter, the AGs pointed out the need for predictability. They spoke to the need to address discharges that can happen in one State, but impact States downstream.

And I just want to say: Is that correct? Just yes or no. Is that a fair statement?

Ms. MCCARTHY. I believe so.

Senator CARPER. However, I understand the EPA has also heard from other States with extreme concerns over the rule. I am sure you have heard that today.

Why do you believe there is such a diversity of views from State to State on this issue? Do you believe this rule does provide needed predictability? And do you believe that there are some changes that you can make in the final rule to address some of the concerns we are hearing from these other States?

You already answered the second question, in part, because you told me you actually think some followup needs to happen. So why such a disparity? I mean, you have got some States that say, "This is good; let's do this," and other States who raise all kind of heck about it.

Ms. MCCARTHY. I think it points out that there is a tremendous amount of lack of clarity and uncertainty today. And so part of it is, I think, when we explained what is actually jurisdictional today, some people were surprised by that.

And when we tried to explain exclusions, they didn't understand that that list was not exhaustive. So if they didn't see themselves in the exclusions, even though it was much larger than current exclusions, they thought we were sending a signal that they weren't excluded.

So there was a lot of misinformation and legitimate misunderstandings and legitimate need for continued clarity on these issues.

Senator CARPER. OK.

Ms. MCCARTHY. And we just need to face that and deal with it in the final rule effectively.

Senator CARPER. Thank you both so much.

Thank you, Mr. Chairman.

Mr. GIBBS. Ms. McCarthy, I have a quick question to follow up.

Ms. MCCARTHY. Yes.

Mr. GIBBS. You told us you are resolving all these issues before the final rule and you are working with the States and stakeholders.

What specifically is the process for resolving these outstanding issues?

Ms. MCCARTHY. To continue to look at the comments received, to continue to have discussions as appropriate and docketed with the stakeholders.

Mr. GIBBS. Are you having interaction with the States?

Ms. MCCARTHY. Absolutely. Yes, we are.

Mr. GIBBS. OK. Mr. Mica, you are recognized for 5 minutes.

Mr. MICA. Well, thank you.

And let me follow up a little bit with the EPA Administrator. It is my understanding that 34 States expressed concern and asked for withdrawal or significant revision.

Is that a correct number?

Ms. MCCARTHY. It is a—I don't have any number——

Mr. MICA. Well, that is what I am told, 34. It is not——

Ms. MCCARTHY. It may be, but——

Mr. MICA. It is not just a few States. It is 34.

Ms. MCCARTHY. The only thing I would indicate is that the same States——

Mr. MICA. And 34 is about two-thirds of the States. I think we still have 50 States. Seems like it is a significant number.

How long have you been working on this proposed rule?

Ms. MCCARTHY. When did we first propose it? Last April in 2014. But certainly well beyond that.

Mr. MICA. And you came out with your proposed language and consulted different folks, States, which aren't happy.

When was the exact date you came out with your proposed rule?

Ms. MCCARTHY. April 21st of 2014.

Mr. MICA. 2014.

Ms. MCCARTHY. But that reflected the guidance document that——

Mr. MICA. And how much longer would you take before you finalize the decision on the rule?

Ms. MCCARTHY. We have not finalized the decision.

Mr. MICA. No. I want to know how much longer it would take to come out with a final rule. What is your prediction?

Ms. MCCARTHY. Well, we are hoping to propose it—we are hoping to finalize it this spring. I do not have an exact date.

Mr. MICA. This spring. OK. But I am trying to get some time.

Ms. MCCARTHY. Sure.

Mr. MICA. I did everything I could to block changing the law after the Supreme Court decision because there were other definitions. I found in that discussion that one of the things that happens—and I heard earlier testimony from the Corps of Engineers that there is some significant impacts.

In fact, you testified earlier, didn't you, Corps representative, that there will be additional costs, additional services required of the Corps, to take on this new responsibility?

Ms. DARCY. There will be some additional implementation costs if the rule is finalized. Yes.

Mr. MICA. OK. So there is additional cost.

One of the things that concerns me—maybe the big corporations can comply with this. First of all, having been in business, when you change this rule, you are going to create legal havoc because you are changing years and years of law and definitions.

And there is—you talk about clarity. Well, when you adopt a new rule with new language, it creates uncertainty. It creates lawsuits. It will create havoc for many businesspeople. And maybe the big guys can handle this. The small guys can't handle it.

What concerns me, too, the information we have is the Small Business Administration's Office of Advocacy recently concluded that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act because it would have direct and significant effects on small business. This isn't something I am saying. This is what they are saying.

So, again, the small guy is going to get screwed—pardon—that is a highly technical term, but—with whatever you do because it will be new. It will be subject to suit. It will be subject to interpretation. It will be subject to new regulation which you are imposing that has a cost.

So the ones that were—you know, what is the biggest job creator in the United States? Do you two know? Where do we get the most jobs from? Do you know?

Ma'am?

Ms. MCCARTHY. Small businesses is what I understand.

Mr. MICA. Small business.

And according to, again, their advocacy group, they don't feel consulted. They don't even feel that you complied with the requirements to consult them.

So any change, I think, is going to raise havoc and some costs documented here, uncertainty. Possibly there are things that we need to do for improvement. And I think you can do many of those

things for water quality in this country without changing this definition.

Again, if you implement the rule—if you adopt the rule this spring, when would it be implemented?

Ms. MCCARTHY. It would be effective on publication in the Federal Register.

Mr. MICA. So everyone would have to comply with that. That is kind of handy-dandy because that is the rule. You create the chaos, the uncertainty, the havoc.

We could pass a bill, and I think there is enough support to pass a bill in the House and Senate to undo your rule. More than likely, that will take time. We have seen the slow roll on Keystone.

Did you want to comment or——

Ms. MCCARTHY. I just wanted to—I neglected to indicate that it is actually 60 days beyond that date, which does allow Congress to take a look at it.

Mr. MICA. OK. That is probably even worse.

But, in any event, what that does is give the President a bill that will rescind what you are doing. I predict that will happen. And then the President would veto it, and it will be much more difficult for us to override that veto.

That is the scenario I see, Mr. Chairman, and it is not a pretty one for small business or anyone who is concerned with Government regulations or its impact.

Mr. GIBBS. The gentleman's time has expired.

Just for a point of information, they will be calling votes here in the next 15, 20 minutes, and we are monitoring that. So we will break for a recess when it is the appropriate time so nobody misses votes.

Mr. Garret Graves, you are recognized for 5 minutes.

Mr. GRAVES OF LOUISIANA. Thank you, Mr. Chairman.

Thank you very much for being here today. Good to see you. And I also appreciate your perseverance through this hearing. I know you have been sitting there a long time, so thank you.

I am from south Louisiana and have very strong concerns about the approach that you are taking in the rule and the regulation.

I think we all know, if you look back at the statute, the Clean Water Act, you have the reference to "navigable waters." And you have seen the Supreme Court come in and repeatedly narrow or reject the rules that have been promulgated in an effort to regulate wetlands in particular.

I am concerned that we are actually headed down the same course right now with this proposed regulation, that we are going to see a perhaps third rejection and narrowing of the regulations as it pertains to the Clean Water Act. And I think that probably what is happening is that the agencies are writing a rule in an effort to try to recapture a similar scope and just taking a different direction, as happened after *SWANCC*, as I recall.

In particular, you know, I want to focus on the word "navigable." That word, you know, it seems that we may have a disconnect in the statute versus what you often referred to was the science. And if that disconnect is there, it seems like it is Congress' job to actually modify the statute if that is something that Congress and the agencies believe need to be done. But I am concerned that we are

stretching these regulations in order to create the same footprint—in fact, perhaps a growing footprint.

An example of that is your own cost analysis that you have done that has been, I guess, rejected or some concerns have been expressed by small business, among others, showing that you actually have a higher regulatory cost. I don't understand how you have a higher regulatory cost if you have more certainty, greater certainty, and if you do not have an expanded footprint of jurisdiction here. That seems to be inconsistent, and I am very concerned about that.

Secondly, when you actually go through and read the regulation, you have terms like "case-specific basis," "significant nexus" that I note was part of the Kennedy statement, not part of the plurality opinion. You have comments like "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."

This is Louisiana. The whole thing is water. You could take some of these terms that you have in here, "tributary," "ephemerals," you could apply—I am going to guess that, if you look at this, you could probably give me 90 percent of the undeveloped property in south Louisiana and I could figure out a way to apply your proposed rule to south Louisiana. Nationwide permits don't apply down there. We have much greater compliance challenges.

This is your own—Assistant Secretary Darcy, I am sure you recognize this one. This is your picture of the watershed.

And, Mr. Chairman, I want to ask for—hang on, I am getting ready to ask unanimous consent to get double pay for holding my own placard. But—thank you. I am sorry.

No, but this is your own picture of the watershed. We have everywhere from Montana to New York coming down and draining through south Louisiana. That gives you an idea of why this first map looked like it did.

If you look at the definitions that you have here and you say things like—you talk about tributaries "even if they lack a bed and banks or ordinary high-water mark," and it says, "if they contribute flow." Well, again, I think that if you wanted to—and, Administrator McCarthy, I am not saying that you are going to be egregious or do bad things, but if you wanted to, I think that you could absolutely take some of these terms and stretch them to apply to virtually anything here, which doesn't provide certainty or clarity, especially when you combine it with some of the other terms that are used.

You also have a term in there that was interesting that pertained to—it said something about areas that were established through sediment deposition. Well, over on the left, that is Louisiana 60 million years ago, and, as you can see, it doesn't exist, because the entire State was created through a deltaic plain through the Mississippi River system.

Again, not saying you are trying to be egregious or regulate my house, but, potentially, if someone wanted to be egregious, I am concerned that could be the case.

Lastly—and I think this is one of the bigger ones. This is south Louisiana. And I want to be clear, Administrator—and Assistant Secretary Darcy and I have known each other for a while, but I am not a knuckle-dragger. I am not a guy who is sitting here saying,

let's pave all the wetlands. I believe that in my previous life I have probably restored thousands of acres of wetlands and probably, in the last 6 years, more than your two agencies combined, uncompelled, not for mitigation purposes, because it was my job. And so I am a big believer, defender of wetlands.

But we have lost 1,900 square miles of wetlands in south Louisiana. The big concern that I have is that the majority of this loss is attributable to channelization of the Mississippi and Atchafalaya Rivers. That was an action of the U.S. Army Corps of Engineers.

This is the greatest historic, current, and prospective rate of jurisdictional wetlands loss in this Nation. And the agency that is now being charged with the actual administration of these regs, these potential regs, is the greatest cause of wetlands loss in the United States.

The hypocrisy there and the lack of credibility is, I think, one of the greatest concerns. Because the Federal Government, the Corps of Engineers has not come in and restored these wetlands. They have made our communities more vulnerable, and it is a great concern on the part of the residents of south Louisiana.

Thank you.

Mr. GIBBS. The gentleman's time has expired.

Mr. Perry, you are recognized for 5 minutes.

Mr. PERRY. Thank you, Mr. Chairman.

Over here. Ladies, thank you very much for your patience. I know it's been a long day. And I think that is maybe a testimonial to how important this subject is to everybody and every State and every Representative in every State. We really can't help ourselves.

And, with all due respect, I think that—I come from Pennsylvania—when you say that the Agency has worked hand-in-hand, my experience as a civilian, as a legislator in Pennsylvania is that we have felt put upon by the Agency and in a very heavy-handed way that has been punitive and that has been uneven in its meting out of penalties and of solution sets that we have been forced to abide by.

And so, because of that, we have, I think, a reasonable trust issue. And because of the scope of this—and when the Agency characterized "navigable" in the same context as "subsurface connections," you know—I said to a lady at a hearing in Altoona on this subject, I said, so you are telling me that the water that flows through the rock strata and the limestone of Pennsylvania is to be considered navigable, and it is navigable? And she said, yes, it is. I said, well, I am waiting for the submarine that is drilling through the rock and doing that, because I haven't seen one yet, but maybe DARPA has one. And so we are skeptical.

But, with that, I want to give you a couple questions here.

You know, we have a clean streams law that gives our DEP jurisdiction over all the Commonwealth's waters. And, under this rule, there will be overlap in that jurisdiction, with this clarification, as you call it. And, of course, there is going to be confusion and costs with the additional layer, what we consider an additional layer of regulatory authority.

Under the proposed rule, will Pennsylvania now only have jurisdiction over those waters specifically excluded from inclusion in the

rule, i.e., or what I would characterize as groundwater and ditches that drain uplands only?

Ms. MCCARTHY. I am not sure I understood the question because you had a couple of negatives in there. Can you just do it again?

Mr. PERRY. OK. I will try and be more clear.

Ms. MCCARTHY. OK.

Mr. PERRY. Under the proposed rule, will Pennsylvania now only have jurisdiction over those waters specifically excluded from inclusion in the rule? So everything that is specifically excluded would be under Pennsylvania's jurisdiction, i.e., what we—and I clarify that by saying groundwater and ditches that drain upland only.

Ms. MCCARTHY. No, that wasn't the intent. If you are excluded from the Clean Water Act in the final rule, then that would not be jurisdictional under Federal law.

Mr. PERRY. OK. And that is a concern.

In addition to that, during and after local development, who has jurisdiction over swales, basins, ponds, and ditches that will be constructed, altered, filled in, left for drainage, and/or questioned? And how will the answer to those questions—how will they come about? What is that process? And who is paying for that?

Ms. MCCARTHY. Nobody is changing who has jurisdiction to implement the rule or the relationship between the Federal Government and the States to actually address these Federal issues. Nothing has changed.

Mr. PERRY. So if during——

Ms. MCCARTHY. It——

Mr. PERRY. I am sorry.

Ms. MCCARTHY. I am sorry. I just wanted—it is a function of the Clean Water Act and how it is implemented today.

Mr. PERRY. So if during construction there is a nexus made by what is now not considered navigable but someone considers it, some—the Corps comes out—I have done work with the Corps; I used to fly with them and do jurisdiction and so on and so forth—and comes out and says, this falls within the jurisdiction, and the local conservation district says, no, it doesn't, what is the answer? What is the redress?

Because somebody is standing there with a machine that costs $500 a day and workers and so on and so forth, and here we are. So what is the conclusion to that? What is the process for adjudication?

Ms. DARCY. If a person is seeking a permit or seeking a jurisdictional determination of a water in order to go forward with a construction project of some kind, the Corps of——

Mr. PERRY. With all due respect, what happens is that somebody comes and visits during the project and makes the claim at that time, at that location, at that time, and everything stops until it is resolved. I am looking for the resolution process, if it is being changed, or what you foresee based on the scenario that I have portrayed.

Ms. DARCY. The resolution process that you just portrayed would not be changed by this proposed rule. Is that your question?

Mr. PERRY. If that is your answer, that is fine. That is not what people believe, but I will accept your answer.

And, finally—ah, my time has expired. Thank you, Mr. Chairman.

Mr. GIBBS. Mrs. Comstock, you are recognized for 5 minutes.

Mrs. COMSTOCK. Thank you, Mr. Chairman. I have no questions.

Mr. GIBBS. That speeds it up.

Mr. Davis, you are recognized for 5 minutes. And I am sure you have questions.

Mr. DAVIS. Thank you, Mr. Chairman. You are correct.

I wish I had something like a big portrait to have Mr. Graves drag his knuckles over here and hold it for me, but——

Mr. GIBBS. Well, at least the House pictures got bigger than the Senate's as we went on.

Mr. DAVIS. We are the House.

Thank you very much, Assistant Secretary Darcy and Administrator McCarthy, for being here today.

As this hearing is about WOTUS, you have heard a lot about the impact or possible impact of the proposed rule on our ag community, and I think there is really a trust gap between both your agencies and our farmers. And that is why one of the things I advocated for in the farm bill was to include agriculture to have a seat at the table as part of your EPA Science Advisory Board.

In my view, it has been a slow rollout. I know applications are being accepted till March 30th. And as you review the candidates, I want to make it very loud and clear that our intent in negotiating this bipartisan provision was to have voices on this committee that didn't only have scientific expertise but also real-life experience with production agriculture. So having voices on this committee with the real-world experience can help bridge this trust gap.

Can I have your commitment that you will honor our congressional intent by ensuring that members of this committee will be part of production agriculture?

Ms. MCCARTHY. I certainly will do the best and as expeditiously as I can to meet what Congress has advised us we should do. And I would look forward to the establishment of this committee so that early on in every process we have an ability to hear what these informed stakeholders have to say.

Mr. DAVIS. Well, thank you. As the author of that provision, I mean, I am clearly stating for the record what our intent is: to make sure that we have not just scientists but people involved in production agriculture. So thank you.

Ms. MCCARTHY. But before you leave, I want to make sure that you know that we did get a request from our ag stakeholders to extend the time for nomination by 60 days.

Mr. DAVIS. Yes.

Ms. MCCARTHY. So I don't want you to think we are being inconsistent in——

Mr. DAVIS. I am not complaining about the process.

Ms. MCCARTHY. OK.

Mr. DAVIS. I just want you to know the intent of what the result could and should be.

Secondly, I sent a letter to your agency on January 22nd in regards to the Mahomet Aquifer and its proposed designation to be considered a sole-source aquifer. That aquifer in central Illinois actually serves over 700,000 people. And I would like you—I will sub-

mit this letter to you and your staff to make sure your eyes see this. And I would like to get an update from you, even after this hearing, as to when we could expect a decision on this very important issue to my constituents.

Ms. MCCARTHY. I am happy to look into it. Thank you.

Mr. DAVIS. Thank you.

And, lastly, there has been some concern being raised by many of my colleagues, and I hope that this process is taken very seriously, about this disconnect that we sometimes feel like we see. And not just between the EPA as a whole and the Corps as a whole and all of our districts; really, I think there is some disconnect between what happens and what you think is happening out here in Washington versus what your regional offices, your district offices, are actually doing on the ground.

And just one of the last hearings we had with one of your deputies, Mr. Perciasepe—forgive me if I have mispronounced his name. "Davis" is easier.

Ms. MCCARTHY. We will call him "Mr. P." It is OK.

Mr. DAVIS. "Mr. P," perfect. I haven't gotten any feedback from him when I asked him if, in this new provision, the clarification for sewage treatment facilities, if it includes aboveground individual septic system units. Will they be required to get a permit?

Ms. MCCARTHY. The clarity is, no, they won't.

Mr. DAVIS. OK. Will you please, then, take the extra step and call the Region 5 office and let them know that the NPDES permit——

Ms. MCCARTHY. You tricked me into this.

Mr. DAVIS. I tricked him, too. So, obviously, he didn't talk with you after that. But if you could——

Ms. MCCARTHY. If there is any lack of clarity, I will call.

Mr. DAVIS. Well, I have the frequently asked questions for the NPDES permit——

Ms. MCCARTHY. OK.

Mr. DAVIS [continuing]. And it clearly uses the Clean Water Act as the justification for asking my homeowners in many rural areas that I represent to actually apply through the EPA for this national permit just to be able to flush their toilet.

And where it disconnects with the proposed rule, the clarified rule that we have been hearing all morning, is that, you know, ditches that are excavated and have less than perennial flow are supposed to not be regulated under the Clean Water Act. That is where many of these discharges go, like in a swale between my home. And gullies and rills and nonwetland swales are not to be regulated.

So you can see the disconnect and the concern that my constituents have when we see what is happening out here, what we are being told, versus what is actually in action in the district. So——

Ms. MCCARTHY. Let me look at it and make sure that there isn't more to this than meets the eye. And I will certainly get back to you as soon as——

Mr. DAVIS. I didn't mean to throw Mr. P under the bus with you, but I am glad I did.

Mr. GIBBS. The gentleman's time has expired.

Mr. DAVIS. Thank you.

Mr. GIBBS. We have one more Member to ask questions, and then we can finish up with this, and we will come back at 2 o'clock. Mr. Barletta will have 5 minutes, and then we will recess. We will start with the second panel at 2 o'clock.

Mr. BARLETTA. Thank you, Mr. Chairman.

Ms. McCarthy, in my flood-prone district, many of my constituents live in the flood plain, and I share the concerns of them and the local elected officials about the definition of a flood plain.

Some of our local officials even sent comments. Here I have comments sent to the EPA about their concerns that the term "flood plain" is not clearly defined. And I ask unanimous consent that the letter from the Commissioners of Columbia County be part of the record.

Mr. GIBBS. Without objection, so ordered.

[The information is on pages 462–463.]

Mr. BARLETTA. Can you define for me right now how this rule interprets the term "flood plain"?

Ms. MCCARTHY. Well, first of all, I think the confusion arose over the fact that, when we spoke about flood plain, people thought we were regulating land use instead of just indicating that if you intend to pollute or destroy a wetland within a flood plain that we need to have an exchange about how to do that appropriately so you won't impact down——

Mr. BARLETTA. Is the EPA's definition of a flood plain the same definition that FEMA uses to draw——

Ms. MCCARTHY. Yes.

Mr. BARLETTA [continuing]. Its flood maps——

Ms. MCCARTHY. Yes.

Mr. BARLETTA [continuing]. And determine the 100-year flood plain?

Ms. MCCARTHY. Yes.

Mr. BARLETTA. Are there maps of your flood plains?

Ms. MCCARTHY. That they produce.

Mr. BARLETTA. That who produces?

Ms. DARCY. FEMA.

Ms. MCCARTHY. FEMA produces.

Mr. BARLETTA. And that would be the same definition that you use?

Ms. MCCARTHY. Yes.

Mr. BARLETTA. You know, in Pennsylvania, agriculture is the number-one industry, and I——

Ms. MCCARTHY. I certainly didn't want—I want to make it very clear, we did not intend that normal farming and ranching activities would stop being exempt from 404 permitting. They are exempt, and we are not intending to change that.

Mr. BARLETTA. OK. I just wanted to know the definition of a flood plain by your standards, and they are the same as FEMA.

Ms. MCCARTHY. It is. Yes.

Mr. BARLETTA. And agriculture is the number-one industry, so you can imagine, you know, why the Pennsylvania farmers are so worried that, when it rains, that any wet spot within a flood plain would be federally regulated. And as I have said once before, sometimes a mud puddle is just a mud puddle. And they would like to

know that, that that is the case, and that is not how they feel right now.

Ms. MCCARTHY. OK.

Mr. BARLETTA. I have one more clarification I need. Railroads operate approximately 140,000 miles of right-of-way. Maintenance of ditches is critical to safe rail transportation, obviously. Identifying rail ditches as "waters of the United States" would create regulatory hurdles that would make it almost impossible for railroads to perform prompt rail ditch maintenance due to the extensive permitting delay and expense, leading to less safe rail transportation.

Previously, representatives from EPA have said railroad ditches would not be subject to Clean Water Act jurisdiction under this rule. Will the final rule make this clear?

Ms. MCCARTHY. Senator—Mr. Barletta—sorry—I will get back to you.

I know that we have expanded the definition of ditches that would be exempt under the clean water rule to make it clearer. We have addressed ditches that basically drain dry land along public lands and highways. I am not sure of the conversation that has happened with rail ditches, but I certainly can get back to you. And if you have heard it, I am hoping there will be a comment in the record, and we can take this into consideration and make any necessary adjustments.

Mr. BARLETTA. Yeah. You would agree that this would cause a safety issue, and, obviously, those delays would not be in the best interest——

Ms. MCCARTHY. We have been really clear in this rule that any ditch that is in dry land that doesn't connect to a tributary below is not going to have the significant nexus required to be jurisdictional under the Clean Water Act.

So we will see. Instead of a sector-by-sector approach, we are hoping to do this in a little more scientific and broad way. But we will take a look at that issue and make sure that we have addressed it.

Mr. BARLETTA. And since I am the last speaker, thank God, I think it is clear that, from coast to coast, I could tell you, I have been called out to farms, I have been called out to you name it, the situation where they have literally shown me—I had pictures on my cell phone—literally shown me a ditch that is going to be regulated. This is a problem from the east coast to the west coast, and I hope we can see that it needs to be addressed.

Ms. MCCARTHY. It will. Thank you, sir.

Mr. BARLETTA. Thank you.

Thank you, Mr. Chairman.

Mr. SHUSTER [presiding]. This concludes our first panel, so you will be excused.

And we will reconvene—we are recessed for now, and we will reconvene at 2 o'clock with the second panel.

[Recess.]

Mr. GIBBS. OK. The committee will come back to order.

At this time, I would like to call up the second panel of witnesses. It is promptly 2 o'clock, so we are getting started.

On our second panel, we have the Honorable E. Scott Pruitt, the attorney general of the State of Oklahoma; the Honorable Adam H.

Putnam, Florida commissioner of agriculture, on behalf of the National Association of State Departments of Agriculture; the Honorable Sallie Clark, District 3 commissioner for El Paso County, Colorado, on behalf of the National Association of Counties; the Honorable Timothy Mauck, District 1 commissioner for Clear Creek County, Colorado; and Lemuel Srolovic, environmental protection bureau chief for the New York State attorney general.

Hope I got your name right.

Mr. SROLOVIC. You did. It is a tough one.

Mr. GIBBS. OK.

I ask unanimous consent that all witnesses' full statements be included in the record.

Hearing no objection, so ordered.

Since your written testimony has been made part of the record, please limit your summary to 5 minutes if you can.

And, Attorney General Pruitt, welcome, and you may proceed.

Senator INHOFE. Sorry.

Mr. GIBBS. Go ahead.

Senator INHOFE. I want to make a brief—it will be a very brief introduction. But, you know, a lot of times, you have people from your own State come in, and you want to participate in it. In this case, this is one who is not just really a great attorney general and one who is doing things that other attorneys general are not doing, but he also is a best friend.

So I was delighted, Scott, to have you here and participating in sharing your thoughts with us today.

TESTIMONY OF HON. E. SCOTT PRUITT, ATTORNEY GENERAL, STATE OF OKLAHOMA; HON. ADAM H. PUTNAM, COMMISSIONER OF AGRICULTURE, STATE OF FLORIDA, AND ON BEHALF OF THE NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE; HON. SALLIE CLARK, COMMISSIONER, DISTRICT 3, EL PASO COUNTY, COLORADO, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES; HON. TIMOTHY MAUCK, COMMISSIONER, DISTRICT 1, CLEAR CREEK COUNTY, COLORADO; AND LEMUEL M. SROLOVIC, BUREAU CHIEF, ENVIRONMENTAL PROTECTION BUREAU, OFFICE OF NEW YORK STATE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN

Mr. PRUITT. Well, you are very kind, Senator Inhofe. Thank you for those kind comments.

Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, members of the Senate Committee on Environment and Public Works and House Committee on Transportation and Infrastructure, thank you for this opportunity to discuss the Environmental Protection Agency's proposed rule to redefine "waters of the United States" and the significant negative impact such a rule would inflict on States and landowners within our borders.

Respect and protection of private-property rights sets the United States apart from other nations and has fueled the greatest expansion of economic freedom the world has ever known. Indeed, private-property rights are among the foundational rights of any functional democracy, not just our own.

President Obama's EPA currently stands poised to strike a blow to private-property rights through a proposed rule that unlawfully expands EPA's jurisdiction by subjecting land use and water management decisions, historically reserved to the States, to the heavy regulatory hand of the Federal Government.

The proposed rule aims to redefine what constitutes a navigable water or "waters of the United States," a term that has long been understood to include only significant bodies of water capable of serving as conduits for interstate commerce. The proposed rule redefines those terms to now include virtually every body of water in the Nation right down to the smallest of streams, farm ponds, and ditches. This is a naked power grab by the EPA.

Now, don't get me wrong. The EPA should have a role in solving and contributing to interstate water quality issues and answers. But when having a role becomes having regulatory primacy at the expense of State authority, the will of this body is undermined, and landowners and States end up the losers, as they are left to the mercy of Agency power, absent a voice, when the system wrongs them. And wrong them it will.

Simply put, the proposed rule is a classic case of overreach and flatly contrary to the will of Congress, who, with the passing of the Clean Water Act, decided that it was the States who should plan the development and use of local land and water resources.

The EPA has generally been unresponsive to concerns expressed by States, local governments, and individual citizens, with their primary tactic being a public relations campaign designed to sway opinion and rule America. EPA Administrator Gina McCarthy has been documented as dismissing many concerns wholesale, calling them ludicrous and silly, while also asserting that the proposed rule is all about protecting waters, quote/unquote, and providing clarification.

To Administrator McCarthy, who appeared before you today, I say, forgive the skepticism of the States, but these reassurances are from the same administration that said, if you like your health insurance, you can keep your health insurance. So, as the old adage says and commends us, trust, but verify. And though we would like to trust the EPA's intent, something doesn't add up. This rule smells far more like—far more than a clarification. Indeed, it reeks of Federal expansion, overreach, and interference with local land use decisions.

Notably, there are several United States Supreme Court decisions illustrating that the intended regulatory jurisdiction of the EPA has been limited to the navigable waters of the United States, with all other waters rightly left to the States to regulate.

At the time that the Clean Water Act was passed, the Supreme Court had previously defined "navigable waters of the United States" as interstate waters that are navigable in fact or readily susceptible of being rendered so.

In recent cases, the Supreme Court has made clear that any examination of Federal jurisdiction must first begin with an understanding that Congress intended the States to retain primacy over the development and use of local land and water resources. With the proposed rule, the EPA is ignoring this core tenet of the CWA and endeavoring to write itself a regulatory blank check.

On another note, and critically, the proposed rule includes a vague catchall category, defeating the EPA's claimed purpose of the rule providing transparency, predictability, and consistency to the scope of the CWA jurisdiction. Instead, the EPA has simply redefined the meaning of "navigable waters" in an extraordinarily broad way so that any landowner may be subject to owners permitting requirements or severe civil penalties if violated, even if unknowingly.

Oklahoma has seen firsthand, Senator, how the Federal Government, specifically the EPA, abuses its regulatory power in States that have interest in energy, farming, and ranching. The States are not and should not be used as a vessel to carry out the will of regulators in Washington, who often seem to have little regard for how their actions negatively impact the economy and private-property rights.

During the comment period for this rule, Oklahoma filed its objections. In fact, my office led a coalition of 16 States to file comments about the lawfulness of this rule, or unlawfulness of it. Additionally, as the chief law enforcement officer of the State of Oklahoma, I can say with confidence that, if the EPA continues forward with this rule as proposed, the rule will be challenged in court.

If this rule is issued as proposed, we will all live in a regulatory state where farmers must go before the EPA to seek permission to build a farm pond to keep their livestock alive, where homebuilders must seek EPA approval before beginning construction on a housing development that contains a dry creek bed, and where energy producers are left waiting for months or even years to get permits from the EPA, costing producers tens, if not hundreds, of thousands of dollars that inevitably will be passed on to consumers.

Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, the EPA's proposed rule is unlawful and should be withdrawn. We urge the EPA to meet with State-level officials, who can help the Agency understand the careful measures the States already have in place to protect and develop the lands and waters within their borders. But most of all, we urge the EPA to take note of the harm that this rule will do to the property rights of citizens across the country and their ability to make land use decisions.

Thank you, Chairman, for the opportunity to speak to you today.

Mr. GIBBS. Thank you.

Mr. Putnam, you have the floor. Welcome.

Mr. PUTNAM. Thank you, Mr. Chairman.

And I think I liked the old view better than this view, but I sincerely hope that the plague which has overtaken these two great committees will pass quickly, and our prayers will be with the Members who are unable to join us for this.

But it is a pleasure to be on this panel and to represent not only the Florida Department of Agriculture and Consumer Services but also the National Association of State Departments of Agriculture.

I come here as a farmer of citrus, a cattleman, a former Member of Congress, and an agriculture commissioner and someone who has dedicated much of my career to water policy and water resource development issues. I am proud of the record that our State has in protecting water, including through agricultural best management practices, putting 10 million acres of agricultural lands in

the State under best management practices, or 90 percent of our intensively managed agricultural lands, and saving 20 billion gallons per year of water through those practices.

The EPA asserts that the purpose of this rule is to clarify which waters are and are not subject to the Clean Water Act. The EPA claims that the proposed regulations will not significantly change what currently is considered "waters of the U.S." They also claim that the proposed regulations will not substantially affect regulated communities like ours. I believe this is yet another attempt by the EPA to regulate areas outside their authority and in contradiction to guidance given by the courts.

Counter to the claims by the EPA regarding intent, the proposed rule, in fact, will lack clarity, significantly expand Federal jurisdiction, impose burdensome requirements on agricultural producers, and impede efforts to protect and restore the environment.

The proposed rule creates more ambiguity regarding what areas are subject to the requirements of the Clean Water Act and will most certainly result in an expansion of jurisdiction. Specifically, the proposed rule does not clearly define "adjacent," "neighboring," "riparian area," and "flood plain." In combination, the application of these terms expand Federal jurisdiction to include all wetlands or other waters similarly situated across a watershed or that share a shallow, subsurface hydrologic connection.

What is more concerning is the intent by the EPA and the Corps, as communicated in their narrative accompanying the rule, to evaluate application of "flood plain" and "watershed" on an individual basis. I fail to see how individual interpretation by EPA and Corps staff guarantees clarity to the regulated community in the implementation of this rule.

Further, the EPA failed to take into account the unique landscape of States like Florida when developing their approach. Florida's flat topography and broad expanse of flood plains, wetlands, and sloughs could subject nearly all of Florida's water to Federal jurisdiction under the Clean Water Act.

Under this rule, isolated wetlands located miles from the nearest navigable water and never before considered jurisdictional would now be defined as "waters of the U.S." simply because they are located in the same watershed and, therefore, under Federal jurisdiction. Even concrete-lined conveyances and other manmade systems intended to capture and treat stormwater could be subject to Federal jurisdiction.

An independent analysis by Breedlove, Dennis and Associates, an environmental firm, found in specific instances where the proposed rule, if implemented, would expand jurisdiction from 13 to 22 percent on two parcels alone.

Across the Nation, farmers and ranchers are good stewards of the land, and the expansion of Federal jurisdiction under this rule will deem many areas of farmland as "waters of the U.S." and, therefore, subject to Federal jurisdiction.

With more areas of farmland categorized as "waters of the U.S.," farmers will be forced to obtain new permits, including section 402 and 404 permits. The requirement to obtain additional permits will involve fees for attorneys and technical consultants, whose expertise is required to ensure an accurate application. An independent

analysis conducted in 2002 revealed that section 404 permits cost an average of $338,000, or $300,000 more than the permit required for areas not considered "waters of the U.S."

As a national leader in water quality protection and restoration, the State of Florida works closely with the EPA. And EPA, in the past, has actually praised the work that we do as being among the most rigorous protections in the Nation. But these proposed requirements will impede and, in some cases, dismantle environmental programs statewide.

The expansion of Clean Water Act jurisdiction to marginal waters, such as stormwater ditches and ponds, will actually have the effect of diverting local, State, and even Federal funds from restoration efforts for truly critically impaired and important natural areas. So, instead of funding those priorities, limited resources will be diverted toward municipal storm system upgrades.

Florida's best management practices are an example where farmers and ranchers work cooperatively and in partnership to improve wetlands and watershed areas. The implementation of this proposed rule and the associated expansion of Federal jurisdiction will decrease landowner willingness to voluntarily participate in these programs. The proposed rule will decrease wetland protection and restoration in our State because landowners will now fear that their restoration activities will bring them under Federal wetlands jurisdiction.

Thank you, Mr. Chairman, for the opportunity to be here, and I look forward to your questions.

Mr. GIBBS. Senator Inhofe, I recognize you.

Senator INHOFE. Thank you, Mr. Chairman.

I would ask unanimous consent that Senator Cory Gardner be recognized for the purpose of introducing his good friend Commissioner Clark.

Mr. GIBBS. So ordered.

Senator GARDNER. Thank you, Mr. Chairmans.

And thank you very much to the committee for allowing me to be here today to introduce not only Commissioner Clark but also to welcome Commissioner Mauck, as well, from Colorado. And I know that Senator Bennet was here earlier but, due to scheduling conflicts, unable to, so please welcome both of you.

To the committee, thank you for holding this very timely hearing to discuss the EPA-Army Corps of Engineers' proposed regulation on "waters of the United States" under the Clean Water Act as we continue to visit this very important discussion.

It is vital that the Federal Government and Congress have a comprehensive understanding of the potential impacts that this rule would have on our Nation's counties, particularly those counties in the western parts of the United States, where our water and our water law is unique to any other place in the Nation. In Colorado, it is the only State in the 48 contiguous States that all water flows out of and not into, presenting a unique challenge for all of us.

In your effort to do so today, to discuss this issue, I am pleased that you have invited Sallie Clark today. And I am honored to introduce Commissioner Sallie Clark of El Paso County, who is testifying on behalf of the National Association of Counties.

Commissioner Clark serves as the vice president of the National Association of Counties and has been a longtime advocate for—and recent upgrades, recent new promotions—longtime advocate for Colorado, local government, and unwarranted Federal mandates to and on our States.

And I appreciate your willingness and your commitment and dedication to public service.

You know, it has been an incredible, challenging couple of years for El Paso County, Colorado, dealing with forest fires and floods. And in conversations with water districts, conservation districts in Colorado, they continue to believe that, under the "waters of the United States" rule, it could be very devastating for their ability to deliver water for the needs of their customers, their constituencies, and, indeed, the people of Colorado.

With the EPA's own studies showing that 68 percent of the streams in Colorado are intermittent, this proposal will have major impacts on all Coloradans, including the energy and agricultural sectors.

If you go into the State capitol building of Colorado, as both commissioners know, there is a poem written on the wall right in the rotunda that says—and it starts out by saying this: "Here is a land where life is written in water." Water is tied to Colorado's history, our land, and our success. And the last thing we need is for the Federal Government to destroy that incredible legacy that we have with a regulation that goes too far in impacting our agriculture, our land, our water, and our people.

Welcome.

Mr. GIBBS. Thank you.

Commissioner Clark, welcome. The floor is yours.

Ms. CLARK. Thank you, Senator, so much.

Thank you, Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, and members of the committee, for the opportunity to testify today on the "waters of the United States" proposed rule and the potential impact on State and local governments.

My name is Sallie Clark, and I am the first vice president of the National Association of Counties, the only national organization that represents county governments. For the past decade, I have served as a county commissioner in El Paso County, Colorado, the home of Pikes Peak. My county is considered urban, with a population of over 640,000, but with a mix of suburban and rural areas and over 113,000 acres of Federal land.

In all my travels as a NACo leader, I have heard concerns from across the country about how counties could be affected by the proposed rule. Hearing these concerns and working closely with our technical experts—county engineers, legal staff, public works directors, and stormwater managers—NACo ultimately called for the proposed rule to be withdrawn until further analysis and consultation with local officials is completed. This decision was not taken lightly.

I want to be clear: Counties support clean water. Our goal is to ensure the public safety and economic vitality of our communities while protecting water quality. In my county and others, we accomplish this through zoning and ordinances, regulating stormwater

runoff, prohibiting illegal discharges, and establishing penalties for violations.

That said, I am here today to share with you the four main reasons we decided to call for the withdrawal of this proposed rule.

First, this issue is so important because counties build, own, and maintain a significant portion of public safety infrastructure, and the proposed rule would have direct and extensive implications. Local governments own almost 80 percent of all public road miles and also own and maintain roadside ditches, flood-control channels, stormwater systems, and culverts. Defining which waters and conveyances fall under Federal jurisdiction has a direct impact on counties, as we are legally responsible for maintaining public-safety ditches and other infrastructure.

Second, the agencies developing the proposed rule did not sufficiently consult with local governments. Counties are not just stakeholders in this discussion; we are partners in our Nation's intergovernmental system. By law, Federal agencies are required to consult with their State and local partners before a rule is published and throughout its development. Although EPA did initiate discussions on guidance documents, we were not consulted through the 17 months between the guidance consultation and the introduction of the proposed rule, despite repeated requests.

This leads to my third point. Due to this inadequate consultation, many terms in the proposed rule are vague and create uncertainty and confusion at the local level. For example, the proposed rule now defines terms like "tributary," "significant nexus," "adjacency," "riparian areas," and "flood plains." Depending on how these terms are interpreted, additional public infrastructure could fall under Federal jurisdiction. The proposed rule, as currently written, only adds to the confusion and uncertainty over how it will be implemented consistently across all regions.

Our fourth and final reason for calling for the withdrawal is that the current permitting process tied to "waters of the U.S." already presents significant challenges for counties. The proposed rule only complicates matters. For example, 1 Florida county applied for 18 maintenance exemptions on the county's network of drainage ditches and canals. The permitting process became so cumbersome that the county had to hire a consultant to compile all of the technical material required. And, 3 months later, as the county moved into its rainy season and after spending more than half-a-million dollars, decisions on 16 of the exemptions were still pending. Ditches began to flood, putting the public at risk. And this is just one of many examples.

In conclusion, while many have attempted to paint this as a political issue, in the eyes of county government this is a matter of practicality and partnership. We look forward to working with you and the agencies to craft a clear and workable definition of "waters of the U.S." that achieves our shared goal, which is to protect water quality without inhibiting the public safety and economic vitality of our communities.

Thank you again for this opportunity.

Mr. GIBBS. I thank you.

Mr. Mauck, the floor is yours. Welcome.

Mr. MAUCK. Thank you. Chairmen Inhofe, Shuster, Ranking Members Boxer and DeFazio, I appreciate this opportunity to testify.

My name is Timothy Mauck. I was elected to the Clear Creek Board of County Commissioners in 2010 and reelected in 2014.

As a county commissioner, I want to convey how important clean water is for my community. The proposed clean water rule will protect the headwaters, tributaries, and wetlands that are essential for providing the high-quality water that supports the hunting, fish, rafting, and outdoor recreation that are an economic backbone of my community. Clean water from streams and wetlands also provide drinking water for thousands of our residents.

Clear Creek County is truly a headwater county. We are bordered by the Continental Divide and provide clean water for downstream communities within the Denver metropolitan area. We are also facing the legacy impacts of historic silver and gold mining. We have struggled with maintaining water quality due to mine runoff and have worked consistently to treat contaminated water and reclaim abandoned mine sites.

I know too well the impacts of contaminated water and the cost and time it takes to mitigate and treat it. I also know Clear Creek has made a remarkable rebound over the past 30 years as we have all made progress, like so much of the country, toward the Clean Water Act goals of fishable, swimmable waters.

In addition, these strides in water quality, while important in their own right, have also made Clear Creek County an outdoor recreation destination. By river segment, Clear Creek hosts the second most commercial rafting trips in Colorado. Whitewater rafting alone has a total economic impact to the community of approximately $23 million annually. Hunting and angling generates a total economic impact of nearly $6 million to the county.

This is not only the story of Clear Creek but also across Colorado and the Nation. According to the National Shooting Sports Foundation, hunting and angling's total economic impact is $192 billion. Outdoor recreation in Colorado generates $13.2 billion and employs more than 124,000 people. Across the country, it generates $646 billion and 6.1 million jobs.

Many of these jobs are dependent on clean water and will benefit from the EPA and Army Corps of Engineers' efforts. In fact, 55 percent of stream miles in the historic range of native trout in our State are intermittent or ephemeral and would clearly be protected by the clean water rule.

Even with seasonal flows, these waters provide habitat for trout or simply maintain the water quality needed by fish in downstream rivers. And as an avid waterfowler, I have spent many cold mornings in the wetlands, sloughs, and creeks feeding the South Platte and know how important it is to protect these places from irresponsible development.

As an elected official with the responsibility of looking after our county's finances, I am also concerned about undue regulatory burden. The EPA and Corps of Engineers have consistently demonstrated that this rule is not an expansion of the Clean Water Act authority. It will restore jurisdiction to fewer of the waters than

had been covered from the passage of the Clean Water Act in 1972 until the first Supreme Court decision in 2001 weakened the law.

During that time period, the population of Clear Creek County increased from approximately 5,900 to 9,400 individuals. Colorado's population doubled from 2.2 million to 4.4 million. The State's gross domestic product increased more than tenfold, from $13.6 billion to $181 billion. Furthermore, natural gas production increased from 116 trillion cubic feet to 817 trillion cubic feet, and coal production increased from 5,500 short tons to 33,000 tons.

Although we are small, we are expected to grow in the future. An expansion of Interstate 70 is underway and, along with it, a growth in home and road development from those from the nearby metropolitan area seeking solace in the mountains.

In addition, we face a challenge of economic diversification as we approach the end of life of the Henderson Mine, which provides a large portion of our property tax base. There are hundreds of mine claims that exist in undeveloped or undeveloped areas, many of which are very near headwater streams. The rule will help us balance the need for diversification while providing the necessary protection for streams and wetlands as we encourage development of all kinds.

If opponents of the rule were worried about returning to the previous jurisdiction of the Clean Water Act, they should realize that protecting intermittent and ephemeral streams and wetlands is fully consistent with population growth, energy production, and economic development writ large. I am ready to have my county's headwaters and wetlands clearly protected under the Clean Water Act.

Thank you, Mr. Chairman.

Mr. GIBBS. Mr. Srolovic, welcome. The floor is yours.

Mr. SROLOVIC. Thank you.

Good afternoon, Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, and members of both honorable committees. I am Lem Srolovic, the environmental bureau chief in the office of New York State Attorney General Eric Schneiderman. Thank you for this opportunity to discuss with you the proposed "waters of the U.S." rule.

Back when I was a boy growing up in Wildwood, Georgia, in the early 1970s, many of the creeks and rivers where I hunted and fished were in a sorry state. The Tennessee River was contaminated with toxic industrial waste. When my brother and I floated down Lookout Creek, it started stinking when we reached the railway yards in Wahatchee.

But the pollution problems in my boyhood waters were not local; they were not regional problems. They were national problems. Up in New York, the Bronx River, once the home of beavers, was described as an open sewer. In central New York, people driving by Onondaga Lake during the summer rolled up their windows because the lake smelled so bad.

Fortunately, Congress responded and in 1972 passed the Clean Water Act. With the act, Congress fundamentally rewrote Federal water pollution control law. The old law had addressed water pollution by authorizing Federal cures for water pollution problems on an ad hoc, water-by-water, problem-by-problem basis, but that nar-

row approach had failed. With the Clean Water Act, Congress replaced that failed scheme with a comprehensive approach to pollution control.

The waters protected by the act are broad, covering, as the U.S. Supreme Court has written, virtually all surface waters in the country. With the act, Congress implemented the tried and true principle that an ounce of prevention is worth a pound of cure.

In the ensuing years, the States, EPA, and the U.S. Army Corps together have implemented the statute, and it is working. My boyhood Lookout Creek now hosts a popular nature center. A beaver has returned to the Bronx River. And Onondaga Lake now is one of America's top 10 bass fishing destinations.

With the proposed rule, the Federal agencies that Congress charged with implementing the Clean Water Act are doing their job. They are providing much needed clarification to the question of whether the law applies to a particular water body. Presently, jurisdiction decisions are made on a case-by-case basis subject to fractured and inconsistent legal interpretation by the courts. The result is uncertainty, delay, and further litigation. By clarifying where the law applies, the rule will accelerate jurisdiction decisions and make them more predictable and less costly.

The proposed rule is grounded in solid, peer-reviewed science. EPA's science report is based on more than 1,200 peer-reviewed scientific studies and has been affirmed by the Agency's independent Science Advisory Board. The science report shows the powerful influence that upstream waters have on the physical, chemical, and biological integrity of downstream waters.

It is important to note that each of the continental States is both upstream and downstream of one or more other States. New York, for example, is downstream of 13 States and is upstream of 19. The proposed rule advances the Clean Water Act's protection of State waters downstream of other States by anchoring a nationwide Federal floor for water pollution control. The floor is critical for maintaining the consistency and effectiveness of the downstream States' water pollution programs. This is because the Federal statute preempts many common-law remedies traditionally used to address interstate water pollution, leaving the Clean Water Act as the primary mechanism for protecting downstream States from the effects of upstream pollution.

Critically, by protecting interstate waters, the proposed rule allows States to avoid imposing disproportionate and costly limits on dischargers in their own State in order to offset upstream discharges which might otherwise go unregulated.

A robust Clean Water Act is important to States and municipalities because, by protecting our waters, it keeps billions of dollars in taxpayers' pockets and supports our State economies. In the interest of clean water, the health and welfare of our citizens, and the economy of our States, we should not go back to failed approaches. We should go forward with what is working.

The "waters of the United States" rule provides much-needed clarification regarding the applicability of the act and anchors an essential nationwide Federal floor for water pollution control.

We look forward to the completion of a final rule, and I look forward to answering any questions.

Mr. GIBBS. Thank you.

I recognize Senator Inhofe for 5 minutes. Thank you.

Senator INHOFE. Thank you, Mr. Chairman.

I will start off with my good friend Scott Pruitt.

Now, confession is good for the soul. I am not a lawyer, and so I have to ask some obvious questions of people who are lawyers.

Now, I want to read something, and tell me, if you would, General, what is ambiguous about this language.

Section 101(g) of the CWA states—and this is a quote. It says, "The authority of each State to allocate quantities of water within its jurisdiction and that shall not be superceded, abrogated, or otherwise impaired by this act."

What is unclear about that?

Mr. PRUITT. Mr. Chairman, I don't think much. And I don't think that it takes a legal mind to draw that conclusion.

I would add this, as well: The CWA states in its text that agencies must recognize, preserve, and protect the primary responsibilities and rights of States to plan the development and use of land and water resources.

This body, Congress, recognized at the creation of the Clean Water Act that the role of the States was important, but, more than important, it was primary in land use and water management decisions.

In the State of Oklahoma, we have a water resources board that is required to measure out permits to those that seek to use water in the State. We have a DEQ that is consistently involved in water quality issues.

The decision and the discussion here today is not whether the EPA has any role in the process. They, in fact, do. But they only have a role when we have navigable waters, interconnectivity, because jurisdiction is at issue here, Mr. Chairman. And I think the EPA, through this redefining of "waters of the United States," is seeking to extend its authority to displace and duplicate the States' authority.

Senator INHOFE. You know, Commissioner Putnam and Commissioner Clark both said statements to the effect that we in Colorado, we in Florida want clean land, we want clean air, we want clean water. Why do you feel it is necessary to reaffirm that?

And I won't ask you to answer it, because I will answer it for you. There is this assumption that no decisions are good decisions unless they are made in Washington. And whether you picked it up or not during the opening statement of the first panel, they feel—and those individuals who are embracing their new authorities that they are seeking are ones who do not believe that you are capable in the States to do as good a job as they would do in the Federal Government.

What do you think of that?

Mr. PRUITT. Well, Senator, I think, in many instances, even beyond the Clean Water Act, there are those in Washington that populate the EPA and other agencies that see the States as a mere vessel of Federal will. And so long as the States agree with the view and the perspective of the agencies here, there is no conflict. But when there is disagreement about how decisions should be made—and I would add this, decisions that have been reserved by

this body, by Congress to the States—that is when the competition and the conflict arises.

And that is what we have here. We have a situation where the EPA is extending its authority into areas that are historically and, I might say, almost exclusively the purview of the States. And they are doing so because they want to dictate to the States how we should manage our water and use our water.

Senator INHOFE. Well, I appreciate that. And we live with this on a daily basis.

There is some other language in here I am going to ask the three of you to respond to, because when I first read this, I know how I interpret it. It says that agencies have told States that these rules will not actually provide any certainty because most of the decisions are left to the, quote, "best professional judgment of the EPA and the Corps of Engineers."

What do you think about that language?

Mr. PRUITT. Well, I think that and also what the commissioner mentioned, Mr. Chairman, about the catchall category, there is a catchall category the EPA is proposing with this rule that they say the purpose is to provide transparency and predictability and consistency with respect to the scope of the CWA, that when it is reduced down to the discretion, the judgment on a case-by-case basis, that definitely does not provide certainty and predictability——

Senator INHOFE. Uh-huh.

Mr. PRUITT [continuing]. To those folks that are regulated across the country.

You know, the greatest benefit that we have of rule of law and regulation is that those that are subject to regulation know what to expect and know how to conform their conduct. And when we have decisions made on a case-by-case basis, that is almost impossible to happen.

And so, Senator, I am very concerned not only about what you have raised but also this catchall category that we have already identified.

Senator INHOFE. Yeah.

And to Commissioners Putnam and Clark, does that phrase concern you as much as it does me?

Ms. CLARK. Thank you, Senator.

Yes, it does. And I heard the EPA this morning even say that it was confusing; there were a lot of components that are still confusing.

It broadens the number of county-maintained public safety ditches and infrastructure that would require section 404 Federal permits, and it is a process that is already cumbersome. There are counties across the Nation that I can look to examples where it has increased the length of time. The clarity is a problem as to how it is being enforced by regions as well as the headquarters.

And I think we heard today that very thing, that there is ambiguity and confusion, and we need to be at the table to help solve that problem.

Senator INHOFE. Thank you.

Mr. GIBBS. Mrs. Napolitano, the floor is yours.

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

There is an area that we really haven't delved into, and that is the cost of inactivity. And I would like to ask either Mr. Mauck or Mr. Srolovic.

Several comments on the proposed rules have expressed concerns about the costs associated with the rule. But in your personal view or that of your organization, is there a cost associated with the inactivity when compared to the existing rule?

Mr. SROLOVIC. Thank you.

I believe there is a cost, and I think the cost is positive. As things exist now, there is fractured conflicting case law. The courts have invited the agencies to clarify that through a rulemaking.

And so I think that, as time goes by and the status quo remains, there will be a continuing cost in greater delay of jurisdiction. I think the rule will very much help clarify when, in most cases, the law applies and when it does not.

It is not perfect. It is undergoing further work. There has been a lot of comments. But I think it will help bring down the cost over the status quo.

Mrs. NAPOLITANO. Mr. Mauck?

Mr. MAUCK. Yes, if I may. Thank you for the question.

As a headwater county, we are consistently under scrutiny in terms of the water and the water quality that flows out of our county and downstream to other users. And for a small county, the treatment of that water continues to increase and it becomes very expensive for us.

And the assurances that we could put in place to assure that the intermittent streams, the headwater, especially in a former mining community like mine where we still have sites out there—that the water that is—it is coming down from those streams are protected. The cleaner that that water is coming into our systems, the cheaper it is for us, and easier for us to send better quality down the hill.

Mrs. NAPOLITANO. Thank you, sir.

Mr. Srolovic, suggestion has been made that New York State is opposed to the rulemaking. And is this position true?

Mr. SROLOVIC. Congresswoman, I think there are two points here. The answer is no. New York is not opposed to the rule.

Our environment and agricultural commissioners in New York strongly support Agency rulemaking to anchor a Federal water pollution control floor on a national level, which is essential to protect States from upstream pollution. The commissioners raised some concerns about the lack of pre-rulemaking consultation with States and some of the definitions of certain terms in the proposed rule.

While consultation before is always better than after, the Corps and EPA have undertaken significant outreach to States, municipalities, and other stakeholders, holding some 400 meetings around the country. One of those was in Worcester, Massachusetts, where our office participated and gave views, along with many others, about these definitions and the importance of the rule.

So the agencies also extended their public comment period twice and have taken strides to listen to everyone and craft a better, clearer rule.

Mrs. NAPOLITANO. Thank you.

Mr. Mauck.

Mr. MAUCK. I am sorry. Could you repeat the question?

Mrs. NAPOLITANO. Well, the question to you would be the opponents of the rule argue that the process was flawed, that the concerns of the State and local governments were not adequately addressed.

Were you given ample time and opportunity? I know that they have held—like Mr. Srolovic was indicating, there were over 400 meetings, et cetera. Was there ample opportunity for input?

Mr. MAUCK. Yes. You know, these discussions have been ongoing for a number of years now. But there was a very lengthy—200 days for public comment. I believe we have received—there have been submitted about 1 million comments. I feel like I have had adequate time. I have been able over the past year to actually address this through letters to the editor, as a matter of fact. So absolutely.

Mrs. NAPOLITANO. Thank you, Mr. Chair. I yield back.

Mr. GIBBS. I yield 5 minutes to myself.

Mr. Srolovic, you were talking about that tough name. In your testimony, you talk a lot about the need for clarification, and I think there is all agreement on that on CWA.

But, however, I find it interesting. I am looking at the comments made by New York State from the environmental department and the agricultural department filed on November 13, 2014, and they are very concerned about the definitional concerns in the proposed rule that prevents New York from providing meaningful comments, the impact of the proposal, economic impacts, a one-size-fits-all approach to redefine the regulated waters will only lead to legal challenges, cause unnecessary harm to farmers, and could lead to other unintended consequences, and they question the process was inadequate because they weren't consulted enough.

So I guess my question is: Are you aware of those comments? I think you are. Did you consult with these State agencies, besides being the representative in the Attorney General's Office in the State of New York?

Mr. SROLOVIC. We do represent the State agencies in court and on other legal issues. I think the fundamental point raised by the commissioners in that letter was that, while there is a need for a rule, it is very important for that rule to have as much clarity in its terms as possible and, at the same time, maintain a flexibility that reflects regional differences.

In New York, we have a lot of water. We are blessed with a lot of water. We have a lot of wetlands. Other States, Colorado, a very different circumstance.

Mr. GIBBS. Yeah. A one-size-fits-all policy I don't agree with, especially with water.

But do you agree with these State agencies in your State, that this proposal would be an expansion of the regulatory authority of the U.S. EPA under the Clean Water Act?

Mr. SROLOVIC. We do not see it as a significant expansion of the jurisdiction of the waters of the United States. We think it codifies the principles that have been applied, that it properly interprets the guidance that a majority of Justices have provided from the U.S. Supreme Court, and is an important step forward.

Mr. GIBBS. OK. I guess for the other panelists, costs to the counties, States. If this rule, as proposed, goes into effect, what is it going to do to the cost of government—for local governments?

Ms. CLARK. Thank you, Mr. Chairman. I will try and go first and be brief.

Financially, actually, it is—I mean, it is reaching farther out based on the ambiguity and the confusion that has been placed on the rules.

If you look at the Small Business Administration's Office of Advocacy and the analysis that they did, there would be a cost not just to small businesses, but to small counties, 50,000 or less, and that makes up about two-thirds of the Nation's population.

In addition to that, if we look back and look at—the delay of projects is a cost to us locally. The longer we delay, then it puts safety at risk. It puts water at risk, frankly, and water quality.

And then the other component of that really is to look back and see when the EPA did their analysis and what data they used. And it was older data. It wasn't based on today's costs in place. So, yes, there is a significant cost.

Mr. GIBBS. I want to get to one more question here.

I am a firm believer that the CWA was put into place because we had major problems. This is what you saw in the earlier panel, the Cuyahoga River and all that. The CWA was structured to be cooperative federalism between the States and the Feds and with the Federal Government in oversight and guidance. That is why the States had to submit the 3-year plan of action.

Maybe Mr. Pruitt or Mr. Putnam might want to comment on how that partnership has been working or not working or what the process has been of implementing and enforcing the Clean Water Act.

Mr. PUTNAM. I will be brief.

In answer to your first question, we know from urban counties just on stormwater and from an agricultural perspective the number is easily in the billions, easily in the billions. Twenty-percent increase in jurisdictional wetlands minimum.

We know from the previous study that is now 12 years old that it costs over $300,000 to get a 404, and we know the wetlands mitigation is $100,000 per acre to mitigate.

So when you grow the impacted areas and you add the regulatory cost and you add the mitigation factors, it is easily in the billions not only for ag, but also for our counties.

And I will let my attorney general friend speak to the partnership issue.

Mr. PRUITT. You know, Mr. Chairman, I think that that is the concern that you have identified. I think, historically, the relationship has been strong. I mean, in Oklahoma, we have water quality issues. The Illinois River in the eastern part of our State, there have been ongoing concerns between Arkansas and Oklahoma about phosphorus load in that body of water.

Both the EPA has been concerned about that, but so has the State of Oklahoma. We have actually negotiated a memorandum of understanding with Arkansas, and we have worked on both sides of the border to take regulatory steps to reduce phosphorus levels

in the Illinois River. And so I think you see examples both at the State level and at the Federal level of concern about water quality.

But here my comments to the panel and to the committee are focused more upon this expanded view of the definition that gives the EPA jurisdiction to interpose itself into those areas that are traditional, historical, and, I believe, lawful to the States on primacy. And that is what we are seeing on this expanded definition, Mr. Chairman.

Mr. GIBBS. Thank you.

Mr. Duncan, you are recognized.

Mr. DUNCAN. Thank you, Mr. Chairman.

The *Rapanos* clean water decision was mentioned when I was here this morning briefly. Let me read what the Federal district judge said in that case.

He said, "I don't know if it is just a coincidence that I just sentenced Mr. Gonzales, a person selling dope on the streets of America. He is here illegally. He is not an American citizen. He has a prior criminal record.

"So here we have a person that comes to the United States and commits crimes of selling dope and the Government asked me to put him in prison for 10 months.

"And then we have an American citizen who buys land, pays for it with his own money, and he moves some sand from one end to the other and the Government wants me to give him 63 months in prison."

And this Federal district judge said, "Now, if that isn't our system gone crazy, I don't know what is. And I am not going to do it."

Well, he was reversed. But it shows you can take any of these laws too far. And I can tell you no one is talking about doing away with the Clean Water Act or going back to where we were in 1970.

But it is also ridiculous to act like we haven't made any progress and that things are worse now than they were in the 1970s. So we have to make these rules even tougher.

And I remember, when I chaired this subcommittee, the mayor of Los Angeles came to me and he said the EPA was coming down with some new regulations about grease.

And he said, "We have got over 10,000 restaurants in Los Angeles." He said, "Most of them are small mom-and-pop restaurants." He said, "This is going to run several thousand of those small mom-and-pops out of business." And we got that stopped.

But I can tell you that people sit up here in Washington and they write these rules and regulations. They are mostly people who have spent their entire careers in Government. Many of them have spent their entire careers here.

They don't realize the effect that these rules and regulations—most of them help the big giants in the industry, but they really hurt the small farmers and the small ranchers and the small businesses.

And, in fact, the SBA said of this rule that we are talking about—the SBA Office of Advocacy put out this statement and said, "Small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the Agency

submitted with the rule provides ample evidence of a potentially significant economic impact."

And, you know, I noticed in the biographies—I was here for an hour this morning and I listened to Administrator McCarthy and Assistant Secretary Darcy. And I noticed in their biographies neither one of them has ever managed a farm or a ranch or been in a small business.

They just don't understand the pressures and how difficult these positions—these jobs are and how tough it is when you have to fight ordinary competition, but then you have to take on your Government that has unlimited funds when you have to take them on, to boot.

And then people wonder why so many small and medium-sized businesses go out of business, and all of these college graduates wonder why we have so many of them working as waiters and waitresses in restaurants because we sent millions of good jobs to other countries for the last 40 years or so.

And a lot of it—an awful lot of it is because of the environmental rules and regulations and red tape. And if we don't wake up and realize that, we are going to keep hurting these small businesses, these small ranches, these small farms.

And I just get sick and tired of these bureaucrats sitting up here coming up with these rules and regulations that they have no understanding of who it is going to hurt, how much effect it is going to have.

I remember, when I chaired this subcommittee, we had a cranberry farmer from Massachusetts who broke down in tears talking about the effect that some of these EPA clean water rules were already having on his farm.

And to come in and expand them at this point now is just wrong, in my opinion. And so I am opposed to it. And I notice that almost all the small business groups and almost all of the agriculture and farm groups are opposed to it, too.

Finally, I will just say I think I am the only one here that has served with Secretary Putnam. He was a great Member of Congress, and he has got a great future ahead of him in the State of Florida.

I also had the privilege of serving, General, with your Governor, and she was a fine Member and outstanding Member of this body, also. And I am real proud of the work she is doing as your Governor.

Mr. Chairman, thank you very much.

Mr. GIBBS. Mr. Rokita, 5 minutes.

Mr. ROKITA. Thank you, Chairman.

It is great to be on your subcommittee. I appreciate being here. As you can tell, I am new to the Transportation and Infrastructure Committee. That might explain the gap here.

Mr. GIBBS. This is a full committee hearing here.

Mr. ROKITA. Right. Right.

Panel 1, where all of the hubbub was, which, Secretary, that is where I had the plague. I had the plague earlier this morning, but I am here now.

I really enjoy being this close because I get to really focus in on each of your testimonies and appreciate them. As the former Indi-

ana secretary of state, I really looked to county government to help solve our problems, just like I think Washington should be looking to the States to do the same.

In fact, I was in Colorado, where I learned about vote centers from one of your counties, and I know several Indiana clerks are members of NACo. But we took vote centers back to Indiana and implemented them there. It was good stuff.

In that vein, I am surprised to hear a local official like you, Commissioner Mauck, look to the Federal Government almost solely to solve your problems. And that is what I got from your testimony, whether it was the clean water or the wildlife that helps—that the water helps flourish.

I couldn't understand when I was listening to your testimony why you, as a reelected elected official, feel powerless to solve these problems yourself or to go to your State legislature.

Now, remember, before you answer, unless Senator Gardner was wrong—and feel free to correct him—all water flows out of Colorado. Right? So you are in almost a unique or particularly good situation to take care of the situation.

Why won't you?

Mr. MAUCK. Well, like I said in my testimony, Clear Creek County does. We do take an opportunity—we work with the Watershed Foundation to clean up a lot of our water.

Mr. ROKITA. What is the need to expand this definition?

Mr. MAUCK. The need is the regulatory uncertainty in terms of what waters are in, what waters are out, the delays in the permitting as we work through the——

Mr. ROKITA. Yeah. I want to talk about the testimony about the delays in the permitting.

This expands the jurisdiction of the Agency over water. So, by definition, you are going to get more permits. So how is getting more permits—because there is going to be more water under jurisdiction—going to speed up the permitting process?

The last thing we want to give these agencies—and I don't just mean the EPA. But they all seem pretty inept in terms of turning work product around. Why would we give them more paperwork?

Mr. MAUCK. It is my understanding that this does not expand the jurisdiction of the Clean Water Act.

Mr. ROKITA. Oh. It doesn't expand the jurisdiction.

Mr. MAUCK. Does not, is my understanding.

Mr. ROKITA. Yeah. You state that in your testimony, too.

But, on the other hand, you suggest that the rule would protect intermittent ephemeral streams and wetlands that are currently not federally regulated.

Don't these arguments contradict each other?

Mr. MAUCK. They were once regulated before, and I think there was more certainty back then with the 2001 and 2006 Court rulings. We have kind of entered this gray area now where we don't understand what is and what is not.

Now, I am dealing with a small business community that is outdoor recreation-centric and the small mom-and-pop delis and ice cream shops that operate on the backs of the rafting companies, the outfitter companies, the people that come into camp and recreate and fish and angle.

Not having certain protections in place and not being clear, to me, is rolling the dice on that outdoor recreation industry. And, for me, that is all I have after the Henderson Mine for my community. But it is a very robust economic engine for not only Colorado, but also the rest of the United States.

Mr. ROKITA. Why couldn't a county commission ordinance take care of this? Why can't you legislate this yourself?

Mr. MAUCK. I can't speak to the legalities. I am not an attorney.

Mr. ROKITA. That is not a legality. It is called sovereignty of a State and, in your situation, sovereignty of a county.

And you have been elected by people to act. And it sounds like what you are doing is saying exactly what Attorney General Pruitt was trying to get at where there are people in this country that unfortunately think they have to be vessels of the Federal Government.

And I am going to let Attorney General Pruitt comment on it and Secretary Putnam. We have about 30 seconds, if you can divide that. And I appreciate your testimony. I want to see if you have anything to add to this exchange we just had.

Mr. PRUITT. Well, I do want to provide a comment with respect to the case law just momentarily. You know, there has been two recent decisions, the *Solid Waste Agency of Northern Cook County* and, also, the *Rapanos* decision that has already been highlighted.

And in the *SWANCC* decision, the Court held that the Corps of Engineers exceeded its authority by attempting to regulate nonnavigable, isolated, interstate waters.

In the *Rapanos* decision, they held that the Corps waters must be navigable waters or at least reasonably made to be so. There is a reason for that. It is called the Interstate Commerce Clause.

And this body, Congress, has the authority with respect to issues that involve interstate commerce as it relates to water. If you are dealing purely with intrastate water that cannot be regionally connected to an interstate body of water, the jurisdiction is exclusively within the States. And that is the tension here.

And so, when you talk about issues of federalism, I agree with you, Congressman. I believe that the States are taking and, in fact, have taken—I know Oklahoma has done this. We have a robust regulatory regime. I have mentioned the Water Resources Board and the DEQ working together to deal with land use and management and water quality issues.

There are issues—and I mentioned one, the Illinois River—with phosphorus load that is affecting us from Arkansas, where the EPA has jurisdiction, that we should be very leery of an approach that yields to the Federal Government a takeover of that land use and water quality issues that are reserved to the States presently.

Mr. GIBBS. OK. Thank you.

Mrs. Napolitano, do you have something to enter for the record?

Mrs. NAPOLITANO. Yes, Mr. Chairman.

There was a statement by Ms. Clark, I believe, that the SBA Advocacy was concerned about the impact this has on small business.

So I have a release dated October the 2nd from the American Sustainable Business Council stating that it appears the SBA is arguing that polluting industries have the right to externalize their pollution and harm downstream businesses and communities. This

organization apparently has 200,000 businesses, 325,000 entrepreneurs, executives.

I would like to introduce it into the record, please.

Mr. GIBBS. So ordered.

[The information is on pages 412–413.]

Mr. GIBBS. I would like to thank our witnesses for your testimony today. Your contribution to today's discussion was very insightful and will be very helpful. Hopefully, we are going to address some legislation and we can get something passed. I do believe it is the role of Congress to address this.

I ask unanimous consent that the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be submitted to them in writing and unanimous consent that the record remain open for 15 days for additional comments and information submitted by Members or witnesses to be included in the record of today's hearing.

Without objection, so ordered.

Any other Members have anything else? If not, then the meeting is adjourned.

[Whereupon, at 3:03 p.m., the committees were adjourned.]

Statement for the Record
Senator Cory A. Booker
"Impacts of the Proposed Waters of the United States Rule on State and Local Governments"
February 4, 2015

40 years ago, Congress had the foresight to pass the Clean Water Act—a law designed to protect our nation's waters. Local streams and wetlands across New Jersey and our nation have benefitted from its protections.

Streams and wetlands naturally remove pollution and provide habitat for hundreds of species of fish and wildlife. They also trap floodwaters and replenish groundwater resources. We all need clean water to survive and we all need to ensure its protection for future generations.

Yet today, one in three Americans are at risk of drinking water from rivers and streams that are vulnerable to pollution from upstream sources. Clean water is not only crucial in protecting public health, but vital in stimulating economic growth in our communities. Across our nation, raw sewage and industrial pollution degrade our harbors, fisheries, and swimming waters, and stymie economic growth in those sectors. This must end, and the Clean Water Act is a tool we can use to help ensure we protect our nation's waters.

The importance of clean water cannot be overstated. To address this issue, members of the Senate Environment and Public Works Committee and the House Transportation and Infrastructure Committee gathered today to discuss the Environmental Protection Agency (EPA) and Army Corps of Engineers' (Corps) proposed Waters of the United State rule.

The proposed rule restores protections for waters that have historically been protected by the Clean Water Act and provides certainty to stewards of the act by clarifying which waters fall under the Act's jurisdiction. Many of our vulnerable waterways, including those that provide drinking water to 4.2 million New Jerseyans, will be safeguarded by the implementation of such a rule. For these reasons, I support the proposed rule.

Protecting our drinking water supplies should not be a controversial or partisan issue. It should be a unifying issue, one in which we all have an interest because we are all at stake. Community leaders and members, state legislatures, and environmental groups understand the importance of protecting clean water. I am submitting for the record, two New Jersey county resolutions, one letter from a bipartisan group of state and national legislators, and one letter from New Jersey environmental groups to demonstrate the wide ranging support for the proposed rule.

Hundreds of thousands of Americans agree that we should support the proposed Waters of the U.S. rule and fight to protect the integrity of the Clean Water Act. I stand with all of them in support of the proposed rule.

Statement of U.S. Senator Ben Cardin
Joint Hearing Before the House Committee on Transportation and Infrastructure and the Senate Committee on Environment and Public Works
"Impacts of the Proposed Waters of the United States Rule on State and Local Governments"

February 4, 2015
10:00 a.m.
Room HVC-210, Capitol Visitors Center

Chairmen Inhofe and Shuster and Ranking Members Boxer and Fazio, thank you for holding today's hearing. I first and foremost want to say that I support of EPA's proposed rule to establish the definition of "Waters of the United States" under the Clean Water Act. As a stalwart champion of restoring the health of the Northern Hemisphere's largest estuary, the Chesapeake Bay, I applaud the EPA for its proposed rule.

I aim to explain what this rule does, and perhaps more importantly what this rule does not do, both of which are critical for colleagues to understand in-light of the millions of dollars being spent to obfuscate and condemn EPA's effort to ensure regulatory clarity and certainty under the law.

Clean water is essential to protect public health, support aquatic life and vibrant ecosystems, and grow regional economies across the country. Prior to the passage of the Clean Water Act in 1972, The United States was in a state of crisis similar to what the world's developing countries face today. The Cuyahoga River had caught fire, Lake Erie was considered dead, the Chesapeake Bay was deemed to have one of the world's first marine dead zones, high levels of PCBs were being discovered in the San Francisco Bay, and unfettered industrial pollution had rendered a majority of waters across the U.S. as unsafe for fishing and swimming.

The immense scope of the tragedies beset our nation's waters was too great for Congress to ignore. In 1972 Congress took decisive action to address this growing threat, and that response brought about the Clean Water Act.

The Clean Water Act set lofty goals of making all waters of the US swimmable and fishable by 1985, by putting in place a series of regulatory procedures to eliminate the degradation of our nation's waters and wetlands.

Despite the plain evidence, like rivers spontaneously combusting, that federal action was not only appropriate but necessary to save these precious natural resources, there was a concerted effort of well funded special interests that actively opposed the enactment of the Clean Water Act.

The Clean Water Act has been essential to restoring our nation's waters, and while we have not yet met the lofty goals of the Act to eliminate all water pollutant discharges by 1985, we have made great progress. For nearly 30 years the Clean Water Act functioned just fine. Application of the Act was done with low incidence of controversy.

After all, most regulatory decisions made under the Clean Water Act simply result in the issuance of a permit for the activity that is being pursued. Meaning, that an actor is usually allowed to proceed with the activity they are proposing that will affect a body of water so long as the actor meets the mitigation or treatment requirements of their permit. Trouble typically arises when actors, whether by accident or deliberate action, break the law by failing to attain the required permits under the law.

Such was the situation in 2001 when the Supreme Court heard case of *SWANCC v. US Army Corps of* Engineers and again in 2006 with the *Rapanos and Carabell* cases. The decisions handed down in these cases, and subsequent inaction of the Bush Administration to swiftly issue appropriate rules as the court ordered created years of regulatory confusion over the Clean Water Act's jurisdiction that largely did not exist during the first 30 years of the Act.

The same groups that opposed the enactment of the Clean Water Act cheered these Court decisions - at first. These decisions were seen by these groups as validating false claims that the Clean Water Act constituted an overreach of federal authority. There was an expectation, predicated upon an incorrect interpretation of the Court's decisions, that the Clean Water Act would no longer be applied to a wide range of waters. That was simply not the case. In the *SWANCC* decision the court ruled that EPA should clarify by rule the definition of Waters of the U.S. Instead President George W. Bush's EPA merely issued a burdensome and inconsistently applied guidance that made matters worse.

To quote the preamble of the new proposed rule:

"The SWANCC and Rapanos decisions resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA. This approach results in confusion and uncertainty to the regulated public and results in significant resources being allocated to these determinations by federal and state regulators."

What was first being hailed by the opponents of the Clean Water Act as a victory, resulted in a major failure of policy that even the regulated community ultimately had to admit was not producing better results. Many of the groups who spent years fighting the Clean Water Act ultimately found themselves calling on EPA to issue a rule on Waters of the U.S. Those groups include (see attached list).

Not surprisingly, now that a rule has been proposed the groups who asked for the rule seem oddly absent in expressing their appreciation for EPA's work to honor their request. I guess some people can't be pleased.

There are many noteworthy supporters of the rule that issued statements on the day of its release.

The CEO of Ducks Unlimited, one of our nation's largest sportsmen groups that does a tremendous amount of work on the Eastern Shore of Maryland working with farming to conserving important migratory water fowl habitat had the is to say about the proposed rule:

"The release of the draft rule gets us one step closer to better defining Clean Water Act regulations in regard to wetlands. We are also pleased with the open process EPA has adopted, which invites the public, Congress and all interested parties to participate in the discussion. EPA's draft science report last year showed many categories of wetlands, including prairie potholes, may be geographically isolated but are still connected to, and have a significant impact on, downstream waters."

The National Farmers Union issued this statement:

"NFU has long advocated for increased certainty surrounding Clean Water Act requirements for family farmers and ranchers in the wake of complicating Supreme Court decisions. Today's draft rule clarifies Clean Water Act jurisdiction, maintains existing agricultural exemptions and adds new exemptions, and encourages enrollment in U.S. Department of Agriculture conservation programs. In addition, farmers and ranchers who are voluntarily enacting certain conservation practices on their farms will be exempt from Clean Water Act Section 404 permitting requirements. Today's ag-friendly announcement clearly indicates that NFU and other agricultural stakeholders made their voices heard, and EPA took notice."

The American Sustainable Business Council issued this statement of support:

"American business has always depended on the availability of clean water for its success, and EPA's regulation in this area historically has been a prime example of the vital partnership between business and government. Whether a company is a food producer, a high tech manufacturer of silicon wafers, outdoor recreation guide or a beer manufacturer, businesses rely on clean water to produce high quality and safe products. Ever since the passage of the Clean Water Act in 1972, the EPA has been charged with ensuring that our water supply remains safe. Today, we applaud the EPA for taking steps to clarify that small streams, wetlands and other tributaries are protected by the Act. Degradation and loss of wetlands or small streams can increase the risk of floods there by threatening businesses."

The Bush Administration had nearly 6 years to issue a rule, and they failed to do so. President Obama's EPA, under the leadership of both Lisa Jackson and Gina McCarthy - but without a confirmed Assistant Administrator for the Office of Water who has been denied a vote in this chamber for more than 2 years - worked extremely hard to issue the rule proposed this week.

This rule represents the application of the best available science, input from a wide variety of stakeholders from the regulated communities, policy input from the Departments of Agriculture and the Army Corps of Engineers, and sound adherence to the law and the instruction of the Supreme Court.

I'll explain what the rule does, what the rule does not do, how the rule specifically treats agricultural activities, and what it means for water quality and the Chesapeake Bay.

Starting with what the rule does. The aim of the rule is to return to the normalcy and consistent application of the Clean Water Act that existed prior to the SWANCC and Rapanos decisions. The proposed rule applies a uniform definition of the Waters of the U.S. to all Clean Water Act regulatory programs. That means the same definitions for what waters are covered under the Act, and what waters are not, is same for Sec. 404 (Dredge and Fill activities/permits) as they are for Sec. 402 (National Pollution Discharge Elimination Systems or NPDES) permits, as they are for Sec. 405 programs and so on. The same definitions of waters apply across all programs.

All waters that were covered pre-SWANCC decision are covered under this rule, except for those waters that may have been covered but are now, by way of this rule explicitly exempted.

I will discuss the latter point in more detail when I get to what waters the rule does not cover, but I want to point out that explicitly listing waters not covered by the Act is a first in the Clean Water Act's 40+ year history and should provide welcome certainty to regulated entities. As for the waters that are covered, the rule provides ample details:

"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;" These waters are not just those waters that boats and barges float down, but also include waters that provide drinking water sources or are receiving waters for discharges.

This is not a change in current practice, nor is it a change in post-SWANCC and Rapanos practice.

"All interstate waters, including interstate wetlands." Again, nothing is new here. The majority of water bodies covered under this rule, and are protected under the Clean Water Act are, or are adjacent to, or flow into interstate waters. This is critically important for members to understand. I have heard colleagues say that regulation of water should be a state responsibility. While I agree, and so does the Clean Water Act, that primacy for enforcement and permitting under the Clean Water Act programs is and should be delegated when appropriate to state authorities, it is completely wrongheaded to assert that the states should be solely responsible for developing their own water quality protection laws.

Much like birds, fish, air and other natural resources, water does not know state boundaries.

No offense to Maryland's neighbors, but I'll be damned if Maryland were to have to accept the water quality standards set by Virginia, Delaware, Pennsylvania, and West Virginia. More than 90% of Maryland's waterways, from the Nanticoke, Choptank, and Pocomoke Rivers on the Eastern Shore, to the Youghiogheny and Monocracy Rivers in Western Maryland, the Potomac River and of course the Chesapeake Bay are interstate waters. Maryland is downstream from all of these states, the Clean Water Act is what protects Maryland from potential weak water protection laws in our neighbor states and the potential bad actors who reside is these states and pollute the water before it reaches Maryland.

"The territorial seas;" These are our oceans, and gulfs and waters that form our nation's coastlines. These are not only interstate waters but in some cases international waters, and what we do to these waters impacts coastal water quality which has a major impact on human health and the environment.

"All tributaries and impoundments of these waters." The clarification on impoundments establishes clarity that building a dam, a berm, a dike or like structures on a Water of the U.S. does not remove Clean Water Act protections from that water. This is also not a change from current practice.

The rule provides a clear science based definition for what a tributary is: "a water physically characterized by the presence of a bed and banks and ordinary high water mark, which contributes to flow, either directly or through another water to an interstate, water or wetland, territorial sea, or water used or susceptible to use in interstate or international commerce."

The defining features of a bed, bank and high water mark are very important features to clarify the application of the law. The definition for tributaries however goes on to provide a clear definition of how flow created by wetlands lakes and ponds also constitute these waters as tributaries too.

While the rule clearly defines what a floodplain is, "as an area bordering waters that was formed by sediment and deposition... and is inundated during periods of moderate to high water flows" it does not explicitly place floodplain areas under the rule – which is important to understand.

The Clean Water Act's applicability to wetlands is irrefutable. Wetlands are vital to water quality and Section 404's requirements for dredge and fill material has a long standing application to wetlands protection. The definition of wetlands in the rule is concise and is scientifically defensible.

The rule states that wetlands are: "areas that are inundated or saturated by surface or groundwater at frequency and duration sufficient to support, and the under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." These include swamps, bogs, and marshes and similar hydrological land features.

While some further clarity on this definition like what constitutes "normal circumstances" is certainly within reason, the rule makes clear what wetlands are and how they fit into the definition of Waters of U.S. based on their adjacency to interstate waters, territorial seas, waters used in commerce and these waters' tributaries.

The rule defines terms like adjacent as "neighboring, bordering, or contiguous".

The way in which the Army Corps has determined adjacency has been a point of contention in many jurisdictional determinations. This clear definition of the term adjacent in combination with the incorporation of Justice Kennedy's significant nexus test should make the regulatory bounds of the Act very clear.

It is also important to note that these terms that are being incorporated into the rule are not new terms that in any way can be misconstrued as an expansion of the Clean Water Act's jurisdiction. These are terms and definitions taken, in the case of "significant nexus", directly from Justice Kennedy's plurality decision in *Rapanos* and from pre-SWANCC guidance that the Court's decision in *SWANCC* recommended be given greater force and clarity in law by way of rulemaking.

Some may argue that basing the rule on a set of pre-SWANCC guidance violates the court's orders. When you read Chief Justice Rehnquist's decision in *SWANCC* you see the opposite is in fact the case.

There are two particularly important tenants of Chief Justice Rehnquist's decision.

The first is that because of the question of the Clean Water Act's application to "isolated" waters, the court ordered EPA to issue a rule clearly defining the Waters of the U.S.

Second, the holding in the *SWANCC* decision is narrowly focused on invaliding the government's sole application of the Reagan-era migratory bird rule to determining jurisdictional waters under the Clean Water Act.

That's it! That's the holding in the case! The Bush-era policy that resulted, however, gave the impression that the Court had all but thrown out the Clean Water Act in its entirety.

The policy, driven by the same special interests that opposed the Clean Water Act's enactment in 1972, that came from President Bush's EPA and Army Corps amounted to a sweeping effort to dismantle the Clean Water Act not unlike driving a policy Mack Truck through a narrow mouse hole of a decision that clearly invalidated just one flawed, particularly when used on its own, test (the Migratory Bird Rule) of jurisdictional determination for Waters of the US.

Furthermore, it was the Bush Administration's failure to promulgate clear rules on the definition of waters of the U.S., like the one issued by the Obama administration, and the prior administration's exploitation of a narrow holding without taking seriously the *SWANCC* decision's order to issue a rule on the definition of Waters of the U.S. that put the issue of Clean Water Act jurisdiction back before the Supreme Court again in 2006 in the *Rapanos and Carabell* cases.

The newly proposed rule is designed to take a lot of the guesswork out of what had become an arduous review process under the Bush policy of completing a case-by-case review and issuance of jurisdictional determinations for every single permit application. While this rule provides a great deal of clarity it is not so ambitious or naive to purport to eliminate the need for case-by-case review and determinations on "other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters and wetlands".

The fact is, no carefully crafted rule that in fact aims to uphold the law could eliminate the need for occasional individual case-by-case jurisdictional determinations to be made. Keeping this process in place for particularly difficult situations will ensure fair application of the Clean Water Act. It is in these cases that the rule requires application of the Kennedy "significant nexus" test from the *Rapanos* plurality decision.

The rule also aims to significantly reduce the confusion and contention over what waters are not covered under the Clean Water Act by, and for the first time, explicitly indentifying types of waters that would not be regulated under any Clean Water Act program.

The waters that by rule will not be covered under the Clean Water Act include a variety of upland ditches, particularly those that do not contain year-round flows.

I know this is particularly important to farmers. Also important to farmers are the exclusion of prior converted croplands, artificially irrigated lands that would revert to upland areas if they weren't being watered, artificial lakes or ponds that were created by excavation or diking of dry land and are used for activities like stock watering, irrigation, settling basins or rice paddocks.

These clearly stated exemptions or exclusions from the Waters of the US definition should be welcomed by America's farmers because for the first time they are seeing EPA make clear delineations on how and where its regulatory authority under the Clean Water Act applies.

And it is also worth noting that all of the longstanding and wide ranging agricultural and silviculture exemptions in the Clean Water Act, including Section 404(f)'s "Non-prohibited discharge of dredge or fill material from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvest" are all still in the law.

Other waters that are being clearly determined as non-jurisdictional are wastewater treatment systems including treatment ponds and lagoons, reflecting pools, excavated swimming ponds, ornamental waters, construction site depressions, gullies, swales and groundwater. Some people might find it confounding to call out these types of waters, many of which have never been considered jurisdictional under the Clean Water Act.

Yet the special interests that have spent the better part of the last decade obfuscating and fear mongering around the Act's jurisdiction compelled the Agency to issue specific clarity on what's in and what's out.

One final detail on what's out is of particular interest to me and Chesapeake Bay farmers. I spent a great deal of energy and time working with Senate Agriculture Committee Chairman Stabenow to make the Regional Conservation Partnership Program in the new Farm Bill work well for Maryland and other Chesapeake Bay states.

The reason this program was so important to me, is because Maryland farmers care about the Bay and are proud participants in a wide variety of NRCS conservation programs. The technical and financial support Maryland farmers receive through these programs is absolutely critical to the restoration of the Chesapeake Bay.

That is why I was so pleased to see that as part of this rulemaking process, EPA, the Army Corps and USDA have issued an interpretative rule, effective immediately, clearly exempting fifty-three NRCS approved conservation practices from the Clean Water Act. This clarifies those farmers engaging in practices that improve water quality in their watershed and ultimately are helping achieve the national goals of the Clean Water Act will have no obligation to seek permits or face Clean Water Act regulation of these agricultural conservation activities.

This proposed rule is a serious steps towards progress and providing assurance for regulated entities. The rule is crafted on the best available science, but is certainly open for improvement. The Public Comment period will open as soon as this rule is published in the Federal Register which is expected to happen in the very near future.

The comment period will be open for 90 days, but I've already heard the Administrator acknowledge that EPA is open to extending it. While I have done my best to explain the rule, I would urge all stakeholders to carefully read it, participate in the various outreach sessions that EPA, USDA and the Corps will be hosting around the country as they gather information on what to include in its final rule and where experts will answer questions. Lastly, I urge concerned individuals and groups to submit comments on how the rule could be improved.

I have assurances that EPA wants input.

As all of my colleagues probably know by now, the restoration of the Chesapeake Bay is both a personal and professional mission of mine here in the Senate.

Maryland is blessed to have such an amazing natural treasure on our door step. I'm sure many of many colleagues know, particularly those who have been in Washington for more than a few years, have had an opportunity to experience the Bay and they know it is more than just the largest estuary in the Northern Hemisphere, it is a cultural, historical and ecological treasure to this nation.

Battles for a nation's independence were fought on its waters, the scene over the Patapsco River, one the Bay's major tributaries, was the inspiration for our national anthem. The bounty of Bay and the economic activities that rely upon it contribute more than a trillion dollars to our nation's economy.

And there are fewer things more beautiful in nature than an October sunset on Blackwater National Wildlife Refuge with a flock of Canvasback ducks on the water having just arrived from New England and a bald Eagle perched atop a loblolly pine at the edge of the lowland forests surrounding the banks of the Blackwater River.

These are the things I'm fighting to preserve through my Chesapeake Bay conservation efforts. As I mentioned at the top of my speech, the timing of the debate and enactment of the Clean Water Act in 1972 coincided with the discovery of the Chesapeake Bay Dead Zone. If it were not for the Clean Water Act I am convinced this country would have lost the Chesapeake Bay.

Clarifying the jurisdiction of the Clean Water Act and giving our region's farmers assurances that they will not face additional regulatory burdens for implementing effective soil conservation practices is essential to protecting and restoring the Chesapeake Bay. Upstream tributaries, and headwater streams comprise a majority of the river and stream miles of the Chesapeake Bay watershed.

Most of these stream miles are outside of Maryland, in the five states that comprise the Bay's 64,000 square mile watershed. When healthy, the upstream wetlands, rivers and creeks improve downstream water quality in the Bay by filtering, slowing and capturing runoff, settling sediments, and removing excess nutrient pollution from the water as it flows downstream. EPA has estimated that first-order streams comprise almost 50% of the more than 200,000 stream-miles in the Chesapeake Bay watershed.

Essential to assuring the water quality benefits of these streams in the Chesapeake watershed are the dwindling 1.7 million acres of wetlands that serve as nature's sponges for water contaminants. Non-tidal wetlands in the Bay watershed remove up to 89% of the nitrogen pollution and 80% of the phosphorous pollution in the runoff that enters the water network.

This rule is absolutely critical to continued protection and maintenance of the ecological values of these waters of the U.S. in the Bay region. I urge my colleagues to read the rule and learn about the water quality benefits it will help extend to the water resources you and your constituents care about.

Our country has made tremendous progress from the days of burning rivers and aquatic dead zones. I urge my colleagues to support furthering this success and support the EPA rule on Waters of the U.S.

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Congress of the United States
Washington, DC 20515

Congressman Sam Graves
Opening Statement

Committee on Transportation and Infrastructure

"Impacts of the Proposed Waters of the United States Rule on State and Local Governments"

February 4, 2015

Mr. Chairman,

I would like to thank Chairman Shuster and Chairman Gibbs for working with our Senate colleagues to hold this important hearing today. It is not often we have a bicameral hearing, but given the importance of this issue and the dramatic impact this rule will have on all of our constituents, I could not think of a more timely and pressing topic to examine in coordination with our Senate counterparts on the Environment and Public Works Committee. I hope the leadership at EPA and the White House take note of the serious concerns raised in this hearing and reconsider their proposal.

From Atchison County, Missouri, where I live, to Marion County clear across my home state, I hear from people who are rightly worried about the Environmental Protection Agency's (EPA) proposed "Waters of the United States" rule.

The *Clean Water Act* was designed in a manner that ensured the primary responsibility of land and water resources belong to States and local governments for the precise reason that a government closest to such a sensitive issue, is best equipped to handle it. However, the "Waters of the United States" rule fundamentally changes this standing and is indicative of many of the problems we see with the federal government inserting itself in local matters. By applying a Washington-knows-best mentality and an additional level of bureaucracy to an already complex issue with many variables at the local level, it creates confusion and stifles action. Under this expansive proposed rule, all tributaries, including small streams and ponds that only flow irregularly or when it rains, fall under the definition of federally-controlled waters and would be subject to the *Clean Water Act*'s permitting and other onerous regulatory requirements.

During my time as Chairman of the House Small Business Committee, I led multiple hearings to examine the effects of the proposed "Waters of the United States" rule. It was evident that if finalized, "Waters of the United States" would have a negative economic impact on small businesses, States, and local governments.

Tom Woods, a constituent from Blue Springs, Missouri, and owner of Woods Custom Homes, testified before my Committee regarding the many ways in which the "Waters of the United States" rule is going to hurt home builders. Mr. Woods, who is the former mayor of Blue Springs, fears the significant impact the proposed rule will have on small businesses nationwide – an important notion that both the EPA and Army Corps of Engineers (Corps) choose to ignore. With this in mind, I called on the EPA and Corps to withdraw the "Waters of the United States" rule.

Last year, the House of Representatives passed the *Waters of the United States Regulatory Overreach Protection Act*, which would have prevented implementation of the rule and required the EPA and Corps to work with State and local governments in the development of any future rulemaking. If the EPA does not withdraw this proposal Congress will be forced to again pursue legislative action to protect family farms and small businesses from this gross overreach by the Administration.

Again, thank you to the committee leadership and our Senate colleagues for holding this important hearing today. My hope is that the concerns raised by Members of Congress and stakeholders across the country do not fall on deaf ears in the Administration.

TESTIMONY OF
GINA MCCARTHY, ADMINISTATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
AND THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES

February 4, 2015

Good morning Chairman Inhofe, Ranking Member Boxer, Chairman Shuster, Ranking Member DeFazio and members of both Committees. I am Gina McCarthy, Administrator of the U.S. Environmental Protection Agency. I am pleased to be here today to discuss the EPA's and the U.S. Army Corps of Engineers' proposed Clean Water Rule, which would clarify the jurisdictional scope of the Clean Water Act (CWA), simplifying and improving the process for determining waters that are, and are not, covered by the Act, consistent with the decisions of the Supreme Court. The agencies' proposed Clean Water Rule was published in the Federal Register for public comment on April 21, 2014. The public comment period was extended twice, until November 14, 2014, to provide a full and effective opportunity for public input on the proposed rule.

The agencies received over one million public comments on the proposed rule. We are currently working to review these comments as we prepare revisions that further clarify our regulations and make them more effective in implementing the statute, consistent with the law and sound science. Our goal in revising the rule is straightforward: to respond to requests from stakeholders across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. We believe the result of this rulemaking will be to improve the process for making jurisdictional determinations under the CWA by minimizing delays and costs, to make protection of the nation's clean water more effective, and to improve predictability and consistency for landowners.

In my testimony today, I plan to highlight the reasons that prompted stakeholders to ask the agencies to develop a proposed rule. I will then describe the primary elements of the proposed rule and how it would provide clarity regarding waters that are and are not "waters of the United States." I will discuss our agencies' efforts to reduce burdens for the nation's farmers, avoid effects on jobs and on the small business community, and enhance our relationships with states and municipalities. Finally, I will describe our work to improve the scientific basis for our decision-making and to gather public input on the proposed rule.

The Importance of Clean Water

The foundation of the agencies' rulemaking efforts to clarify protection under the CWA is the goal of providing clean and safe water for all Americans. Clean water is vital to every single American – from families who rely on affordable, safe, clean waters for their public drinking water supply, and on safe places to swim and healthy fish to eat, to farmers who need abundant and reliable sources of water to grow their crops, to hunters and anglers who depend on healthy waters for recreation and their work, to businesses that need a steady supply of clean water to make their products. The range of local and large-scale businesses that we depend on—and who, in turn, depend on a reliable supply of clean water—include tourism, health care, farming, fishing, food and beverage production, manufacturing, transportation and energy generation.

In addition to providing habitat, rivers, lakes, ponds and wetlands supply and cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits. Consider these facts about the value of clean water to Americans:

- Manufacturing companies use nine trillion gallons of fresh water every year.
- 31 percent of all water withdrawals in the U.S. are for irrigation, highlighting the extent to which the nation's farmers depend on clean water.

- About 40 million anglers spend $45 billion annually to fish in U.S. waters.
- The beverage industry uses more than 12 billion gallons of water annually to produce products valued at $58 billion.
- About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but are critically important to the health of downstream waters.
- Approximately 117 million people – one in three Americans – get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams.

Clean water is something that is all too easy to take for granted. It is only when our daily routines get interrupted that we notice. Perhaps the water shuts off, or our favorite beach closes. But these are the reasons why we need to remember why we have a Clean Water Act, and why it's important that we have a strong and consistent rule. Strong so our water stays clean, and we can continue to have the safest and cleanest water. And consistent so businesses and communities can plan ahead and invest with certainty.

Legal Background and Recent Confusion Regarding CWA Jurisdiction

In recent years, several Supreme Court decisions have raised questions regarding the geographic scope of the Act. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Supreme Court in a 5-4 opinion held that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA. Five years after this case, the Court again addressed the Clean Water Act term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006), which involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. While all Members of the Court agreed that the term ''waters of the United States'' encompasses waters, including wetlands, beyond those that are navigable in the traditional sense, the case yielded no majority opinion. Neither the plurality nor the concurring opinion in *Rapanos* invalidated any of the agencies' existing regulations defining "waters of the United States," but these opinions did raise questions concerning how to determine which waters were jurisdictional

pursuant to their regulations.

Following these decisions, there has been a lack of clarity regarding CWA jurisdiction over some streams and wetlands. Members of Congress, state and local officials, industry, agriculture, environmental groups, and the public have asked our agencies for a rulemaking to provide clarity. This complexity has made enforcement of the law difficult in many cases, and has increased the amount of time it takes to make jurisdictional determinations under the CWA.

In response to these implementation challenges and significant stakeholder requests for rulemaking, the agencies began developing a proposed rule. To help inform the proposed rule, the agencies began reviewing available peer-reviewed science regarding the connectivity or isolation of aquatic resources and effects on downstream waters, a topic we will discuss in more detail later. Consistent with EPA and U.S. Army Corps of Engineers ("the Corps") policy to promote communications among the agencies, states and local governments, and in recognition of the vital role states play in implementation of the CWA, the EPA undertook federalism consultation for this effort. The EPA reached out to states in advance of the proposed rule, taking advantage of regularly scheduled meetings to hear key implementation concerns and issues raised in the confusing wake of the Supreme Court rulings. After the proposal was published, the EPA held dozens of meetings and outreach calls across the country with state and local governments and their representatives soliciting input. We made ourselves available to talk with every state in the country -- and participated in conversations with as many as 2500 individuals representing states, counties, cities and townships. We also gained tremendous insight from local governments through the work of our Local Government Advisory Committee that met across the country and heard from the actual commissioners, public works directors, and managers that deal with clean water issues. Their final report articulates a number of conclusions helpful to the Agencies rulemaking efforts. In addition, toward the end of the comment period, the Agencies convened a series of four calls with state representatives on topics related to the proposal to hear specific comments and ideas on the best ways to respond to key implementation concerns from the states. During this extensive process of engagement, state and local governments identified a number of issues, which the agencies

are carefully evaluating as we prepare a final rule – among them, how to be more responsive to stormwater management issues, better approach roadside ditch maintenance, improve the discussion of significant nexus, and increase clarity for the upper extent of jurisdiction for tributaries.

Key Elements of the Proposed Clean Water Rule

The agencies' proposed rule promotes effective protection of the nation's clean water, makes the process of identifying covered waters more consistent and predictable, and is consistent with the law and currently available scientific and technical expertise. The rule provides continuity with the existing regulations, where possible, which will reduce confusion and will reduce transaction costs for the regulated community and the agencies. Toward that same end, the agencies also proposed, where consistent with the law and their scientific and technical expertise, categories of waters that are and are not jurisdictional, as well as categories of waters and wetlands that require a case-specific evaluation to determine whether they are protected by the CWA.

Specifically, the proposed rule clarifies that, under the CWA:

- All tributaries to the nation's traditional navigable waters, interstate waters, the territorial seas, or impoundments of these waters would be protected because they are critical to the chemical, physical, and biological integrity of these waters.
- Waters, including wetlands, that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters would be protected because such waters significantly influence the traditional navigable waters, interstate waters, or the territorial seas.
- Some waters would remain subject to a case-specific evaluation of whether or not such waters meet the legal standards for federal jurisdiction established by the Supreme Court.
- Categories of waters are excluded, as described below.

The proposed rule also discusses several regulatory alternatives that would reduce or eliminate the need for case-specific evaluations, to provide even greater clarity for the public. The proposed rule retains the

agencies' longstanding exclusions for waste treatment systems and prior converted cropland, from the definition of "waters of the United States." Moreover, the agencies also propose to clarify for the first time, by rule, that certain features and types of waters are not considered "waters of the United States." These include features such as certain intermittent and ephemeral ditches; artificially irrigated areas that would revert to uplands if irrigation were to cease; artificial lakes and ponds used for purposes such as stock watering, irrigation, settling basins, or rice growing; and groundwater, including groundwater drained through subsurface drainage systems.

The agencies' proposed rule continues to reflect the states' primary and exclusive authority over water allocation and water rights administration, as well as state and federal co-regulation of water quality. The agencies worked hard to assure that the proposed rule reflects these fundamental CWA principles, which we share with our state partners. We greatly appreciate the extensive discussions, comments and input provided by state and local governments on the proposed rule and we are committed to reflecting this input in improvements to the final rule.

Concurrent with the release of the proposed rule, the agencies published an economic analysis of the benefits and costs of the proposed rule based on implementation of all parts of the CWA. We concluded that the proposed rule would provide an estimated $388 million to $514 million annually of benefits to the public, including reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. The public benefits significantly outweigh the costs of about $162 million to $278 million per year for mitigating impacts to streams and wetlands, and taking steps to reduce pollution to waterways. The agencies will update the economic analysis as a part of the process to prepare a final rule to ensure the analysis incorporates the best and latest information available to us.

Benefits of the Clean Water Rule for Agriculture

The EPA and the Corps have worked hard to reach out to the agriculture community to listen to their concerns about the geographic scope of the CWA. Since proposing the rule, we met with agriculture,

ranching, and forestry organizations nationwide to facilitate their input on the proposal. Our visits with individual farmers on their farms has been particularly valuable as we have worked to ensure the rule achieves our goal of reducing potential burdens and costs. Using the input from those discussions, the EPA and the Corps are coordinating with the U.S. Department of Agriculture to ensure that concerns raised by farmers and the agricultural industry are effectively addressed in the final rule. The final rule will not change, in any way, existing CWA exemptions from permitting for discharges of dredged and/or fill material into waters of the U.S. associated with agriculture, ranching, and forestry activities, including the exemptions for:

- Normal farming, silviculture, and ranching practices, which include plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products;
- Upland soil and water conservation practices;
- Agricultural stormwater discharges;
- Return flows from irrigated agriculture;
- Construction and maintenance of farm or stock ponds or irrigation ditches;
- Maintenance of drainage ditches; and
- Construction or maintenance of farm, forest, and temporary mining roads, where constructed and maintained in accordance with best management practices.

I want to emphasize that farmers, ranchers, and foresters who are conducting the activities covered by the exemptions (activities such as plowing, tilling, planting, harvesting, building and maintaining roads, ponds and ditches, and many other activities in waters on their lands), can continue these practices after the new rule without the need for approval from the Federal government. Additionally, we expect to clarify for the first time in regulation that groundwater, including groundwater in subsurface tile drains, is not subject to the CWA. The proposed rule reduces jurisdiction over ditches, and maintains the existing exclusions for prior converted cropland and waste treatment systems, including treatment ponds and lagoons.

Science and Public Input in the Agencies' Rulemaking Efforts

The agencies' rulemaking efforts are being supported by the latest peer-reviewed science regarding the connections between aquatic resources and effects on downstream waters. In preparation for the proposed rule, the EPA reviewed and summarized more than 1,200 peer-reviewed scientific papers and other data, and the EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of tributary streams, wetlands, and open waters on downstream waters. This draft report, "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*," informed the agencies' development of the proposed rule. The draft report itself underwent independent peer review led by EPA's Science Advisory Board (SAB). The SAB's review of the draft report was completed last fall and their recommendations have now been incorporated into a final report that was published in the **Federal Register** on January 15, 2015.

The final science report provides several key conclusions based on review of the peer-reviewed scientific literature:

1. *All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, biologically, and chemically connected to downstream rivers and this connection influences the integrity of downstream rivers.*
2. *Wetlands and open waters in floodplains and riparian areas are physically, chemically and biologically connected with downstream rivers and influences the ecological integrity of such rivers.*
3. *Non-floodplain wetlands and open waters (i.e., isolated waters) provide many functions that benefit downstream water quality and ecological integrity.*
4. *The connectivity of streams, wetlands and other surface waters, taken as a whole, to downstream waters occurs along a continuum from highly connected to highly isolated – but*

these variations in the degree of connectivity are critical to the ecological integrity and sustainability of downstream waters.

5. *The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their function considered over time.*

The final Clean Water Rule will carefully reflect the SAB's recommendations and the data/information presented in the final report. We also want to emphasize that EPA responded to a request from the SAB to review our effectiveness in basing the agencies' proposed rule on the best available peer reviewed science. The SAB concluded their review of the science supporting the proposed rule in September 2014 by concluding that the available science supports key components of the proposed rule.

Conclusion

Thank you Chairman Inhofe, Ranking Member Boxer, Chairman Shuster, Ranking Member DeFazio, and members of the Committees, for this opportunity to discuss the agencies' efforts to provide additional clarity regarding the geographic scope of the Clean Water Act. I look forward to a robust and careful review of all public input on the agencies' proposed rule to ensure that the final rule achieves the goal of providing greater predictability, consistency, and environmental effectiveness in the process of identifying waters that are, and are not, covered by the CWA.

Thank you again, and I will be happy to answer your questions.

QUESTIONS FOR THE RECORD
U.S. House Committee on Transportation and Infrastructure

Impacts of the Proposed Waters of the United States Rule on State and Local Government
February 4, 2015

Questions for EPA Administrator McCarthy

Note: The responses reflect information based on the issuance of the final rule, published in the *Federal Register* on June 29, 2015, not the draft rule in-place at the time the questions were initially posed. This will help ensure that there is no confusion, given changes made in the final rule based on the extensive input received and the length of time that has passed since the rule was finalized.

1. **The proposed rule talks about regulating "waters." How do you specifically define "water"? Is any wet area on land a potential "water" under the proposed rule? If not, please describe in detail what is, and is not, a "water."**

Response: The EPA and the Department of the Army (hereafter, "the agencies") have not defined "water" in a rule, though they do define the term "waters of the United States." A wet area is not automatically considered a "water of the United States." Only "waters of the United States" are regulated under the Clean Water Act.

2. **We understand that EPA and the Corps received over 1 million comments from the public on the proposed rule, but the docket for the rule only includes approximately 19,400 "substantive" comments.**
    a. **Did the agencies receive any other substantive comments besides the approximately 19,400 comments in the docket?**

    Response: All unique letters have been posted in the docket, which include both substantive and non-substantive comments. Multiple copies of mass mail-in campaigns are not posted to the docket, though the number of Americans providing the same comment are noted.

    b. **Were the remaining 900,000-plus comments received considered "not" substantive? Were these nonsubstantive from mass mail-in campaigns? Please describe the nature of these other, nonsubstantive comments.**

    Response: The only letters not posted to the public docket are duplicate copies of identical letters received as part of mass mail-in campaigns. All public comments, including examples of every mass mail-in campaign, are available online at regulations.gov.

    c. **On February 26th, 2015, Administrator McCarthy told the House Appropriations Committee that 87 percent of the comments received were positive responses. Is that 87 percent of the 1 million comments received? Were**

most of the 900,000-plus comments that made up Administrator McCarthy's 87 percent statistic not separate or substantive comments, but were from mass mail-in campaigns?

Response: Yes, more than 87 percent of the more than one million comments received were supportive of policies in the proposed rule.

d. Of the approximately 19,400 "substantive" comments received, how many were positive? How many were opposed? How many were neutral?

Response: In the end, approximately 20,000 comments were determined to be unique and were, therefore, posted to the docket. Posting of unique comments is standard practice to allow efficient public access to all comments received.

3. EPA recently indicated that it is planning to finalize the rule during the Spring of 2015.

a. Are EPA and the Corps still planning to promulgate the rule in the Spring of 2015? If so, please explain specifically how the EPA and the Corps plan to review and take into consideration each of the 1 million comments that were received, prepare responses to all of the comments, and revise the rule based on the multitude of comments received, all within a period of a few months?

Response: All comments received were reviewed and a response to comments document was completed. The final rule was signed on May 27, 2015, and published in the Federal Register on June 29, 2015.

b. Will the Agencies prepare a detailed response to the public comments? How will the EPA respond to each and every issue raised in each comment, or does the EPA plan to gloss over the issues in the response to public comment?

Response: All comments received were reviewed and a response to comments document was completed. The final response to comments document was posted on June 24, 2015.

4. In developing its proposed rule, the Agencies failed to conduct outreach to state and local governments. The lack of appropriate consultation was pointed out in comments filed by many state and local officials, plus organizations representing state and local governments. If EPA and the Corps worked with states to develop the proposed rule as they claim, why did the majority of states write comments opposing the rule as proposed and asking the Agencies to withdraw or substantially revise the rule?

Response: EPA and the Corps conducted significant outreach on the proposed rule, including to state and local governments.

As part of the agencies' consultation process, the EPA held three in-person meetings and two phone calls in the fall and winter of 2011, to coordinate with state organizations prior to beginning formal rulemaking. EPA also worked closely with states and municipalities after the

rule was proposed. Organizations involved include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of the States (ECOS). In addition, the National Association of Clean Water Agencies (NACWA) and the Association of Clean Water Administrators (ACWA) were invited to participate. As part of the consultation, 12 counties, eight associations and various state agencies and offices from five states (Alaska, Wyoming, Kansas, Tennessee, and Texas) submitted written comments. In addition, the EPA held numerous outreach calls with state and local government agencies seeking their technical input. More than 400 people from a variety of state and local agencies and associations, including the Western Governors' Association, the Western States Water Council and the Association of State Wetland Managers participated in various calls and meetings. The agencies' engagement with states continued through a series of conference calls organized by both ACWA and ECOS.

During the public comment period, the agencies met with stakeholders across the country to facilitate their input on the proposed rule. We talked with a broad range of interested groups including farmers, businesses, states and local governments, water users, energy companies, coal and mineral mining groups, and conservation interests. In October 2014, the EPA conducted a second small business roundtable to facilitate input from the small business community, which featured more than 20 participants that included small government jurisdictions as well as construction and development, agricultural, and mining interests. After releasing the proposal in March, the EPA and the Army conducted unprecedented outreach to a wide range of stakeholders, holding over 400 meetings all across the country to offer information, listen to concerns, and answer questions.

In addition, the EPA asked the EPA's Local Government Advisory Committee's Protecting America's Waters Workgroup for advice and recommendations on the proposed rule. The LGAC Protecting America's Waters Workgroup held a series of public meetings to hear from local elected and appointed officials at several geographic field locations. The workgroup meetings provided an opportunity for the workgroup to hear from local officials on local issues of concern related to the proposed rule. State, local, and tribal officials were invited to attend these open meetings. The Local Government Advisory Committee is a formal advisory committee chartered under the Federal Advisory Committee Act and is composed primarily of local, state, and tribal elected and appointed officials from around the country. The LGAC sent their final recommendations to the Administrator on November 5, 2014, which the agencies carefully considered as they developed the final rule.

These actions exemplify the agencies' commitment to provide a transparent and effective opportunity for all interested Americans to participate in the rulemaking process.

5. **EPA has said it has done extensive outreach to stakeholders during the comment period, and has conducted some 400 stakeholder meetings around the country.**
    a. **Please identify each of the stakeholder meetings that was held, including the data and location where each was held.**

b. **Provide a complete list of all Federal agency (EPA, Corps, and any other agencies) and Federal contractor participants at each stakeholder meeting.**
c. **Identify all of the stakeholders who participated at each stakeholder meeting.**
d. **Provide all handouts and other.**

Response: After releasing the proposed rule in March 2014, the EPA and the Army conducted unprecedented outreach to a wide range of stakeholders, holding over 400 meetings all across the country to offer information, listen to concerns, and answer questions. To promote transparency, a list of the outreach meetings that were held is posted in the public docket.[1] Where available, this list includes the location of the meeting, groups represented, topics discussed, and materials provided. Individual attendees were not recorded.

6. **The Small Business Administration's Office of Advocacy (SBA) recently concluded that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act because it would have direct, significant effects on small entities, and recommended that the Agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking. Furthermore, the Small Business Administration along with many governmental and private stakeholders, concluded that EPA and the Corps conducted a flawed economic analysis of the proposed rule. The analysis ignored the impact of the rule on CWA's regulatory programs and did not adequately evaluate impacts of the proposed rule.**
   a. **What is EPA's response to the SBA Office of Advocacy's comments on the proposed rule?**

Response: The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As part of the "Waters of the U.S." rulemaking, the EPA certified that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The RFA applies to significant, disproportionate adverse economic impacts on small entities subject to the rule; the primary purpose of the initial regulatory flexibility analysis is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603. Because this rule sought only to clarify the existing scope of the Clean Water Act, this action will not adversely affect small entities to a greater degree than the existing regulations. The agencies' proposed rule is not designed to "subject" any entities of any size to any

[1] A list of meetings conducted at the headquarters level is available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-13183. A list of meetings conducted at the regional level is available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-13182.

specific regulatory burden. *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001). Rather, it is designed to clarify the scope of the "waters of the United States," consistent with U.S. Supreme Court precedent. Following publication of the final rule, the Government Accountability Office conducted an independent evaluation of the Agencies' compliance with the Administrative Procedure Act and other rulemaking requirements, and concluded that the Agencies had successfully satisfied them, including the Regulatory Flexibility Act.

b. Why wasn't a Small Business Advocacy Review panel held? Will you commit to re-examining the impacts of the proposed rule on small entities and conducting a Small Business Advocacy Review panel before proceeding any further with this rulemaking?

Response: For the reasons described above, a panel was not convened. At the same time, the agencies recognize the substantial interest in this issue by small governmental jurisdictions and other small-entity stakeholders. In light of this interest, the EPA and the Corps sought early and wide input from representatives of small entities while formulating a proposed rule. This process enabled the agencies to hear directly from these representatives, at an early stage, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities identified for possible consideration in separate proceedings.

The EPA has also prepared a report summarizing its small entity outreach, the results of this outreach, and how these results informed the development of this proposed rule. This report is publicly available in the docket for the rule. On October 15, 2014, the agencies hosted a second roundtable to facilitate input from small entities. A summary of this roundtable is also available in the docket for the rule. As indicated above, following publication of the final rule, the U.S. Government Accountability Office conducted an independent evaluation of the Agencies compliance with the Administrative Procedure Act and other rulemaking requirements, and concluded that the Agencies had successfully satisfied them, including the Regulatory Flexibility Act.

c. Will you commit to conducting a new economic impacts analysis of the proposed rule, taking into account and specifically addressing the concerns stated by SBA and the stakeholders, before proceeding any further with this rulemaking?

Response: An updated economic analysis was completed for the final rule. This analysis includes estimated indirect costs and benefits associated with the rule requirements, including effects to Clean Water Act programs. EPA reviewed and considered all comments on the economic analysis in developing the final analysis document. The final economic analysis was released with the final rule on May 27, 2015.

7. **EPA and the Corps state that this rule is not an expansion of jurisdiction, that it is only a clarification. What exactly will the rule clarify? Specifically what waters are in and what waters are outside of Federal jurisdiction under this rule? Will the Agencies add clarity and specificity to the final rule text, or will the Agencies keep the final rule text**

general and add discussion to the preamble of the final rule or to supplemental "guidance?

Response: The final rule clarifies which waters are within and which are outside the scope of federal jurisdiction under the Clean Water Act. This clarity is provided in rule text, by listing features that are not jurisdictional, and in discussion of the preamble to the final rule.

The most substantial change was the deletion of the existing regulatory provision that defined "waters of the United States" as including all other waters "such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) which are used or could be used for industrial purposes by industries in interstate commerce." 33 CFR 328.3(a)(3); 40 CFR 122.2. Under the final rule, these "other waters" (those which do not fit within the categories of waters jurisdictional by rule) would only be jurisdictional upon a case-specific determination that they have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.

Additionally, the final rule specifically excludes groundwater from regulation and lists a number of other exclusions previously only discussed in preamble language. The exclusions will apply to waters regardless of whether they might otherwise be considered jurisdictional under paragraphs (a)(4)-(a)(8) of the rule. Also, for the first time, under the rule the agencies determined to exclude by rule certain ditches that have intermittent or ephemeral flow, and to exclude ditches that are not tributaries to traditional navigable waters, interstate waters, or the territorial seas, regardless of their flow regime. These excluded ditches cannot be "recaptured" under any of the jurisdictional categories of "waters of the U.S." under the proposed rule except under paragraphs (a)(1)-(a)(3). The final rule excludes ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands.

8. The Agencies have been trying to create the impression that ditches are not regulated.

a. Describe specifically in which circumstances what ditches are considered jurisdictional under the rule and what ditches are not jurisdictional.

Response: The final rule excludes ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands. The final rule also excludes ditches that do not flow directly or indirectly into a traditional navigable water, an interstate water, or the territorial seas. Ditches may be jurisdictional if they meet paragraphs (a)(1)-(a)(3). Ditches may also be jurisdictional if they are not excluded and meet the definition of "tributary."

b. Describe specifically in which circumstances what ditches are considered a tributary under the rule and what ditches are not a tributary.

Response: The final rule excludes ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands. The final rule also excludes ditches that do not flow directly or indirectly into a traditional navigable water, an interstate water, or the territorial seas. Ditches with perennial flow and that otherwise meet the definition of "tributary" as described in the final rule and preamble are covered by the regulations.

c. If a ditch is determined to be jurisdictional, will the ditch be subject to water quality standards? Total Maximum Daily Loads (TMDLs)?

Response: States typically develop water quality standards for general categories of waters, which have been and are inclusive of the types of waters that have been jurisdictional. This rule does not change the requirements for state water quality standards to be consistent with the Clean Water Act (e.g., designated uses, criteria to protect those uses, antidegradation policies). If a state determines water quality standards need to be developed for specific types of waters, that need would exist with or without this rule.

States are required to list waters that are impaired, but have discretion to prioritize this list for TMDL development, which may proceed over a period of several years under existing EPA policy. Monitoring, assessment, and TMDL development tend to occur in water segments where the agencies assert jurisdiction under current practices.

9. In determining whether a ditch is jurisdictional, how will connection be determined? Will it be through the physical ditch structure which directly (or indirectly) connects to a "water of the U.S."?

Response: A ditch must meet the definition of a "tributary" in the final rule, and not be otherwise excluded, to be determined jurisdictional. A ditch can also be jurisdictional if it meets the paragraphs (a)(1)-(a)(3).

a. Is there a limit to connectivity? Can a ditch that is physically connected to another ditch (for example, via a pipe, or other infrastructure, or convergence) that ultimately leads to a "water of the U.S." be considered jurisdictional even if it is hundreds of miles away and doesn't have a relatively permanent flow of water?

Response: A ditch is jurisdictional where it meets the definition of a tributary – including both physical characteristics – and is not otherwise excluded. A ditch can also be jurisdictional if it meets paragraphs (a)(1)-(a)(3) of the rule.

10. This proposal references "ephemerals." What is the definition of an "ephemeral" feature? Can a feature be "ephemeral" and not be a stream or tributary and not be jurisdictional? Please explain.

Response: The agencies did not define the term "ephemeral" in the rule.

A feature can be "ephemeral" and not meet the agencies' regulatory definition of tributary and, therefore, not be jurisdictional. A "tributary," as defined in the final rule, must have a bed and banks and an ordinary high water mark, and contribute flow either directly or through other waters to a traditional navigable water, interstate water, or the territorial seas, to be jurisdictional. Where an ephemeral feature does not meet the definition of a "tributary" that feature would not be jurisdictional as a "tributary." The agencies added a specific exclusion for such ephemeral features in the final rule.

11. How will intermittent, ephemeral, and seasonal tributaries be regulated under the proposed rule?

Response: A "tributary" must have bed and banks and an ordinary high water mark, and contribute flow either directly or through other waters to a traditional navigable water, interstate water, or the territorial seas, to be jurisdictional. An intermittent or ephemeral stream that meets this definition would be jurisdictional.

12. The proposed rule includes an exclusion for ditches that are excavated in uplands and drain only uplands if they do not have water year round. But the rule does not define the term "uplands." How will uplands be defined? Does it mean that land that is not a wetland?

Response: The term "upland" has been used by the agencies for decades in longstanding practice to mean areas that are not a wetland (as defined in Clean Water Act implementing agency regulations) or other waterbody. The final rule eliminated the use of the word "uplands," and provides a clearer statement of the types of ditches that are subject to exclusion.

13. EPA states that the exemption for maintenance of drainage ditches will continue, as this exemption is automatic, and that state and local agencies responsible for maintaining ditches do not have to apply for this exclusion. However, even under current rules, it is unclear whether and to what extent the maintenance exemption is allowed for ditches. For example, in some districts, agencies must apply for the exemption while others state the conditions for maintenance activities are too narrow to qualify. Other agencies have been told to discontinue their maintenance activities they believed were previously exempt. Agencies have been told they need to provide the original documents that show the scope, measurements, etc., of these ditches but since many of them may have been dug decades ago, the documentation does not exist.

a. Please explain specifically how the ditch maintenance exemption will be implemented under the new rule. Will the rule specifically state that all ditch maintenance activities are exempt and do not need prior approval?

Response: The ditch maintenance exemption is created in the Clean Water Act itself, and further discussed in agency regulations (33 C.F.R. 320-330, 40 C.F.R. Part 232) and in agency guidance letters. The rule defines waters of the U.S. and does not in any way change or address the ditch maintenance exemption or its implementation.

b. If a state or local agency is conducting routine maintenance activities on the ditch that is near or adjacent to wetland areas, would that make the ditch jurisdictional?

Response: No, the activities performed on or in the ditch would not make the ditch jurisdictional. Determinations of jurisdiction are based on the characteristics of the ditch and whether the ditch meets the definition of a "tributary."

14. Will municipal storm sewer systems, water recycling and reuse, stormwater treatment, and other water treatment related facilities be exempt from jurisdiction under the Clean Water Act under the proposed rule? Or will water recycling supply ponds, constructed wetlands, and other treatment components of this infrastructure jurisdictional and subject to Clean Water Act regulation?

Response: The final rule expressly excludes stormwater control features created in dry land, detention and retention basins constructed in dry land used for wastewater recycling, as well as groundwater recharge basins and percolation ponds built for wastewater recycling.

15. The EPA has said that municipal separate storm sewer systems (MS4s) will not be regulated as "waters of the U.S." However, EPA also has indicated that there could be a "water of the U.S." within an MS4 system.

a. Please explain what stormwater management facilities are specifically exempt under the proposed rule? What types of facilities are or could be considered jurisdictional waters? Please provide several examples where a "water of the U.S." might be found within an MS4?

b. Please explain in detail where an MS4 ends and a "water of the U.S." begins? Can a feature be both an MS4 and a water of the U.S.?

c. If an MS4 is determined to be a "water of the U.S.," how will that impact the ability to utilize that facility for water quality (e.g., stormwater) treatment? Will water quality standards be applied to such facilities?

Response: The Army and EPA did not change the jurisdictional status of various components of stormwater systems and drainage networks in the rule. During the public comment period, the agencies received many comments from representatives of cities, counties, and other entities concerned about how the proposed rule may affect stormwater systems. The agencies clarified their policy in the final rule by adding a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

The EPA considers MS4s to be systems and, in terms of jurisdiction, MS4s should be thought of as component parts and not a singular entity. As was true historically, MS4s can include jurisdictional and non-jurisdictional features. If needed, the jurisdictional status of such components could be evaluated. Implementation of the Clean Water Rule will not alter the manner in which MS4 systems currently operate and are approved under the CWA.

16. What specifically is considered a floodplain and a riparian area under the rule?

Response: The agencies specifically requested comments on the proposed definitions and approaches, to consider options for addressing them in the final rule. As a result, the final rule did not include "riparian areas" and clarified the term "floodplain" by making clear that the rule relies on the boundary of the 100-year floodplain or 1500 feet from the Ordinary High Water Mark of a tributary, whichever is less.

QUESTIONS FOR THE RECORD

Congressman Richard Hanna (R-NY)
U.S. House Committee on Transportation and Infrastructure

Impacts of the Proposed Waters of the United States Rule on State and Local Government
February 4, 2015

Questions for EPA Administrator McCarthy

1. **What support will EPA give in the permitting and implementation process to state environmental agencies currently responsible for enforcing water regulations?**

Response: Now that the rule is final, the EPA and the Department of the Army (hereafter, "the agencies") are working to develop outreach materials for the public and state agencies to make it as clear as possible which waters are jurisdictional and which are not. In addition, the agencies have been conducting webinars with state agencies and public stakeholders to help them to better understand the rule.

2. **How has EPA ensured that states will interpret and implement ambiguously defined provisions in the same way?**

Response: With this rulemaking, the goal is to improve predictability and consistency, which will improve the process for making jurisdictional determinations by minimizing delays and cost. The final rule provides clearer categories of waters that are jurisdictional, as well as a clearer list of the waters and features that are not jurisdictional.

Now that the rule is final, the agencies are developing outreach materials for the public and state agencies to make it as clear as possible which waters are jurisdictional and which are not. In addition the webinars mentioned above, both the preamble to the rule and the response to comments documents include greater discussion on the content of the rule, providing additional clarification.

3. **A farmer purchased property 25 years ago that was in pasture land when he purchased it. The pasture routinely has wet spots during extremely wet years, and water typically dots the landscape and meanders across the floodplain into a drainage way which experiences seasonal flows occasionally. Drainage flows to a classified water body subject to federal jurisdiction. The farmer maintains a variety of fences for his cattle, including cattle crossings, and periodically fertilizes the entire pasture system. Cultivation of this area occurs under a five year rotation. The farm is conscious of the navigable waters that lie in close proximity to his farm.**

Under the proposed WOTUS rule:

   a. **At what point in the floodplain does "upland" drainage become jurisdictional water of the U.S.?"**

Response: Unconfined upland drainage such as sheetflow is not a regulated water, regardless of whether or not it is in the floodplain. In addition, waters in a floodplain associated with normal farming, ranching, or forestry areas are excluded from the definition of adjacent under the rule. As a result, the only circmstances that upland drainage may be regulated is when the drainageway meets the definition of tributary (i.e., has a bed and banks and Ordinary High Water Mark) and is not otherwise excluded or where it is determined to have a "significant nexus" based on a case-specific evaluation.

b. Does fertilizing these pastures count as applying nutrients to a jurisdictional water of the U.S.?

Response: No.

c. Does installing fencing or shaping and grading wet areas through cultivation now count as activities regulated through Section 404 dredge and fill permitting?

Response: The final rule does not change the existing statutory exemptions for discharges of dredged and/or fill material into waters of the U.S. associated with normal farming, silviculture, and ranching activities, or any other exempt activity under Section 404(f)(1) of the CWA. Installing fences is not regulated. "Cultivation" is exempted under Section 404(f)(1).

d. Who will make such jurisdictional calls?

Response: The Corps is the agency that conducts most of the day-to-day permitting and making jurisdictional determinations under Clean Water Act Section 404. A memorandum of agreement between EPA and the Corps describes the allocation of responsibilities between the EPA and the Corps to determine the geographic jurisdiction of the Section 404 program and the applicability of the exemptions under section 404(f) of the CWA.[2]

e. Given the close nature of Federal conservation standards and exemptions proposed from the CWA, where do non-participating farmers stand?

Response: The rule does not affect the activity exemptions set forth in the CWA. There is no requirement for a farmer, rancher, or forester to be a USDA-NRCS program participant to utilize these exemptions.

f. The EPA maintains that the list of exempted practices favors agriculture. If this is the case, why didn't EPA choose to pursue the relatively few practices that would require a permit?

Response: Section 404(f) of the CWA covers activity-based exemptions for farmers,

[2] Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act - http://water.epa.gov/lawsregs/guidance/wetlands/404f.cfm

ranchers, and foresters. Nothing in the rule affects these exemptions. The rule only clarifies the extent of waters that are and are not covered under the CWA. The rule does address the types of activities in waters of the United States that are regulated because they involve the discharge of a pollutant under CWA section 301.

QUESTIONS FOR THE RECORD

Congressman Sam Graves (R-MO)
U.S. House Committee on Transportation and Infrastructure

Impacts of the Proposed Waters of the United States Rule on State and Local Government
February 4, 2015

Questions for EPA Administrator McCarthy

1. **The Environmental Protection Agency (EPA), Army Corps of Engineers, and the regulated utility industry rely on nationwide and general permits, under the Clean Water Act sections 402 and 404, to authorize certain projects in jurisdictional waters without the need for individual permits. These general permits have been an especially important tool for energy infrastructure projects, including transmission lines, as well as large solar and wind projects.**

   Currently, in order to rely on nationwide permits, utilities are subject to a small acreage limitation of jurisdictional waters that will be affected by "single and complete" projects. In other words, a relevant nationwide permit is limited to a small, individual section of a project that may affect jurisdictional waters. General permits ensure that the project is not significantly harming navigable waters. However, under the proposed "waters of the United States" rule, most if not all ditches, dry washes, and other minor features that a project crosses would be considered a jurisdictional water. It appears the "waters of the United States" rule will it more difficult to use nationwide permits by making it harder to qualify for them.

   I have heard that the EPA doesn't see it this way. Please explain how linear facilities will continue to be able to use nationwide permits for crossings when more geographic features will be considered as jurisdictional under the rule. Also, please explain how ditches designed to facilitate transmission line construction (or renewable project construction) would not come under current definitions, and how utilities would continue to be able to rely on nationwide and regional general permits as the utilities currently do, especially since these permits are administered by local Corps employees who have to interpret the rules.

Response: The final rule does not alter the Clean Water Act Section 404 permitting process administered by the U.S. Army Corps of Engineers and two authorized states. The final rule does not alter the Corps' existing nationwide permits (NWPs) that currently streamline the permitting process for activities with minimal adverse effects on the aquatic environment. In general, the EPA and the Department of the Army (hereafter, "the agencies") believe the rule may expedite the jurisdictional determination review process in the long-term for certain waters by clarifying jurisdictional matters that have been time-consuming and cumbersome for field staff and the regulated community in light of the 2001 and 2006 Supreme Court cases. The NWP for linear projects is not affected by the rule because the NWP considers each crossing separately – not cumulatively.

The Corps' NWP program authorizes Clean Water Act Section 404 and Rivers and Harbors Act Section 10 discharges that would have no more than minimal adverse effects on the aquatic environment for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstances described above. Some of these activities may be non-reporting while others may require notification to the Corps. The Corps can provide a permit applicant with additional information regarding which Nationwide Permit might apply to a particular activity. In addition, some Corps districts also have State Programmatic General Permits and Regional General Permits for emergency-type activities allowing for efficient permit decision-making.

Authorization under the CWA is not needed for activities which occur in non-jurisdictional waters/features.

QUESTIONS FOR THE RECORD
Congressman John Katko (R-NY)
U.S. House Committee on Transportation and Infrastructure

Impacts of the Proposed Waters of the United States Rule on State and Local Government
February 4, 2015

Questions for EPA Administrator McCarthy

1. **Please provide illustrative examples of what does and does not constitute:**
   a. **A tributary.**
   b. **An upland.**
   c. **Adjacent waters.**
   d. **Shallow subsurface hydrologic connections as "neighboring" waters.**
   e. **A floodplain.**
   f. **A significant nexus.**

Response:

a. This final rule defines "tributaries" as waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high water mark – and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas. An example of what does constitute a tributary is a stream that has a bed, banks, and OHWM, and flows into the Hudson River. Examples of what are not tributaries include water features that flow infrequently enough that they do not have bed, banks, and/or an OHWM, and streams that do not connect to a traditional navigable water, interstate water, or the territorial seas.

b. The final rule does not define "upland" and has eliminated use of the term in the exclusions for ditches, in response to the questions created by use of the term in the proposal.

c. Under this final rule, "adjacent" means bordering, contiguous, or neighboring, including waters separated from other "waters of the United States" by constructed dikes or barriers, natural river berms, beach dunes and the like. Further, waters that connect segments of, or are at the head of, a stream or river are "adjacent" to that stream or river. "Adjacent" waters include wetlands, ponds, lakes, oxbows, impoundments, and similar water features. However, it is important to note that "adjacent" waters do not include waters that are subject to established normal farming, silviculture, and ranching activities under Section 404(f) of the CWA.

d. The final rule does not include a provision defining neighboring based on shallow subsurface flow, though such flow may be an important factor in evaluating a water on a case-specific basis under paragraphs (a)(7) and (a)(8) to determine if the water has a significant nexus to a traditional navigable water (TNW), interstate water, or territorial sea. In the evaluation of whether a water individually or in combination with other similarly situated waters has a significant nexus to a TNW, interstate water, or the territorial seas, a variety of factors will influence the chemical, physical,

or biological connections the water has with the downstream TNW, interstate water, or the territorial seas, including distance from a jurisdictional water, the presence of surface or shallow subsurface hydrologic connections, and density of waters of the same type.

e. The final rule uses floodplain to mean a 100-year floodplain. The agencies intend to rely on FEMA maps wherever possible to identify the extent and location of the 100-yr floodplain. An example of an area that is not considered a floodplain are any areas outside the 100-yr floodplain as mapped by FEMA, for example.

f. The final rule defines significant nexus as meaning that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a traditional navigable water (TNW), interstate water, or the territorial seas. For an effect to be significant, it must be more than speculative or insubstantial. Under the final rule, functions relevant to the significant nexus evaluation are sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; and provision of life cycle-dependent aquatic habitat for a species located in a traditional navigable water, interstate water, or the territorial seas. An example of a significant nexus is where a water provides spawning habitat for salmon, which then swim downstream to become part of the ocean's biological integrity such that the water has a more than speculative or insubstantial effect on the ocean's biological integrity. An example of absence of significant nexus is where a water contributes flow directly or through another water to a TNW but does not have any effect on the chemical, physical, or biological integrity of the TNW.

2. **What type of technical and financial assistance will you be providing to farmers and state enforcement agencies to ensure seamless implementation of this rule? Additionally, what will the cost of compliance be for New York farmers?**

Response: Under the final rule, the EPA and the Department of the Army (hereafter, "the agencies") have been working to develop outreach materials for the agricultural community, public and state agencies, and other stakeholders.

The estimated compliance costs for Clean Water Act programs that would be affected by the proposed rule provisions were conducted on a national scale. We did not calculate the cost of compliance for each state. Refer to the Economic Analysis prepared by EPA for the final rule for additional information on estimated costs/benefits associated with the implementation of the final rule.

3. **In comments submitted to EPA by the New York Farm Bureau regarding this proposed rule, they note "The rule defines a tributary as having the 'presence of a bed and banks and ordinary high water mark...which contributes flow, either directly or through another water' to a traditional navigable water (79 Fed. Reg. 22263). Despite this**

definition, however, the agencies will not necessarily require that these features exist for a tributary designation, since on low gradients 'the banks of a tributary may be very low or may even disappear at times' and the Ordinary High Water Mark need only be indicated by changes in soil characteristics or the presence of litter or debris (79 Fed. Reg. 22202)." Does this type of definition equate to the need of a judgment call by the Federal government? Even if the physical features of a tributary disappear, could the EPA have the authority to issue a judgment call that the features of a tributary need not be present to declare certain lands to be jurisdictional waters?

Response: To provide additional clarity, and for ease of use to the public, the agencies included the Corps' existing definition of ordinary high water mark (OHWM) in EPA's regulations. Long-standing Corps regulations define OHWM as the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, 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. 33 CFR 328.3(c)(6). That definition is not changed by the rule.

4. **In its comments, the New York Farm Bureau also shares the concern that "Farmers wishing to ensure compliance with the Clean Water Act will be forced to seek individual determinations for a host of low spots, ditches, seasonal drainages, and isolated wetlands," but that no additional staff or resources are planned for the agencies with a shared responsibility to makes these determinations, and there is already a significant delay in normal conservation determinations in parts of New York State. How long should a farmer expect to wait for an individual determination on planned farm activities? Can the EPA provide a time limit under which determinations will be made?**

Response: With this rulemaking, the agencies' goal was to improve predictability and consistency which will improve the process for making jurisdictional determinations by minimizing delays and cost. All agricultural exemptions from Clean Water Act requirements that have existed for nearly 40 years are not affected by the rule. Also unchanged are current statutory and regulatory exemptions from permitting requirements. The CWA excludes agricultural stormwater discharges and return flows from irrigated agriculture from being regulated as a "point source" under any of the Act's permitting programs. Further, the rule would not change the current exclusions for waste treatment systems and prior converted cropland (PCC). The final rule maintains these exclusions.

QUESTIONS FOR THE RECORD

Congresswoman Barbara Comstock (R-VA)
U.S. House Committee on Transportation and Infrastructure

Impacts of the Proposed Waters of the United States Rule on State and Local Government
February 4, 2015

Questions for EPA Administrator McCarthy

1. **Under the recent proposed rule, landowners with properties containing newly jurisdictional waters will experience a decrease in property value. Has EPA considered how the rule will affect property values?**

Response: The rule does not impose any direct costs, including direct costs on property values.

2. **How will the proposed regulation affect other Clean Water Act programs besides Section 404? Will EPA revise its economic analysis to include the impacts on other Clean Water Act programs such as Section 402 (NPDES, stormwater)?**

Response: The EPA did consider costs to other Clean Water Act programs in its economic analysis, and did not limit its analysis to Section 404. The EPA considered costs regarding compliance with Clean Water Act Sections 404 and 401, Section 402, Sections 303 and 305, and Section 311. The agencies welcomed public comment on this analysis during the public comment period, which ended on November 14, 2014. The EPA issued a revised economics analysis with the final rule, which again included an assessment for all programs of the CWA based on the analysis under the Section 404 program. The final economic analysis was released with the final rule on May 27, 2015.

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT
OF

THE HONORABLE JO-ELLEN DARCY
ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS)

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES

and

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ON

Impacts of the Proposed Waters of the United States Rule on State and Local Governments

February 4, 2015

Chairman Inhofe, Ranking Member Boxer, Chairman Shuster and Ranking Member DeFazio, I am Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works). Thank you for the opportunity to discuss the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency's (EPA) proposed Clean Water rule to clarify the jurisdictional scope of the Clean Water Act (CWA) and thereby improve the efficiency of the process by which the Corps determines which waters are and are not covered by the Act. I am pleased to be here today testifying alongside the Honorable Gina McCarthy, Administrator of the EPA.

Our overarching policy objective is to enable the agencies to balance the protection of our Nation's aquatic resources as required by the CWA with the need for utilization of important resources. Both the Corps and EPA continually strive to be more efficient and to streamline required environmental reviews. A corollary objective is to make improvements in our regulations fully responsive to, and consistent with, the three Supreme Court decisions that I will highlight for you today. Our goal in this rulemaking is to provide the clarity, consistency, and predictability that members of Congress and the regulated public have requested, while remaining faithful to the requirements of Federal law.

The jurisdictional scope of the CWA is "navigable waters," defined in the statute as "the waters of the United States, including the territorial seas." The statutory text, legislative history and the case law confirm that "the waters of the United States" in the CWA are not limited to the traditional navigable waters. It is this Clean Water Act definition that is the subject of this proposed rule. The CWA leaves it to EPA and the Corps to define the term "waters of the United States." Existing regulations define "waters of the United States" as the traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.

Under Section 404 of the CWA, the Corps regulates discharges of dredged or fill material into waters of the United States, including wetlands. The Corps Regulatory Program is implemented day-by-day at the district level by 38 district commanders and their staffs, who know their regions and resources, and the public they serve. Nationwide, the Corps makes final decisions on over 81,000 permit-related activities and approximately 56,000 jurisdictional determinations, annually. Therefore, maintaining and improving regulatory efficiency for the members of the public who submit to the Corps for decision applications for permits and requests for jurisdictional determinations under Section 404 of the Act is a critical goal of this rulemaking. Since the enactment of the CWA, there have been three significant Supreme Court decisions that have addressed the scope of waters that are regulated under Section 404 of the Act. As already noted by Administrator McCarthy, two of those cases followed the publication of our 1986 regulations, which are still on the books. The outcome of these court decisions illustrate why there is a pressing need for the Corps and EPA to clarify and update their CWA regulations. Allow me to briefly explain further.

In 1985, the Supreme Court in *United States* v. *Riverside Bayview Homes* deferred to the Corps' judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." The Court found that interpretation reasonable in light of Congress' broad objectives of protecting water quality and aquatic ecosystems. Thus, the 1986 regulations reflect the inclusion of the term "adjacent" in the regulatory definition of "waters of the United States." The 1986 regulations include a definition of adjacent, which clarifies that the term refers to wetlands that are "bordering, contiguous, or neighboring" jurisdictional waters of the United States. The definition of "adjacent" also states that "Wetlands separated from other Waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

In 2001, the Supreme Court held in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers (SWANCC),* that the use of "isolated" non-navigable intrastate ponds as habitat by migratory birds was not, by itself, a sufficient basis for the exercise of Federal regulatory authority under the CWA over those ponds, and that the significant nexus between the adjacent wetlands and `navigable waters' had informed the Court's reading of the CWA in *Riverside Bayview*.

In 2006, *Rapanos v. United States* involved two consolidated Supreme Court cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. All members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality interpreted the term "waters of the United States" as covering relatively permanent, standing or continuously flowing bodies of water that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies.

Justice Kennedy in *Rapanos* concluded that the term "waters of the United States" encompasses wetlands that "possess a *significant nexus* to waters that are or were navigable in fact or that could reasonably be so made." He further stated that wetlands possess the requisite significant nexus if the wetlands, "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable." The four dissenting Justices in Rapanos would have affirmed the court of appeals' application of the existing Corps regulation and also concluded that the term "waters of the United States" includes all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy.

Since 2007, the United States' view is that CWA jurisdiction can be established under either the plurality standard or Justice Kennedy's standard, and the proposed Clean Water Rule addresses this. Because Justice Kennedy identified a "significant nexus"

threshold for establishing CWA jurisdiction, and the four dissenting Justices agreed that this was an appropriate basis for establishing jurisdiction, the Corps and EPA have determined that it is reasonable and appropriate to apply the "significant nexus" standard to both open waters and wetlands to determine whether they are subject to CWA jurisdiction. Federal courts have generally upheld this interpretation of Rapanos.

Following the *SWANCC* and *Rapanos* decisions, the Corps and EPA developed policy guidance in 2003 and in 2008. The latter calls for case-specific significant nexus analysis for many categories of non-navigable streams, other water bodies, and wetlands. These jurisdictional determinations require extensive documentation, field work, and in specific circumstances involve coordination between the Corps and EPA, all of which require significant resources and time. Applicants seeking a Department of the Army CWA Section 404 authorization have, on a regular basis, expressed concern and frustration over the lack of clarity regarding how significant nexus determinations are being made by the Corps.

In addition, when the agencies began developing draft guidance on this subject in 2011, we received many comments from various entities, including Congress, business and industry, agricultural interests, scientists, other stakeholders, and the public, urging the agencies to pursue a notice and comment rulemaking effort instead of relying on guidance. Chief Justice Roberts himself in the *Rapanos* decision stated that the agencies would be in a better position if they had conducted a notice and comment rulemaking and promulgated a new final rule regarding CWA jurisdiction. We chose to pursue rulemaking with a wide range of support for a new rule to clarify jurisdiction under the CWA.

The proposed rule retains much of the structure of the agencies' longstanding definition of "waters of the United States," including many of the existing provisions not directly impacted by the *SWANCC* and *Rapanos* decisions. The agencies did not propose to

substantively change the following terms and provisions: traditional navigable waters, interstate waters, and the territorial seas.

For the first time, the agencies proposed a regulatory definition for the term "tributary" and proposed that only those waters that meet that definition and that flow directly or indirectly into a traditional navigable water, an interstate water, or the territorial seas are jurisdictional as tributaries.

The agencies have significantly clarified the definition of "adjacency." The agencies proposed to change the definition of "adjacent" to cover both adjacent wetlands and other adjacent water bodies. Furthermore, our proposed rule clarifies the meaning of the term "neighboring" as used in the definition of "adjacent" and defines the terms "riparian area" and "floodplain." These new definitions afford greater clarity to the identification of waters that would be jurisdictional by rule under this category using well understood ecological concepts. As a result, no additional site-specific analysis would be required for the adjacent waters category. Our decision to propose to regulate "by rule" all tributaries and adjacent waters and wetlands is based on our understanding that these waters, alone or in combination with similarly-situated waters in a watershed, have a significant nexus to a traditional navigable water, interstate water, or the territorial seas based on the best currently available science.

The proposal also reduces jurisdictional uncertainty because it defines certain categories of waters that currently require case-specific analyses to instead be "jurisdictional by rule." By decreasing the number of jurisdictional determinations that require a case-specific significant nexus analysis evaluation, the proposed rule is expected to reduce documentation requirements and processing times for those determinations.

One of the most substantial changes in the proposed rule is to delete the existing regulatory provision that refers to "other waters." Under the proposed rule, an "other

water" could be determined to be jurisdictional only upon a case-specific determination that it has a significant nexus with traditional navigable waters, interstate waters, or the territorial seas. The rule offers a definition of "significant nexus" and explains how similarly situated "other waters" in the region could be identified.

The agencies proposed, for the first time, to exclude by rule certain waters and features over which the agencies have as a policy matter generally not asserted jurisdiction, such as certain ditches, artificial reflecting pools and swimming pools, groundwater, and specific erosional landscape features. Waters and features that are determined to be excluded from CWA jurisdiction will not be jurisdictional under any of the categories of "waters of the U.S." in the proposed rule, even if they would otherwise satisfy the regulatory definition of a jurisdictional water body.

Finally, the agencies do not propose any changes to the existing regulatory exclusions, including those for waste treatment systems or prior converted cropland.

What is the process going forward?

The proposed rule was published in the Federal Register (FR) on April 21, 2014, and comments were accepted through November 14, 2014. The FR notice solicited comment and public input on all aspects of the proposed rule and specifically requested comment on certain options and approaches. The public provided robust input; over a million comments were received, over 20,000 of which are unique and present individual ideas, opinions, and suggestions for the agencies to consider as they craft a proposed final rule. The agencies are in the process of fully evaluating the body of public comment and considering that input as a final rule is being developed. In publishing the final rule, the agencies will also carefully consider the Science Advisory Board's findings and recommendations contained in its final report, which was recently published in the Federal Register.

In summary, like Administrator McCarthy, I am focused on ensuring that the final rule will achieve the goal of providing greater predictability, consistency and effectiveness in the process of identifying those waters that are and are not jurisdictional under the CWA.

This concludes my statement. Thank you again for the opportunity to be here today and I will be happy to answer any questions you may have.

QUESTIONS FOR THE RECORD

HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE AND SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS HEARING ON

"Impacts of the Proposed Waters of the United States Rule on State and Local Governments"
February 4, 2015

QUESTIONS for The Honorable Jo-Ellen Darcy
(Assistant Secretary of the Army for Civil Works)

A. Submitted on Behalf of the Committee:

Q1 - On January 30, 2015, the Army Corps and the EPA withdrew the Agricultural Exemptions Interpretative Rule.

A. Does this mean the exemptions from Clean Water Act Section 404 permits for discharges of dredged or fill material will continue to apply for normal farming, silviculture, and ranching activities, as well as for other qualifying agricultural activities under 404(f)(1)?

Answer: The withdrawal of the Interpretive Rule (IR) on January 29, 2015, does not affect the statutory provisions of the Clean Water Act (CWA), including those exemptions listed under section 404(f)(1). Discharges of dredged and/or fill material associated with normal farming, silviculture, and ranching activities remain exempt, meaning that they do not require authorization under the CWA. In addition, the withdrawal of the IR also does not affect the other exemptions related to agricultural activities under section 404(f)(1). The other CWA exemptions cover several additional activities important to agriculture, such as maintenance of levees, irrigation and drainage ditches, and the construction of farm and stock ponds, irrigation ditches, and farm and forest roads.

B. Does this also mean that all (not just those that are based on the Natural Resources Conservation Service (NRCS) conservation practice standards) agricultural conservation practices will be exempt from 404 permitting?

Answer: If a farmer, rancher, or silviculturist could undertake a conservation practice without a permit before the IR, they can continue to do so now that the IR has been withdrawn. However, not all agricultural conservation practices that discharge dredged and/or fill material into "waters of the U.S." (WoUS) are exempt from section 404 permitting under the CWA. Some agricultural conservation practices may not meet the terms of the 404(f)(1)(A) exemption. Some activities are not considered a "normal farming" practice, or are not part of an "established operation" and are therefore not exempt under 404(f)(1)(A). Those activities may also not meet the terms of any other exemption under 404(f)(1), or may be recaptured under 404(f)(2), thereby requiring authorization by some form of Section 404 permit. Conservation practices that do not involve a

discharge of dredged and/or fill material into WoUS do not require authorization under section 404 of the CWA.

The IR included a specific set of 56 Natural Resource Conservation Service conservation practices that were determined to be "normal farming, silviculture, and ranching" activities that often resulted in discharges of dredged and/or fill material into WoUS, and that were determined to have water quality benefits. Prior to the IR, producers had sought permits for some of those activities. With the withdrawal of the IR, the interpretation of how the 404(f)(1)(A) exemption applies to those specific 56 conservation activities reverts back to the interpretation and implementation prior to the IR. Authorization may be required for certain conservation practices that do not meet the terms of the exemptions and which include non-exempt discharges of dredged and/or fill material into WoUS. The withdrawal of the IR does not affect the legal standing of the Section 404 exemptions for conservation practices that were not listed.

C. Or will agricultural conservation practices now require a 404 permit?

Answer: See responses above.

D. Please clarify the status of agricultural conservation practices now that the Interpretative Rule is withdrawn.

Answer: Agricultural conservation practices that meet the terms of the exemptions under section 404(f)(1)(A) under the CWA are exempt and as such would not require authorization by permit. Those conservation practices that do not meet the terms of an exemption or are recaptured under 404(f)(2) would generally require authorization, either under a general permit or an individual permit. In order to be considered exempt under 404(f)(1)(A), the landowner must be part of an "established operation" (see 33 CFR 323.4) and the conservation practice being undertaken must be part of a "normal farming" practice. With the withdrawal of the IR, the interpretation of the 404(f)(1)(A) exemption for the 56 identified conservation practices identified within the IR reverts back to the interpretation and implementation prior to the issuance of the IR.

Q2- We understand that EPA and the Corps received over 1 million comments from the public on the proposed rule, but the docket for the rule only includes approximately 19,400 "substantive" comments.

A. Did the agencies receive any other substantive comments besides the approximately 19,400 comments in the docket?

Answer: The approximately 19,400 comments in the docket represent "unique" comments; these unique comments do not include all copies of form letters or mass mail-in campaign letters but rather may include only one copy of each form letter or mass mail-in campaign letter received. Mass mail-in campaign and form letters are copies of letters with the same exact language; if any language is different from the standard "form" letter such letter would be considered "unique." Of the approximately 20,000 unique comments, approximately 10% were found to be substantive such that they contained specific comments and input about the proposed rule that could be considered in developing the final rule language. The remaining unique non-substantive comments included comments that were helpful in assessing the overall interest in and support for

the rule and the overall general themes and/or general topics of concern.

The Corps received some unique comments via hard copy and these letters were sent to the Federal Register office for posting to the docket. More than 400 outreach and stakeholder sessions were held during the public comment period. It was made clear during those sessions that the discussion did not constitute or replace formal written comments submitted to the docket. Participants were urged to submit written comments to the docket. The remaining comments that were not posted to the docket were comments received from agencies during interagency review under the Office of Management and Budget oversight, which was held prior to publication of the proposed rule in the Federal Register.

> B. Were the remaining 900,000-plus comments received considered "not" substantive? Were these non-substantive comments from mass mail-in campaigns? Please describe the nature of these other, non-substantive comments.

Answer: The remaining 900,000-plus comments received that are not posted to the docket include the form letters and mass mail-in campaign letters. Such letters are counted once in the total number of unique comments and are being reviewed for content to be considered in the development of any final rule language. Simply because they are form letters or mass mail-in campaign letters does not preclude them from containing specific concerns or issues that would be considered "substantive." However, such letters will only be counted once in totaling the number of unique and, if applicable, substantive comments. All unique letters, including one copy of each form and mass mail-in campaign letter, are being reviewed for "substantive" comments and considered in the development of the final rule language.

When considering all comments received, which included the multiple copies of form and mass mail-in campaign letters as well as the unique comment letters, the picture of support for and opposition to the proposed rule changes greatly compared to considering only the unique comment letters received. In considering all comment letters, overall support for the proposed rule was approximately 88%. In considering only the unique comment letters, overall support for the proposed rule was approximately 37%.

All of the unique comments received on the proposed rule will be thoroughly reviewed and analyzed. The public comments help identify suggested language improvements, unintended issues, specific concerns to related to the commenter/the commenter's constituency, and implementation issues. These comments will be considered and used to inform the final rule language. A preamble to the final rule provides additional information and guidance to the agencies and the regulated public specific to the implementation of the rule. A separate response to comments document will be published with the final rule, which will provide responses to public comments received and addresses how those comments were considered within the final rule.

> C. On February 11th, Assistant Secretary Darcy told the House Appropriations Committee that approximately 37 percent of the comments on the proposed waters of the United States Rule were in favor of the rule, about 58 percent were opposed, and the others were neutral. Were these statistics based on the Corps' review of the

approximately 19,400 "substantive" comments received (rather than on the 900,000-plus non-substantive comments received)?

Answer: The statistics cited in Assistant Secretary Darcy's response were based on the approximately 19,400 unique comments posted to the docket. Rather than totaling all comments received for general support or opposition to the proposed rule, which would include all copies of form letters and mass mail-in campaign letters, the unique comments provide insight into more specific themes and areas of concern and support for the proposed rule. Both forms of calculating statistics are correct, factual, and represent an important breakdown and understanding of the comments received on the proposed rule.

As an update since the February hearing, additional comment letters have been posted to the docket. Over 1 million comments were received, with 20,065 unique comment letters posted to the docket. This represents approximately 2% of the total comments received. Of the unique comments 36% supported the proposed rule, 57% opposed the proposed rule, and 7% were neutral. Approximately 10% of the unique comment letters have been determined to be substantive comment letters. These numbers are consistent with the statistics provided by Assistant Secretary Darcy at the February hearing.

Q3 - Green Infrastructure is increasingly being used by states and local governments across the nation to address stormwater water pollution concerns. States and local governments are concerned about the regulatory status, under the proposed rule, of stormwater management facilities and green infrastructure for treating stormwater.

A. Will Section 404 permits be required for green infrastructure construction and long term maintenance activities?

Answer: Each consideration of an application or notification received for a proposed discharge of dredged and/or fill material into WoUS is a case-specific review to determine whether authorization under section 404 of the CWA is required and if so, which form of authorization may be required (e.g. Nationwide permit, individual permit). The Corps regulates discharges of dredged and/or fill material into WoUS associated with the construction of green infrastructure under section 404 of the CWA and is not able to speak to other authorizations that may be required for green infrastructure under other sections of the CWA, such as section 402 and the National Pollutant Discharge Elimination System permit program.

Construction of green infrastructure features in dry land would not result in CWA Section 404 regulated discharges into WoUS and therefore would not require authorization by the Corps. Other discharges of dredged and/or fill material associated with certain forms of "green infrastructure" may meet the terms of an exemption under section 404(f)(1) of the CWA and would not require authorization. There may also be discharges associated with "green infrastructure" that would require authorization, but that may meet the terms and conditions of a Nationwide General Permit (NWP), which require impacts to the aquatic environment to be minimal both individually and cumulatively. For those discharges associated with "green infrastructure" construction that may not meet the terms and conditions of the NWPs, authorization under an individual permit may be required.

Maintenance of "green infrastructure" may be considered exempt under section 404(f)(1)(B) for maintenance of currently serviceable structures; those that do not qualify for the exemption generally would be authorized under NWP 3 for "Maintenance" activities. Section 404 permits primarily are for the discharges of dredged and/or fill material associated with the construction of infrastructure and generally would not be required for the operation of such infrastructure. In addition, discharges from the green infrastructure or stormwater management facilities may require authorization under section 402 of the CWA, which is under the purview of EPA.

The Corps recognize the importance of "green infrastructure" and received many comments on the proposed rule describing unintended consequences that the proposed rule may have on the development of "green infrastructure." Those comments will be considered in development of the final rule language.

> B. Under what circumstances will the exclusion for "waste treatment systems, including treatment ponds or lagoons" apply to stormwater treatment systems constructed as part of stormwater management facilities?

Answer: The proposed rule does not modify or change any existing statutory exclusions, including the waste treatment system exclusion. Therefore, treatment systems and management facilities that currently fall under the waste treatment system exclusion will continue to do so. Waste treatment systems which are designed to meet the requirements of the CWA would generally meet the exclusion.

Many comments related to the regulation of discharges into WoUS associated with stormwater treatment systems and stormwater management facilities were received on the proposed rule. Those comments will be considered as final rule language is drafted.

> C. What will EPA and the Corps do to ensure that concerns about creating jurisdictional waters do not discourage the adoption of green infrastructure for stormwater management?

Answer: The Corps CWA authority is limited to section 404 and EPA is best equipped to address authorizations that may be required for green infrastructure and stormwater management facilities under other sections of the CWA, such as section 402 and the National Pollutant Discharge Elimination System (NPDES) permit program. The exclusions under the proposed rule include certain waters created by excavating and/or diking dry land, which would include artificial lakes or ponds used as settling basins. These features may be part of a green infrastructure system or stormwater management facilities and would not be WoUS if they met the terms of the exclusion.

Many comments were received, in particular from local and state government agencies, regarding the regulation of waters associated with green infrastructure and stormwater management facilities. These comments will be taken into consideration in drafting the final rule language.

It is important to note that the maintenance of such structures, if they occur in WoUS, may be exempt under the CWA statute under section 404(f)(1)(B). The statutory exemptions have not been changed by the proposed rule.

Q4- The rule's addition of numerous waters to be considered on a "case-by-case" basis introduces a whole new level of uncertainty. Any addition of uncertainty adds costs and delays

for the regulated community. Do the Agencies believe that adding new waters considered on a case-by-case basis will reduce the workload of the Agencies or the regulated community? What additional resources will be required to implement the proposed rule?

Answer: All jurisdictional determinations are made on a case-by-case basis considering the facts and site-specific characteristics. The proposed rule is anticipated to reduce the circumstances in which case-specific significant nexus determinations are required. The agencies have proposed that it is appropriate to conclude, based on existing science and the law, that a significant nexus exists between tributaries (as defined in the proposed rule), and their adjacent waters, and the traditional navigable waters, interstate waters, and the territorial seas into which they flow. Thus, the need to make a case-specific significant nexus determination for tributaries (as defined in the proposal) and adjacent waters will be eliminated because a determination would be made in the final rule that as a category, these waters have a significant nexus and thus are "waters of the United States" by rule.

Under the proposed rule, "other waters" would be the only category of WoUS requiring a case-specific significant nexus determination; currently, such "other waters" typically require a case-specific determination under the 2003 post-*SWANCC* guidance regarding interstate or foreign commerce. The proposed rule identifies several categories of waters as being jurisdictional by rule, plus a list of waters and features that are proposed for exclusion from CWA jurisdiction by rule for the first time, and includes additional definitions for certain terms. Thus, the Corps believes there will be increased clarity, predictability, and efficiency in jurisdictional determinations if the proposed rule is finalized when compared to current guidance and practice.

An increase in jurisdictional WoUS is not expected under the proposed rule as compared to the existing 1986 regulations; however, an increase in jurisdictional WoUS compared to the 2003 post-*SWANCC* and 2008 post-*Rapanos* guidance employed in current practice can be expected. In the economic analysis that was done for the proposed rule, the EPA estimated an overall increase in jurisdictional WoUS of approximately 3 percent compared to current practice. The Corps expects that with an increase in jurisdiction there will likely be a comparable increase in the number of additional permits required. The EPA is preparing an updated economic analysis that will be published with any issued final rule, which will also include an updated estimate of change in jurisdiction under the Clean Water Act.

The President requested additional funding of $5 million in the fiscal year 2016 budget to provide additional resources to the Corps districts for roll-out and implementation of the final rule, including training costs. This additional funding will enable the Corps to protect aquatic resources while allowing reasonable development through fair, flexible and balanced permit decisions in an efficient and effective manner in the midst of an increase in workload.

Q5- Twice, the Supreme Court, in the *SWANCC* and *Rapanos* decisions, has told the Agencies that there are limits to Federal jurisdiction under the Clean Water Act, and that they had gone too far in asserting their authority. Therefore, to be consistent with those Supreme Court decisions, any new rule would necessarily have to leave to the states regulation of some waters previously regulated by the Federal government. How does the Agencies' proposed rule comply with the Court's rulings in SWANCC and Rapanos? What waters does the proposed rule leave to the states to regulate?

Answer: The proposed rule remains consistent with congressional intent as expressed in the CWA, and is also consistent with science and case law. The Preamble and Legal Appendix B of the proposed rule has further discussion on this matter.

In both *SWANCC* and *Rapanos*, the controlling decisions of the U.S. Supreme Court required the agencies to afford some meaning to the concept of "navigability" in the term "navigable waters", by finding a significant nexus between non-navigable waters, including other waters and adjacent wetlands, and downstream navigable waters. As Justice Kennedy wrote in *Rapanos*, "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." The proposed rule provides greater clarity by defining the term "significant nexus" at paragraph (c)(7). The proposed rule has remained consistent with the *SWANCC* and *Rapanos* decisions.

In *Rapanos,* both the plurality opinion and Justice Kennedy's opinion discussed the Court's prior opinion in *Riverside Bayview* to begin their analysis of the scope of the CWA. Justice Kennedy began, "As the plurality points out, and as *Riverside Bayview* holds, in enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense. *Ante* at 12; *Riverside Bayview,* 474 U.S. at 133; see also *SWANCC, supra,* at 167." *Id* at 780. This conclusion is supported by "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems."*Riverside Bayview, supra,* at 133; see also *Milwaukee* v. *Illinois,* 451 U.S. 304, 318 (1981) (describing the Act as "an all-encompassing program of water pollution regulation"). In *Rapanos,* Justice Kennedy established a standard for determining whether wetlands should be considered to possess the requisite nexus in the context of assessing whether wetlands are jurisdictional: "if the wetlands, either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. While Justice Kennedy focused on adjacent wetlands in light of the facts of the cases before him, it is reasonable to utilize the same standard for tributaries and other water bodies.

As discussed in the preamble to the proposed rule, based on a detailed examination of the scientific literature, the agencies have proposed to conclude that tributaries as they propose to define them, and their adjacent waters, perform the requisite functions identified by Justice Kennedy, so that those waters are proposed to be considered, as a category, to be "waters of the United States." This will eliminate the need to make a case-specific significant nexus determination for tributaries and their adjacent waters. The proposed rule would therefore provide more certainty and predictability compared with current guidance and practice, and jurisdictional determinations for these categories of waters will be more efficient for both the agencies and the regulated public.

Under section 510 of the Act, unless expressly stated in the CWA, nothing in the Act precludes or denies the right of any state or tribe to establish more protective standards or limits regarding water pollution control than the Federal CWA. Many states and tribes, for example, protect wetlands that are vital to their environment and economy but which are outside the regulatory jurisdiction of the CWA. Nothing in the proposed rule would limit or impede any existing or future state or tribal efforts to further protect their waters.

Landowners who want to discharge dredged and/or fill material into jurisdictional WoUS within all states are subject to Section 404 of the CWA unless they meet a statutory exemption under 404(f)(1) that is not recaptured under 404(f)(2). Michigan and New Jersey implement the Section 404 program in their respective states, regarding waters for which those states have assumed responsibility. In states that have not assumed the Section 404 program, the Corps will continue to regulate such discharges. The states are partners in regulating activities under the CWA. Every state has the right to regulate all waters within that state, including waters that are subject to Federal CWA jurisdiction and waters that are not subject to Federal CWA jurisdiction. The Corps does not regulate "waters of the state" that are not subject to Federal CWA jurisdiction; those state waters are regulated only by the state. The Corps can only implement section 404 of the CWA in waters subject to Federal CWA jurisdiction, identified as WoUS. As for other CWA programs, those remain outside Corps responsibility.

B. Submitted on Behalf of Congresswoman Comstock:

Q1- Do you foresee an increase in the use of individual permits, versus nationwide permits?

Answer: The proposed rule provides a definition of "waters of the U.S." (WoUS) under the Clean Water Act (CWA) and does not modify any statutory provisions or regulatory requirements associated with obtaining authorizations under section 404 of the CWA. The increase in jurisdictional tributaries, adjacent waters, and other/isolated waters over the current 2003 post-*SWANCC* and 2008 post-*Rapanos* guidance would correspond to an increase in the number of permits required. However, there may also be efficiencies gained in jurisdictional determinations from the additional categories of waters that are jurisdictional by rule that previously required case-specific significant nexus determinations.

The proposed rule does not modify or revoke any of the efficient permit mechanisms currently available including general permits. The general permits thresholds appropriately authorize only those impacts with minimal adverse effects to the aquatic environment, when looked at individually and cumulatively. In addition, single and complete, separate and distant impact areas can be authorized under separate general permits, thereby not requiring an individual permit for those impacts that do not exceed the general permit thresholds. The Nationwide General Permits will be reauthorized in 2017, and will include a public notice during which the public may provide comments regarding the general permits. Corps districts also authorize the majority (~60%) of individual permits within 120 days of receiving a federally complete application.

In addition, the proposed rule does not modify or revoke any of the activity exemptions included under section 404(f)(1) of the CWA for discharges of dredged and/or fill material associated with certain activities such as normal farming, ranching and silviculture, the maintenance of currently serviceable structures, the construction of irrigation ditches, and maintenance of irrigation and drainage ditches.

The President requested additional funding of $5 million in the fiscal year 2016 budget to provide additional resources to the Corps districts for roll-out and implementation of the final rule, including training costs. This additional funding will enable the Corps to protect aquatic resources

while allowing reasonable development through fair, flexible and balanced permit decisions in an efficient and effective manner in the midst of an increase in workload.

Q2 - How will the proposed regulation affect CWA programs outside of its reach to Section 404?

Answer: The Corps has authority to implement the Section 404 program under the CWA; all other CWA programs, such as Sections 401 and 402, are under the authority of the EPA and the states with implementing authority.

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

Joint Hearing of the Senate Committee on Environment and Public Works and House Committee on Transportation and Infrastructure

"Impacts of the Proposed Waters of the United States Rule on State and Local Government"

Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, Members of the Senate Committee on Environment and Public Works and House Committee on Transportation and Infrastructure, thank you for this opportunity to discuss the Environmental Protection Agency's proposed rule to redefine the "Waters of the United States" and the significant negative impact such a rule would inflict on states and the landowners within their borders.

Respect and protection of private property rights sets the United States apart from other nations and has fueled the greatest expansion of economic freedom the world has ever known. Indeed, private property rights are among the foundational rights of any functional democracy, not just ours.

President Obama's Environmental Protection Agency currently stands poised to strike a blow to private property rights, through a proposed rule that radically expands EPA jurisdiction by placing virtually all land and water under the heavy regulatory hand of the federal government.

The Proposed Rule aims to redefine what constitutes "navigable waters" or "waters of the United States" – a term that long been understood to include only significant bodies of water capable of serving as conduits for interstate commerce. The proposed rule redefines those terms to now include virtually every body of water in the nation, right down to the smallest of streams, farm ponds and ditches. This is a naked power grab by the EPA.

Messrs. Chairmen, the EPA should undoubtedly have a role in solving interstate water quality issues. That role should not, however, be so expansive so as to render virtually every property owner in the nation subject to often unpredictable, unsound, and Byzantine federal regulatory regimes. When the states are cut out of the loop in favor of federal regulators, landowners are left lobbying distant federal bureaucrats when the system wrongs them – and wrong them it will.

Simply put, the proposed rule is a classic case of overreach, and flatly contrary to the will of Congress, who, with the passing of the Clean Water Act, decided that it was the states who should plan the development and use of local land and water resources.

The EPA has been generally dismissive of these concerns brought by states, local governments and individual citizens, with their primary tactic being an ineffective public relations campaign

to sway opinions in rural America. EPA Administrator Gina McCarthy has been documented as dismissing many concerns wholesale — calling them "ludicrous" and "silly" — while also asserting that the proposed rule is all about "protecting waters" and providing clarification.

To Administrator McCarthy, who appeared before you today, I say: pardon my skepticism, but these reassurances are from the same administration that preyed on the "ignorance" (their words, not mine) of the American voters to sell them on a federal takeover of healthcare, with lies like "if you like your insurance, you can keep your insurance." So, just as President Reagan told us, "Trust, but verify," we would like to trust you, but something does not add up. This rule smells like far more than mere clarification; indeed, it reeks of federal expansion, overreach, and interference with local land use decisions.

Notably, there are several United States Supreme Court decisions illustrating that the intended regulatory jurisdiction of the EPA has been limited primarily to the "navigable waters" of the United States, with all other waters rightly left for the states to regulate.

At the time the Clean Water Act (CWA) was passed, the Supreme Court had previously defined the "navigable waters of the United States" as interstate waters that are navigable in fact or readily susceptible of being rendered so. [The Daniel Ball, 10 Wall. 557, 563 (1871)]. More recently, the Court decided *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* [531 U.S. 159 (2001)], known as SWANCC, and *Rapanos v. United States* [574 U.S. 715 (2006)]. These two cases more clearly specify the limits of federal jurisdiction under the CWA, placing two significant limitations on federal jurisdiction. First, the Court has made clear that any examination of federal jurisdiction must begin with the understanding that Congress intended the States to retain primacy over the development and use of local land and water resources. Second, the Court made clear that federal jurisdiction is only proper over water that has a continuous surface connection to a "core" water.

In *SWANCC*, the Court ruled that the Army Corps of Engineers exceeded its authority by attempting to regulate "non-navigable, isolated, intrastate waters," such as seasonal ponds. The Court explained that in enacting the CWA, Congress intended to preserve the States' historical primacy over the management and regulation of intrastate water and land management.

In *Rapanos*, the Court described two different tests for when a secondary water can be considered a "water of the United States." A four-Justice plurality thought the question turned on whether the water has a continuous surface connection to a core water, while Justice Kennedy's concurring opinion examined whether a water has a "significant nexus" to a core water.

With this Proposed Rule, the EPA has attempted to transform Justice Kennedy's concurring opinion in *Rapanos* into a regulatory blank check for themselves. But the Proposed Rule's *ad hoc* approach is certainly contrary to the test adopted by the *Rapanos* plurality and is broader than even Justice Kennedy would permit.

In addition, and critically, the proposed rule's inclusion of this vague, catch-all category defeats the EPA's claimed purpose of the rule of bringing "transparency, predictability and consistency" to the scope of CWA jurisdiction and land-use decisions. Instead, the EPA has simply redefined the meaning of "navigable waters" in an extraordinarily broad way, so that any land owner may

be subject to onerous permitting requirements or severe civil penalties if violated, even if unknowingly.

Oklahoma has seen firsthand how the federal government, specifically the EPA, abuses its regulatory power in states that have interests in energy, farming and ranching. The states are not, and should not be used as, a vessel to carry out the misguided visions of bureaucrats in Washington, who often seem to have little regard for how their actions negatively impact the economy and private property rights.

During the comment period for this rule, Oklahoma filed its objections to the rule. Additionally, as the chief law officer of the state of Oklahoma, I can say with confidence that if the EPA continues forward with this rule as proposed, the rule will be challenged in court.

If this rule is issued as proposed, we will all live in a regulatory state where farmers must go before the EPA to seek permission to build a farm pond to keep their livestock alive, where home builders must seek EPA approval before beginning construction on a housing development that contains a dry creek bed, and where energy producers are left waiting for months or even years to get permits from the EPA, costing the producers tens, if not hundreds, of thousands of dollars that inevitably will be passed on to consumers.

Messrs. Chairmen, the EPA's proposed rule is unlawful and must be withdrawn. We urge the EPA to meet with state-level officials who can help the agency understand the careful measures that states already have in place to protect and develop the lands and waters within their borders. We urge the EPA to listen to Congress regarding the intent of the law to limit the regulation of non-navigable waters. But most of all, we urge the EPA to take note of the harm that its rule will do to the property rights of the average American and their ability to make land use decisions.

Thank you for the opportunity to speak to your committees.

E. Scott Pruitt
Attorney General

Environment and Public Works WOTUS Hearing "Impacts of the Proposed Water of the United States Rule on State and Local Governments"

February 4, 2015

Follow-Up Questions for Written Submission to Attorney General Scott Pruitt

Ranking Member Senator Boxer

1. In your testimony you state that if this rule is issued that farmers will have to "go before the EPA to seek permission to build a farm pond to keep their livestock alive". As the top attorney for the State of Oklahoma, I trust that you have studied the law and the proposed regulation.

The proposed regulation specifically addresses the stock ponds that you highlight in your testimony. It says, "The following are not 'waters of the United States'...artificial lakes or ponds created by excavating and/or diking dry land used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;"

Are you aware of this language?

Attorney General Pruitt's Response:

Thank you Senator Boxer, and yes, I am aware of the language you mention above, however, the language does not alleviate my concern regarding the over expansive reach of the proposed WOTUS rule. First, many farm ponds in Oklahoma are built with an overflow pipe feature and/or a spillway, many of those ponds may be constructed adjacent to or near a wetland as defined by the proposed rule and/or may occasionally drain through the overflow pipe and or spillway in a way that may eventually reach a ditch, creek or other waterway. The small creek, ditch or wetland, may have some minor relationship with "core waters," thus bringing the farm pond into coverage under the proposed rule. Likewise, the proposed definition of tributaries is extremely broad and may sweep up ponds, ephemeral streams and usually dry channels. I am also greatly concerned with the catch-all language in the proposed rule which would allow the EPA to determine on a "case-by case" basis that a water in combination with other similarly situated waters, including wetlands, located in the same region, has a significant nexus to a core water.

I see this proposed WOTUS rulemaking as an attempt by the agencies to regulate far more than what is granted under the CWA. I also firmly believe that the proposed rule will lead to greater uncertainty and confusion as to what is and what is not covered as a WOTUS, rather than bringing "transparency, predictability and consistency" to the scope of CWA jurisdiction.

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Testimony of
Adam H. Putnam, Commissioner of Agriculture
State of Florida

As submitted to the
Joint Hearing Before the House Committee on Transportation and Infrastructure and the Senate Committee on Environment and Public Works
Titled "Impacts of the Proposed Waters of the United States Rule on State and Local Governments"

February 4, 2015
10:00 a.m.
Room HVC-210, Capitol Visitors Center

Chairmen Bill Shuster and James Inhofe, and Ranking Members Peter DeFazio and Barbara Boxer, thank you for the opportunity to appear before this joint hearing of the House Committee on Transportation and Infrastructure and the Senate Committee on Environment and Public Works regarding the impacts of the proposed Waters of the United States (WOTUS) Rule on State and Local Governments.

Background

I am Adam Putnam, Florida's Commissioner of Agriculture. In this role, I am responsible for promoting Florida's agriculture industry, protecting it from threats, managing the state's natural resources and safeguarding consumers. I testify before you today on behalf of Florida's $120 billion agriculture industry and the two million jobs it supports. I am also here on behalf of the National Association of State Departments of Agriculture, an organization that represents the Commissioners, Secretaries and Directors of the state departments of agriculture in all fifty states and four U.S. territories.

On April 21, 2014, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly proposed regulations expanding the definition of waters subject to the jurisdiction of the federal government, referred to as WOTUS in the application of the Clean Water Act (CWA) and the Corps jurisdictional regulations.

The EPA asserts that the purpose of the proposed regulations is to clarify what waters are (and are not) covered by the CWA, that the regulations will not significantly change what currently is considered WOTUS, and that they will not substantially affect the regulated community.

However, an evaluation of the proposed rule and its impact on Florida indicates otherwise. It will significantly expand federal jurisdiction. It will impose additional burdensome requirements on agricultural producers. And it will impede current efforts to protect and restore the environment.

Expansion of Federal Jurisdiction

The proposed rule creates a great deal of ambiguity regarding what areas are subject to the requirements of the Clean Water Act because it does not clearly define "adjacent," "neighboring," "riparian area" and "floodplain." In combination, the application of these terms would expand federal jurisdiction to include all wetlands and other waters similarly situated across a watershed or that share a shallow subsurface hydrologic connection.

Furthermore, the EPA failed to take into account the diversity of topographic features that make up the landscape of communities across this nation when developing the one-size-fits-all approach in the proposed rule. For example, in Florida, with its flat topography and broad expanse of floodplains, isolated wetlands located miles from the nearest navigable water and never before considered jurisdictional, would be defined as WOTUS under the proposed rule simply because they are located in the same watershed and, therefore, under federal jurisdiction. Even concrete-lined control conveyances and other man made systems intended to capture and treat stormwater flows could be subject to federal jurisdiction.

An independent analysis by Breedlove, Dennis and Associates, confirms that the proposed rule will in fact expand federal jurisdiction in Florida. The firm used a Geographic Information System (GIS) to evaluate the impact of the proposed rule on two parcels of land representative of rural communities across South Central Florida. The two parcels contained a number of isolated wetlands that are currently not subject to federal jurisdiction. When the proposed rule is implemented, however, federal wetlands jurisdiction would expand by 13 to 22 percent on each of these two parcels.

Additional Burdens on Agriculture

Across this nation, agricultural producers are stewards of more than 914 million acres of farm land, on which they safely and efficiently produce the food and fiber necessary to feed the world. This critical industry, however, will face increased regulations and be forced to pay additional costs for mitigation efforts under the proposed rule, threatening its long-term sustainability and hindering its ability to provide the food and fiber we need to survive.

The expansion of federal jurisdiction under the proposed rule, for example, will deem many areas of farmland as WOTUS and, therefore, subject to federal jurisdiction. Farmers and ranchers rely on adequate supplies of healthy water to support their efforts and use many features of the land, such as low spots, ditches and irrigation channels, to capture, store and carry water from rainfall. In many cases, these features are miles from "navigable" waters and were previously not subject to federal jurisdiction. Under the proposed rule, however, these features would in many cases be categorized as WOTUS.

Furthermore, with more areas of farmland categorized as WOTUS, farmers will be forced to obtain additional permits, including CWA Section 402 and Section 404 permits. The requirement to obtain additional permits often involves fees for lawyers and technical consultants whose expertise is necessary to ensure an accurate application and to develop the plans that must be submitted with the application. There are also costs associated with management practices,

monitoring and reporting. An independent analysis conducted by David Sunding & David Zilberman in 2002 revealed that the Section 404 permit costs an average of $337,577, or nearly $300,000 more than the permit required for areas that are not considered WOTUS.

Counter to what the EPA claimed, that regulated industries would not be affected by the proposed rule, the agriculture industry will certainly face increased burdens in the form of permits, delays and costs.

Impediments to Current Environmental Programs

As a national leader in water quality protection and restoration, the state of Florida works closely with Florida's agriculture industry and many others to protect Florida's waters. Several times in the past, the EPA has described Florida's wetlands protection and stormwater management regulatory programs as elements of the most comprehensive state water resource protection program in the nation. Florida has made significant progress in water resources protection, and we recognize that there is more work to do.

Despite the expressed intent of the proposed rule to protect the nation's water resources, the increased regulations will serve to impede, and in some cases dismantle, environmental programs in Florida and across the nation. The expansion of CWA jurisdiction to marginal waters such as stormwater ditches and ponds would divert local, state and even federal funds from restoration efforts for critically impaired and truly important natural water resources. In Florida, major environmental restoration projects such as Lake Okeechobee, the Everglades Protection Area, the Lower St. Johns River, Tampa Bay, the Indian River Lagoon and others would suffer as funding for these priorities is diverted to municipal storm system upgrades that would be required under this rule. Urban and rural communities could be faced with billions of dollars more in compliance costs, with little additional environmental benefit.

Conclusion

For the reasons I have stated above and submitted as comments to the EPA in response to the proposed rule, I am gravely concerned about the unintended consequences of the EPA's proposed rule.

While many of the concerns I've expressed represent that of Florida, these concerns transcend any one industry or one state. The lack of clarity will present significant challenges in many situations. The expansion of federal jurisdiction will impose burdensome requirements on many private landowners, businesses, municipalities and states, but yield little, positive, measurable benefit. Worst of all, forcing these entities to shift priorities and resources to meet new requirements will stall or cancel existing environmental programs proven to have a positive, measurable impact.

I urge Congress to prevent the EPA and the Corps from taking further action on the proposed regulations until a more detailed assessment of their economic impact is completed, and we can better understand the scope of additional waters that would be considered jurisdictional.

Environment and Public Works WOTUS Hearing
"Impacts of the Proposed Water of the United States Rule on State and Local Governments"
February 4, 2015
Followup Questions for Written Submission to Commissioner Putnam

Ranking Member Senator Boxer

Q1. Mr. Putnam, isn't it true that most agriculture activities have been exempt from the Clean Water Act since 1977? Are you aware that EPA and the Corps, including in testimony before this Committee, stated that all of these existing exemptions will remain under the new rule?

ANSWER: Agricultural activities that are exempt are irrelevant. The impact of this rule is on those agricultural activities that are not exempt. For example, an agricultural producer wants to convert 200 acres of unimproved pasture to vegetable production. Within that 200 acre parcel reside 5 acres of isolated wetlands that were not jurisdictional under the current rule. Under the current rule the landowner would be free to convert those wetlands without securing a Corps permit and without having to pay mitigation costs. The proposed rule now makes those 5 wetland acres "waters of the U.S." because they are situated in the same watershed and share a shallow subsurface hydrologic connection. If the landowner chooses to convert those 5 acres of now jurisdictional wetlands he will likely be required to not only get a Corps 404 permit but will also have to pay approximately $100,000 per acre for mitigation credits.

Q2. Mr. Putnam, your testimony cites a 2002 study claiming the cost of a Section 404 permit is $337,577. According to the study, this cost applies to "individual permits," which the study says are required for "activities involving more than minimal impacts." Are you aware that in FY 2014 3 percent of Corps permit actions involved individual permits, meaning that the cost you highlight would not even be relevant for 97 percent of Corps 404 permit actions?

ANSWER: Current estimates with regards to the number of individual Section 404 permits being issued annually are not relevant since that number will increase precipitously given the unprecedented expansion of federal jurisdiction that will occur should this rule be implemented. It is the cost of such permits and the effect that cost will have on producers that is of critical importance. With Florida alone estimated to see a 13 to 20 percent increase in the acreage of jurisdictional wetlands as a result of the implementation of the proposed rule, I stand by my contention that the fiscal impact on Florida urban and rural communities will be in the scores of billions of dollars.

WRITTEN STATEMENT FOR THE RECORD

THE HONORABLE SALLIE CLARK
COMMISSIONER, EL PASO COUNTY, COLO.
AND
FIRST VICE PRESIDENT, NATIONAL ASSOCIATION OF COUNTIES

ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS

BEFORE THE
U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
AND THE
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON
TRANSPORTATION AND INFRASTRUCTURE

FEBRUARY 4, 2015
WASHINGTON, D.C.

Thank you, Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio and members of the U.S. Senate Environment and Public Works and the U.S. House of Representatives Transportation and Infrastructure committees for the opportunity to testify on the "waters of the United States" proposed rule and the potential impact on state and local governments.

My name is Sallie Clark and I serve as the First Vice President of the National Association of Counties (NACo). I am an elected county commissioner from El Paso County, Colo., the home of Pikes Peak, one of the highest summits on the southern edge of the Rocky Mountains. I have served in this capacity since 2005.

About NACo

NACo is the only national organization that represents county governments in the United States, including Alaska's boroughs and Louisiana's parishes. Founded in 1935, NACo assists America's 3,069 counties in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

About Counties

Counties are highly diverse, not only in my state of Colorado, but across the nation and vary immensely in natural resources, social and political systems, cultural, economic and structural circumstances, and public health and environmental responsibilities. Counties range in area from 26 square miles (Arlington County, Virginia) to 87,860 square miles (North Slope Borough, Alaska). The population of counties varies from Loving County, Texas, with just under 100 residents to Los Angeles County, California, which is home to close to ten million people. Of the nation's 3,069 counties, approximately 50 percent of counties have populations below 25,000 residents. On the other hand, there are more than 120 major urban counties that provide essential services to more than 130 million resident each day. If you've seen one county, you've seen one county, and there are 3,068 more to go.

Regardless of size, counties nationwide continue to be challenged with fiscal constraints and tight budgets. According to a report released by NACo last month, only 65 of the nation's 3,069 counties have fully recovered to pre-recession levels, due to their booming energy and agricultural economies. However, in many parts of the country, the economic recovery is still fragile. In addition, county governments in more than 40 states must operate under restrictive revenue constraints imposed by state policies, especially property tax assessment caps.

About El Paso County, Colorado

As a county commissioner, former councilmember and utilities board member, and current small business owner, I interact with constituents and businesses on a daily basis. While El Paso County, Colorado is considered "urban," with a population of more than 640,000 residents, we have a very diverse mix of urban, suburban and rural areas. In fact, we have over 113,857 acres of federal land within our jurisdiction. The county lies in east central Colorado and encompasses more than 2,100 square miles, twice the size of Rhode Island. The western part of El Paso County is extremely mountainous and the eastern part is largely prairie land with strong agricultural components.

Despite being one of the most populous counties in Colorado, El Paso County faces constant risks of wildfires, drought and flooding. In the past several years, we've had two major wildfires in the Waldo Canyon and Black Forest areas, totaling about $40 million in damage and burning more than 32,500 acres. Over 70,000 residents were evacuated and 834 homes were lost during these two horrific events that were declared presidential disasters. These fires in our county have significantly changed our landscape; the county is now home to charred, barren hillsides and the vegetation that once protected the area from stormwater runoff is now gone, resulting in dangerous flash floods. Our county has been fully focused on not only pre- and post-disaster mitigation, but also improving our infrastructure through public safety projects that will protect our citizens and businesses. Over $50 million has been invested to date to repair these vital watersheds.

Many of the projects we are working on—and many other county projects across the nation—would be significantly affected by the changes to the definition of "waters of the U.S." that have been proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). **Therefore, we have urged the agencies to withdraw the proposed rule until further analysis of its potential impacts has been completed.** In fact, many prominent national associations of regional and local officials have expressed similar concerns including Colorado Counties Inc., U.S. Conference of Mayors, National League of Cities, National Association of Regional Councils, National Association of County Engineers, American Public Works Association and the National Association of Flood and Stormwater Management Agencies.

Today, I will discuss potential on-the-ground impacts of this proposed rule on my county and on counties nationwide.

1. **The "Waters of the U.S." Proposed Rule Matters to Counties**—*Clean water is essential for public health and safety, and state and local governments play a significant role in ensuring that local water resources are protected. This issue is so important to counties because not only do we build, own and maintain a significant portion of public safety infrastructure, but we are also mandated by law to work with federal and state governments to implement Clean Water Act (CWA) programs.*

2. **The Consultation Process with State and Local Governments was Flawed**—*Counties are not just another stakeholder group in this discussion—we are a key partner in our nation's intergovernmental system. Because counties work with both federal and state governments to implement Clean Water Act (CWA) programs, it is important that all levels of government work together to form practical and workable rules and regulations that achieve the shared goals of protecting clean water, ensuring the safety of our communities and minimizing unnecessary delays and costs.*

3. **Counties Have Significant Concerns with the Proposed Rule; A One-Size-Fits-All Federal Regulation is Not the Answer**—*For over a decade, counties have been voicing concerns on the existing "waters of the U.S." definition, as there has been much confusion regarding this definition, even after several Supreme Court cases. While we agree that there needs to be a clear, workable definition of "waters of the U.S.," we do not believe that the new proposed definition provides the certainty and clarity needed for operations at the local level. After consulting extensively with county technical experts—including county engineers, attorneys, stormwater managers and other county authorities—*

on the proposed rule's impact on daily operations and local budgets, our key concerns include undefined and confusing definitions and potential for sweeping impacts across all Clean Water Act programs.

4. **The Current Process Already Presents Significant Challenges for Counties; the Proposed Rule Only Complicates Matters**—*Under federal law as it pertains to the Clean Water Act, counties serve as both the regulator and regulated entity and are responsible to ensure that clean water goals are achieved and that our constituents are protected. However, the current system already presents major challenges—including getting permits approved by the agencies in a timely manner, juggling multiple and often duplicative state and federal requirements, and anticipating and paying for associated costs. The proposed rule, as currently written, only adds to the confusion and uncertainty over how it would be implemented consistently across all regions.*

1. The "Waters of the U.S." Proposed Rule Matters to Counties

First, clean water is essential to all of our nation's counties, who play vital roles in protecting our citizens by preserving local resources and maintaining public safety. The availability of an adequate supply of clean water is vital to our nation and integrated and cooperative programs at all levels of government are necessary for protecting water quality. *Let me be clear, counties support clean water.*

Counties play a key role in protecting the environment. We pass zoning and other land use ordinances to safeguard valuable natural resources and protect our local communities depending on state law and local responsibility. Counties provide extensive outreach and education to residents on water quality and stormwater impacts. We also establish rules on illicit discharges and fertilizer ordinances, remove septic tanks, work to reduce water pollution, adopt setbacks for land use plans, and are responsible for water recharge areas, green infrastructure and water conservation programs.

Counties must also plan for the unexpected and remain flexible to address regional conditions that may impact the safety and well-being of our citizens. Specific regional differences, including condition of watersheds, water availability, climate, topography and geology are all factored in when counties implement public safety and common-sense water quality programs.

For example, some counties in low-lying areas have consistently high groundwater tables and must carefully maintain drainage conveyances to both prevent flooding and reduce breeding grounds for disease-causing mosquitoes. On the other hand, counties in the arid west are facing extreme drought conditions where the availability of water has become scarce. In these regions, counties are using stormwater and water and wastewater ditch infrastructure to preserve water for future use.

El Paso County has taken our own steps to protect our local water resources by prohibiting illegal discharges into the county's stormwater system and establishing significant financial penalties for violations. We also have a robust public information and education program, and regulate development by administering standards for best management practices for storm water management.

Second, counties have much at stake in this discussion as we are major owners of public infrastructure including 45 percent of America's road miles, nearly 40 percent of bridges, 960 hospitals, more than 2,500 jails, 650 nursing homes and a third of the nation's airports. Counties also own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule, including roadside ditches, flood control channels, stormwater culverts and pipes, Municipal Separate Storm Sewer Systems (MS4), and other infrastructure used to funnel water away from low-lying roads, properties and businesses. These not only protect our water quality, but prevent accidents and flooding. Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining our public safety ditches and other infrastructure.

Counties are also the first line of defense in any disaster, particularly as it relates to public infrastructure. Following a major disaster, county local police, sheriffs, firefighters and emergency personnel are the first on the scene. In the aftermath, counties focus on clean-up, recovery and rebuilding. After the Black Forest fire in our county, two roads were washed out, residents were stranded and major flooding and sediment changes occurred. The county had to take quick action to work with multiple federal agencies to rebuild critical infrastructure.

This is neither partisan, nor a political issue for counties. It is a practical issue and our position has been guided by county experts—county engineers, attorneys and stormwater practitioners—who are on the ground working every day to implement federal and state mandated rules and policies. NACo's position on the proposed rule has been approved and supported by urban, suburban and rural county elected officials and our association's policy is based on the real world experiences of county governments within the current Clean Water Act (CWA) permitting process.

2. The Consultation Process with State and Local Governments was Flawed

Counties are not just another stakeholder group in this discussion—we are a key part of the federal-state-local partnership. Because counties work with both federal and state governments to implement Clean Water Act (CWA) programs, it is important that all levels of government work together to form practical and workable rules and regulations that achieve the shared goals of protecting clean water, ensuring the safety of our communities and minimizing unnecessary delays and costs.

Throughout this process, counties were not properly consulted as outlined by federal law. NACo has repeatedly requested a transparent process, as directed under the Administrative Procedures Act (APA), which includes meaningful consultation with impacted state and local governments. Under the Regulatory Flexibility Act (RFA) and Executive Order 13132—Federalism, federal agencies are required to work with impacted state and local governments on proposed regulations that will have a substantial direct effect on them. We believe the "waters of the U.S." proposed rule triggers federal consultation requirements with state and local governments.

Within the proposed rule, the agencies indicated they "voluntarily undertook federalism consultation." While we appreciate the agencies' outreach efforts, we believe that EPA prematurely truncated the Federalism consultation process. In 2011, EPA initiated a formal Federalism consultation process. In the 17 months between the

consultation and the proposed rule's publication, the agency failed to avail itself of the opportunity to continue meaningful discussions during this intervening period, thereby failing to fulfill the intent of Executive Order 13132, and the agency's internal process for implementing it.

As part of the rulemaking process, the agencies must also "certify" the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). This process allows federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. In a letter sent to EPA Administrator Gina McCarthy and Corps Deputy Commanding General for Civil and Emergency Operations Major General John Peabody, the Small Business Administration's (SBA) Office of Advocacy expressed significant concerns that the proposed rule was "improperly certified...used an incorrect baseline for determining...obligations under the RFA...and imposes costs directly on small businesses" and "will have a significant economic impact..."

The office also requested that the agencies "withdraw the rule" and that the EPA "conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking." Since over 2,000 of our nation's counties are considered rural and covered under SBA's responsibility, NACo supports their conclusions.

Further, because a thorough consultation process was not followed, the agencies released an incomplete and inaccurate economic analysis that did not fully consider the potential impact on other Clean Water Act programs. Further, they used permit applications from 2009-2010 as a baseline to estimate the costs when there was more current data available. NACo has repeatedly raised concerns about the potential costs and the data points used in the cost-benefit analysis—these concerns have yet to be addressed.

3. Counties Have Significant Concerns with the Proposed Rule; A One-Size-Fits-All Federal Regulation is not the Answer

For over a decade, counties have been voicing concerns on the existing "waters of the U.S." definition, as there has been much confusion regarding this definition even after several Supreme Court decisions. While we agree that there needs to be a clear, workable definition of "waters of the U.S.," we do not believe that the new proposed definition provides the certainty and clarity needed for operations at the local level.

After consulting extensively with county technical experts—including county engineers, attorneys, stormwater managers and other county authorities—on the proposed rule's impact on daily operations and local budgets, we are very concerned about:

- *undefined and confusing definitions*
- *cascading negative impacts across all Clean Water Act programs*

First, specific definitions within the proposed rule are undefined and unclear, which could be used to claim federal jurisdiction more broadly. The proposed rule extends the "waters of the U.S." definition by utilizing new terms—"tributary," "uplands," "significant nexus," "adjacency," "riparian areas," "floodplains" and "neighboring"—that could increase the types of public infrastructure that is considered jurisdictional under the CWA. For counties that own and manage public safety infrastructure, the potential implication is that public safety

ditches will be treated the same as rivers and streams, while the functions and purposes of both are significantly different.

NACo has worked with the agencies to clarify these key terms and their intent, but has received little assurance about how each region will interpret and implement the new definition. In fact, the agencies have delivered inconsistent information about what waters would or would not be covered under federal jurisdiction.

Second, the proposed rule could have a cascading impact on all CWA programs, not just the Section 404 program. This means that changing the definitions within the proposed rule could have far-reaching impacts on even more local stormwater programs and county owned infrastructure. NACo has asked for clarification from the agencies and has yet to receive a direct answer on the potential reach and implications of a new definition to "waters of the U.S.".

4. <u>The Current Clean Water Act Section 404 Permit Process Already Presents Significant Challenges for Counties; the New Proposed Rule Only Complicates Matters</u>

Under federal law as it pertains to the Clean Water Act, counties serve as both the regulator and regulated entity and are responsible to ensure that clean water goals are achieved and that their constituents are protected. In practical terms, counties implement and enforce Clean Water Act programs, and also must meet Clean Water Act requirements ourselves.

However, the current system already presents major challenges—including the existing permitting process, multiple and often duplicative state and federal requirements, and unanticipated project delays and costs. <u>The proposed rule, as currently written, only adds to the confusion and complicates already inconsistent definitions used in the field by local agencies in different jurisdictions across the country.</u>

Ditches are pervasive in counties across the nation; until recently, they were not required to have federal CWA Section 404 permits. However, in recent years, some Corps districts have inconsistently required counties to have federal permits for construction and maintenance activities on our public safety ditches. *It is critical for counties to have clarity, consistency and certainty on the types of public safety infrastructure that require federal permits.*

Next, the current process is already complex, time-consuming and expensive, leaving local governments and public agencies vulnerable to citizen suits. Counties across the nation have experienced delays and frustrations with the current Section 404 permitting process. If a project is deemed to be under federal jurisdiction, other federal requirements are triggered such as environmental impact statements, the National Environmental Policy Act (NEPA) process and Endangered Species Act (ESA) implications. These assessments often involve intensive studies and public comment periods, which can delay critical public safety upgrades to county owned infrastructure and add to the overall time and costs of projects.

One Midwest county had five road projects that were significantly delayed by the federal permitting process for over two years. After studying the projects, the county determined that the delays and extra

requirements added approximately $500,000 to the cost of completing these projects. Some northern counties have even missed entire construction seasons as they waited for federal permits.

Under the current federal program, counties can utilize a maintenance exemption to move ahead with necessary upkeep of ditches (removing vegetation, extra dirt and debris)—however, the approval of such exemptions is sometimes applied inconsistently, not only nationally but within regions. These permits come with strict special conditions that dictate when and how counties can remove grass, trees and other debris that cause flooding if they are not removed from the ditches.

For example, one California county was told that they had to obtain a maintenance permit to clean out an earthen stormwater ditch. Because the ditch is now under federal jurisdiction, the county is only permitted to clear overgrowth and trash from the ditch six months out of the year due to potential ESA impacts. Since the county is not allowed to service the ditch regularly, it has flooded private property several times and upset the surrounding community.

Another county in Florida applied for 18 specific maintenance exemptions on the county's network of drainage ditches and canals. The federal permitting process became so challenging that the county ended up having to hire a consultant to compile all of the data and surveying materials that were required for the exemptions. Three months later and at a cost of $600,000, the county was still waiting for 16 of the exemptions to be determined. At that point, the county was moving into its seasonal rainy season and had to deal with calls from residents as ditches that did not have a decision from the Corps were flooding.

El Paso County is responsible for bridges and culvert maintenance in over 250 locations. These critical pieces of infrastructure cross streams, wetlands and rivers, and annual maintenance is essential for long-term stability and safety. If the proposed rule moves forward and dramatically increases the waters under federal jurisdiction, it would significantly impact daily county operations and our ability to serve constituents.

Additionally, counties are liable for ensuring that our public safety ditches are maintained and in some cases counties have faced lawsuits over ditch maintenance. In 2002, *in Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a flood control channel that failed due to overgrowth of vegetation.

Counties are also facing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. Even though the counties are following the state and federal permitting rules on water quality, these groups are asserting that the permits are not stringent enough. A number of counties in Washington and Maryland have been sued over the scope and sufficiency of their approved MS4 permits.

These are just a few examples of the real impact of the current federal permitting process. The new proposed rule creates even more confusion over what is under federal jurisdiction. If the approval process is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety and stormwater ditches.

CONCLUSION

Chairmen Inhofe and Shuster and members of the U.S. Senate Environment and Public Works Committee and the U.S. House of Representatives Committee on Transportation and Infrastructure, the health, well-being and safety of our residents is a top priority for counties. Our bottom line is that the proposed rule contains many terms that are not adequately defined and NACo believes that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this proposal.

This is problematic because our members are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches, even if federal permits are not issued by the federal agencies in a timely manner. Furthermore, the unknown impacts on other CWA programs are equally problematic.

We ask that the proposed rule be withdrawn until further analysis has been completed and more in-depth consultation with state and local officials—especially practitioners—is undertaken. NACo and counties nationwide share the EPA's and Corps goal for a clear, concise and workable definition for "waters of the U.S." to reduce confusion—not to mention costs—within the federal permitting process. Unfortunately, we believe that this proposed rule falls short of that goal.

Counties stand ready to work with Congress and the agencies to craft a clear, concise and workable definition for "waters of the U.S." to reduce confusion within the federal CWA program. We look forward to working together with our federal partners, as our founding fathers intended, to protect our nation's water resources for generations to come. Counties stand ready to work with our counterparts in states and in the federal government to reach a resolution that makes sense. We can achieve our shared goal of protecting the environment without inhibiting public safety and economic vitality of our communities.

Thank you again for the opportunity to testify today on behalf of America's 3,069 counties. I would welcome the opportunity to address any questions.

Attachments:

- NACo letter submitted to EPA and the Corps on the "waters of the U.S." proposed rule on November 14, 2014
- Joint letter submitted to EPA and the Corps from U.S. Conference of Mayors, National League of Cities, National Association of Regional Councils, National Public Works Association, National Association of Flood and Stormwater Agencies, National Association of County Engineers and National Association of Counties on November 14, 2014
- Resolution on "waters of the U.S." proposed rule passed by Colorado Counties, Inc. on December 2, 2014

NACo National Association of Counties

November 14, 2014

Donna Downing
Jurisdiction Team Leader, Wetlands Division
U.S. Environmental Protection Agency
Water Docket, Room 2822T
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Stacey Jensen
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G Street N.W.
Washington, D.C. 20314

Re: Definition of "Waters of the United States" Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880

Dear Ms. Downing and Ms. Jensen:

On behalf of the National Association of Counties (NACo) and the 3,069 counties we represent, we respectfully submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed rule on *Definition of "Waters of the United States" Under the Clean Water Act*.[1] We thank the agencies for their ongoing efforts to communicate with NACo and our members throughout this process. **We remain very concerned about the potential impacts of the proposed rule and urge the agencies to withdraw it until further analysis has been completed.**

Founded in 1935, NACo is the only national organization that represents county governments in the United States and assists them in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties.

The Importance of Clean Water and Public Safety

Clean water is essential to all of our nation's counties who are on the front lines of protecting the citizens we serve through both preserving local resources and maintaining public safety. The availability of an adequate supply of clean water is vital to our nation and integrated and cooperative programs at all levels of government are necessary for protecting water quality.

Counties are not just another stakeholder group in this discussion—they are a valuable partner with federal and state governments on Clean Water Act implementation. To that end, it is important that the federal, state and local governments work together to craft practical and workable rules and regulations.

Counties are also responsible to protect the public. Across the country, counties own and maintain public safety ditches including road and roadside ditches, flood control channels, stormwater culverts and pipes, and other infrastructure that is used to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidents. **Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining their public safety ditches and infrastructure.**

[1] Definition of Waters of the U.S. Under the Clean Water Act, 79 Fed. Reg. 22188 (April 21, 2014).

NACo shares the EPA's and Corps goal for a clear, concise and workable definition for "waters of the U.S." to reduce confusion—not to mention costs—within the federal permitting process. Unfortunately, we believe that this proposed rule falls short of that goal.

EPA asserts that they are not trying to regulate any waters not historically or previously regulated. But this is misleading. Prior to a 2001 Supreme Court decision,[2] virtually all water was jurisdictional. The EPA's and the Corps economic analysis agrees. It states that "Just over 10 years ago, almost all waters were considered "waters of the U.S."[3] This is why we believe the proposed rule is an expansion of jurisdiction over current regulatory practices.

Hundreds of counties, including their respective state associations of counties, have submitted public comments on the proposed rule over concerns about how it will impact daily operations and local budgets. We respectfully urge the agencies to examine and consider these comments carefully.

This letter will highlight a number of areas important to counties as they relate to the proposed rule:

- **Counties Have a Vested Interest in the Proposed Rule**
- **The Consultation Process with State and Local Governments was Flawed**
- **Incomplete Data was Used in the Agencies' Economic Analysis**
- **A Final Connectivity Report is Necessary to Justify the Proposed Rule**
- **The Clean Water Act and Supreme Court Rulings on "Waters of the U.S."**
- **Potential Negative Effects on All CWA programs**
- **Key Definitions are Undefined**
- **The Section 404 Permit Program is Time-Consuming and Expensive for Counties**
- **County Experiences with the Section 404 Permit Process**
- **Based on Current Practices—How the Exemption Provisions May Impact Counties**
- **Counties Need Clarity on Stormwater Management and Green Infrastructure Programs**
- **States Responsibilities Under CWA Will Increase**
- **County Infrastructure on Tribal Land May Be Jurisdictional**
- **Endangered Species Act as it Relates to the Proposed Rule**
- **Ensuring that Local Governments Are Able to Quickly Recover from Disasters**

Counties Have a Vested Interest in the Proposed Rule

In the U.S., there are 3,069 counties nationally which vary in size and population. They range in area from 26 square miles (Arlington County, Virginia) to 87,860 square miles (North Slope Borough, Alaska). The population of counties varies from Loving County, Texas, with just under 100 residents to Los Angeles County, California, which is home to close to ten million people. Forty-eight of the 50 states have operational county governments (except Connecticut and Rhode Island). Alaska calls its counties boroughs and Louisiana calls them parishes.

Since counties are an extension of state government, many of their duties are mandated by the state. Although county responsibilities differ widely between states, most states give their counties significant authorities. These authorities include construction and maintenance of roads, bridges and other infrastructure, assessment of property taxes, record keeping, running elections, overseeing jails and court

[2] *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'r (SWANCC)*, 531 U.S. 159, 174 (2001).

[3] U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), *Econ. Analysis of Proposed Revised Definition of Waters of the United States*, (March 2014) at 11.

systems and county hospitals. Counties are also responsible for child welfare, consumer protection, economic development, employment/training, and land use planning/zoning and water quality.

Counties own and maintain a wide variety of public safety infrastructure that would be impacted by the proposed rule including roads and roadside ditches, stormwater municipal separate storm sewer systems (MS4), green infrastructure construction and maintenance projects, drinking water facilities and infrastructure (not designed to meet CWA requirements) and water reuse and infrastructure.

On roads and roadside ditches, counties are responsible for building and maintaining 45 percent of public roads in 43 states (Delaware, North Carolina, New Hampshire, Vermont and West Virginia counties do not have road responsibilities). These responsibilities can range from intermittent maintenance, such as snow plowing, debris cleanup, short term paving and surface repairs to maintenance of traffic safety and road signage and major long-term construction projects.

Many of these road systems are in very rural areas. Of the nation's 3,069 counties, approximately 70 percent of our counties are considered "rural" with populations less than 50,000 and 50 percent of these are counties have populations below 25,000 residents. Any additional cost burdens are challenging to these smaller governments, especially since more rural counties have the most road miles and corresponding ditches. Since state constitutions and statutes dictate and limit the revenue sources counties may use, balancing increased federal and state regulations with the limited financial resources available to local governments poses significant implementation challenges.

Changes to the scope of the "waters of the U.S." definition, without a true understanding of the direct and indirect impact and costs to state and local governments, puts our local governments in a precarious position, choosing between environmental protection and public safety. Counties do not believe this needs to be an either/or decision if local governments are involved in policy formations from the start.

Regardless of size, counties nationwide are coping with fiscally tight budgets. County revenues have declined and ways to effectively increase county treasuries are limited. In 2007, our counties were impacted by the national financial crisis, which pushed the nation into a recession. The recession affected the capacity of county governments to deliver services to their communities. While a number of our counties are experiencing moderate growth, in some parts of the country, economic recovery is still fragile.[4] This is why we are concerned about the proposed rule.

The Consultation Process with State and Local Governments was Flawed

Throughout the entire rule-making process, state and local governments were not adequately consulted through the Regulatory Flexibility Act (RFA) and Executive Order 13132: Federalism. Since 2011, NACo has repeatedly requested a transparent process, as directed under the Administrative Procedures Act (APA), which includes meaningful consultation with impacted state and local governments.

The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires federal agencies to consider potential impacts of proposed rules on small entities. This process was not followed for the proposed "waters of the U.S." rule.

Under RFA, small entities are defined as small businesses and organizations, cities, counties, school districts and special districts with a population below 50,000. RFA requires agencies to analyze the impact any proposed rule

[4] Nat'l Ass'n of Counties, *County Tracker 2013: On the Path to Recovery*, NACo Trends Analysis Paper Series, (2014).

could have on small entities and provide less costly options for implementation. The Small Business Administration's (SBA) Office of Advocacy (Advocacy) oversees federal agency compliance with RFA.

As part of the rulemaking process, the agencies must "certify" the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). To certify a proposed rule, federal agencies must provide a "factual basis" to certify that a rule does not impact small entities. This means "at minimum...a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."[5]

The RFA SISNOSE process allows federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. If the agencies are unable to certify that a proposed rule does not impact small entities, the agencies are required to convene a small business advocacy review (SBAR) panel. **The agencies determined, incorrectly, there was "no SISNOSE"—and therefore did not provide a necessary review.**

In a letter sent to EPA Administrator Gina McCarthy and Corps Deputy Commanding General for Civil and Emergency Operations Major General John Peabody, SBA Advocacy expressed significant concerns that the proposed "waters of the U.S." rule was "improperly certified...used an incorrect baseline for determining...obligations under the RFA...imposes costs directly on small businesses" and "will have a significant economic impact..." Advocacy requested that the agencies "withdraw the rule" and that the EPA "conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking."[6] **Since over 2,000 of our nation's counties are considered rural and covered under SBA's responsibility, NACo supports the SBA Office of Advocacy conclusions.**

President Clinton issued Executive Order No. 13132, "Federalism," on August 4, 1999. **Under Executive Order 13132—Federalism, federal agencies are required to work with state and local governments on proposed regulations that will have a substantial direct impact on state and local governments.** We believe the proposed "waters of the U.S." rule triggers Executive Order 13132. Under Federalism, agencies must consult with state and local officials early in the process and must include in the final draft regulation a federalism summary impact statement, which must include a detailed overview of state and local government concerns and describe the extent the agencies were able to address the concerns.[7] **A federalism impact statement was not included with the proposed rule.**

EPA's own internal guidance summarizes when a Federalism consultation should be initiated.[8] Federalism may be triggered if a proposed rule has an annual implementation cost of $25 million for state and local governments.[9] Additionally, if a proposal triggers Federalism, EPA is required to work with state and local governments in a "meaningful and timely" manner which means "consultation should begin as early as possible and continue as you develop the proposed rule."[10] Even if the rule is determined not to impact state

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[5] Small Bus. Admin. (SBA), Office of Advocacy (Advocacy), *A Guide for Gov't Agencies: How to Comply with the Regulatory Flexibility Act*, (May 2012), at 12-13.

[6] Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Adm'r, EPA and Gen. John Peabody, Deputy Commanding Gen., Corps of Eng'r, on Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014).

[7] Exec. Order No. 13132, 79 Fed. Reg. 43,255 (August 20, 1999).

[8] U.S. Envtl. Prot. Agency, *EPA's Action Development Process: Guidance on Exec. Order 13132: Federalism*, (November 2008).

[9] *Id.* at 6.

[10] *Id.* at 9.

and local governments, the EPA still subject to its consultation requirements if the proposal has "any adverse impact above a minimum level."[11]

Within the proposed rule, the agencies have indicated they "voluntarily undertook federalism consultation."[12] While we are heartened by the agencies' acknowledgement of our concerns, we are disturbed that EPA prematurely truncated the state and local government Federalism consultation process. **EPA initiated a formal Federalism consultation process in 2011. In the 17 months between the consultation and the proposed rule's publication, EPA failed to avail itself of the opportunity to continue substantial discussions during this intervening period with its intergovernmental partners, thereby failing to fulfill the intent of Executive Order 13132, and the agency's internal process for implementing it.**

Recommendations:

1. **Pursuant to the rationale provided herein, as well as that put forth by the SBA Chief Counsel for Advocacy, formally acknowledge that this regulation does not merit a "no SISNOSE" determination and, thereby, must initiate the full small entity stakeholder involvement process as described by RFA SBREFA**

2. **Convene a SBAR panel which provides an opportunity for small entities to provide advice and recommendations to ensure the agencies carefully considers small entity concerns**

3. **Complete a multiphase, rather than one-time, Federalism consultation process**

4. **Charter an ad hoc, subject-specific advisory committee under the authority of the Federal Advisory Committee Act (FACA), as EPA has done on numerous occasions for less impactful regulations, to underpin the development of this comprehensive regulation**

5. **Accept an ADR Negotiated Rulemaking process for the proposed rule**: Because of the intrinsic problems with the development of the proposed rule, we would also ask the agencies to consider an Alternative Dispute Resolution (ADR) negotiated rulemaking with all stakeholders. An ADR negotiated rulemaking process would allow stakeholders of various groups to "negotiate" the text of a proposed rule, to allow problems to be addressed and consensus to be reached.

Incomplete Data was Used in the Agencies' Economic Analysis

As part of the proposed rule, the agencies released their cost-benefit analysis on *Economic Analysis of Proposed Revised Definition of Waters of the U.S.* (March 2014). We are concerned about the limited scope of this analysis since it bases its assumptions on a narrow set of CWA data not applicable to other CWA programs. Since EPA has held its 2011 Federalism briefing on "waters of the U.S.," **we have repeatedly raised concerns about the potential costs and the data points used in the cost-benefit analysis—these concerns have yet to be addressed.**[13] [14] [15]

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[11] *Id.* at 11.

[12] 79 Fed.Reg. 22220.

[13] Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA & Jo Ellen Darcy, Assistant Sec'y for Civil Works, U.S. Dep't of the Army, "Waters of the U.S." Guidance (July 29, 2011) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Final.pdf.

[14] Letter from Larry Naake, Exec. Dir., Nat'l Ass'n of Counties to Lisa Jackson, Adm'r, EPA, Federalism Consultation Exec..Order 13132: "Waters of the U.S." Definitional Change (Dec. 15, 2011) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Dec%2015%202011_final.pdf.

The economic analysis uses CWA Section 404 permit applications from 2009-2010 as its baseline data to estimate the costs to all CWA programs. There are several problems with this approach. Based on this data, the agencies expect an increase of approximately three percent of new waters to be jurisdictional within the Section 404 permit program. The CWA Section 404 program administers permits for the "discharge of dredge and fill material" into "waters of the U.S." and is managed by the Corps.

First, we are puzzled why the agencies chose the span of 2009-2010 as a benchmark year for the data set as more current up-to-date data was available. In 2008, the nation entered a significant financial recession, sparked by the housing subprime mortgage crisis. Housing and public infrastructure construction projects were at an all-time low. According to the National Bureau of Economic Research, the recession ended in June 2009,[16] however, the nation is only starting to show signs of recovery.[17] By using 2009-2010 data, the agencies have underestimated the number of new waters that may be jurisdictional under the proposed rule.

Second, the economic analysis uses the 2009-2010 Corps Section 404 data as a baseline to determine costs for other CWA programs run by the EPA. Since there is only one "waters of the U.S." definition used within the CWA, the proposed rule is applicable to all CWA programs. The Congressional Research Service (CRS), a public policy research arm of the U.S. Congress, released a report on the proposed rule that stated "costs to regulated entities and governments (federal, state, and local) are likely to increase as a result of the proposal." The report reiterates there would be "additional permit application expenses (for CWA Section 404 permitting, stormwater permitting for construction and development activities, and permitting of pesticide discharges...for discharges to waters that would now be determined jurisdictional)."[18]

We are concerned the economic analysis focuses primarily on the potential impacts to CWA's Section 404 permit program and does not fully address the cost implications for other CWA programs. The EPA's and the Corps economic analysis agrees, "...the resulting cost and benefit estimates are incomplete...Readers should be cautious in examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis." [19]

Recommendation:

- **NACo urges the agencies to undertake a more detailed and comprehensive analysis on how the definitional changes will directly and indirectly impact all Clean Water Act programs, beyond Section 404, for federal, state and local governments**

- **Work with national, state and local stakeholder groups to compile up-to-date cost and benefit data for all CWA programs**

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[15] Letter from Tom Cochran, CEO and Exec. Dir., U.S. Conf. of Mayors, Clarence E. Anthony, Exec. Dir., Nat'l League of Cities, & Matthew D. Chase, Exec. Dir., Nat'l Ass'n of Counties to Howard Shelanski, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. and Budget, EPA's Definition of "Waters of the U.S." Under the Clean Water Act Proposed Rule & Connectivity Report (November 8, 2013) *available at* http://www.naco.org/legislation/policies/Documents/Energy,Environment,Land%20Use/NACo%20NLC%20USCM%20Waters%20of%20the%20US%20Connectivity%20Response%20letter.pdf.

[16] Nat'l Bureau of Econ. Research, Bus. Cycle Dating Comm. (September 20, 2010), *available at* www.nber.org/cycles/sept2010.pdf.

[17] Cong. Budget Office, *The Budget & Economic Outlook: 2014 to 2024* (February 2014).

[18] U.S. Cong. Research Serv., EPA & the Army Corps' Proposed Rule to Define "Waters of the U.S.," (Report No. R43455; 10/20/14), Copeland, Claudia, at 7.

[19] Econ. Analysis of Proposed Revised Definition of Waters of the U. S., U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'r, 11 (March 2014), at 2.

A Final Connectivity Report is Necessary to Justify the Proposed Rule

In addition to the aforementioned issues, we are also concerned that the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, used as a scientific basis of the proposed rule, is still in draft form.

In 2013, EPA asked its' Science Advisory Board (SAB), which is comprised of 52 scientific advisors, to review the science behind the report. The report focused on more than 1,000 scientific studies and reports on the interconnectivity of water. In mid-October, 2014, the SAB completed its review of the draft report and sent its recommendations to the EPA.[20]

The SAB recommendations have yet to be incorporated into the draft connectivity report. Releasing the proposed rule before the connectivity report is finalized is premature—the agencies missed a valuable opportunity to review comments or concerns raised in the final connectivity report that would inform development of the proposed "waters of the U.S." rule.

Recommendations:

- **Reopen the public comment period on the proposed "waters of the U.S." rule when the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report is finalized**

The Clean Water Act and Supreme Court Rulings on "Waters of the U.S."

Clean water is essential for public health and state and local governments play a large role in ensuring local water resources are protected. It is important state and local governments are involved as a significant partner in the CWA rule development process.

The Clean Water Act charges the federal government with setting national standards for water quality. Under a federal agreement for CWA enforcement, the EPA and the Corps share clean water responsibilities. The Corps is the lead on the CWA Section 404 Dredge and Fill permit program and the EPA is the lead on other CWA programs.[21] 46 states have undertaken authority for EPA's Section 402 NPDES permit program—EPA manages NPDES permits for Idaho, Massachusetts, New Hampshire and New Mexico.[22] Additionally, all states are responsible for setting water quality standards to protect "waters of the U.S."[23]

"Waters of the U.S." is a term used in CWA—it is the glue that holds the Clean Water Act together. The term is derived from a law that was passed in 1899, the Rivers and Harbors Act, that had to do with interstate commerce—any ship involved in interstate commerce on a "navigable water," which, at the time, was a lake, river, ocean—was required to have a license for trading.

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[20] Letter from Dr. David T. Allen, Chair, Science Advisory Bdd & Amanda D. Rodewald, Chair, Science Advisory Bd. Panel for the Review of the EPA Water Body Connectivity Report to Gina McCarthy, Adm'r, EPA, SAB Review of the Draft EPA Report Connectivity of Streams & Wetlands to Downstream Waters: A Review and Synthesis of the Sci. Evidence (October 17, 2014).

[21] Memorandum of Agreement Between the Dep't of the Army & the Envtl. Prot. Agency Concerning the Determination of the Section 404 Program & the Applications of Exemptions Under Section(F) of the Clean Water Act, 1989.

[22] Cong. Research Service, Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia, at 4.

[23] *Id.*

The 1972 Clean Water Act first linked the term "navigable waters" with "waters of the U.S." in order to define the scope of the CWA. The premise of the 1972 CWA was that all pollutants discharged to a navigable water of the U.S. were prohibited, unless authorized by permit.

In the realm of the CWA's Section 404 permit program, the courts have generally said that "navigable waters" goes beyond traditionally navigable-in-fact waters. However, the courts also acknowledge there is a limit to jurisdiction. What that limit is within Section 404 has yet to be determined and is constantly being litigated.

In 2001, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers,* the Corps had used the "Migratory Bird Rule"—wherever a migratory bird could land—to claim federal jurisdiction over an isolated wetland. [24] In SWANCC, Court ruled that the Corps exceeded their authority and infringed on states' water and land rights.[25]

In 2006, in *Rapanos v. United States*, the Corps were challenged over their intent to regulate isolated wetlands under the CWA Section 404 permit program.[26] In a 4-1-4 split decision, the Court ruled that the Corps exceeded their authority to regulate these isolated wetlands. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a "significant nexus" with a navigable water, either alone or with other similarly situated sites.[27] Since neither opinion was a majority opinion, it is unclear which opinion should be used in the field to assert jurisdiction, leading to further confusion over what waters are federally regulated under CWA.

Potential Negative Effects on All CWA Programs

There is only one definition of "waters of the U.S." within the CWA which must be applied consistently for all CWA programs that use the term "waters of the U.S." While Congress defined "navigable waters" in CWA section 502(7) to mean "the waters of the United States, including the territorial seas," the Courts have generally assumed that "navigable waters of the U.S." go beyond traditional navigable-in-fact waters such as rivers. However, the Courts also acknowledge there is a limit to federal jurisdiction.

Previous Corps guidance documents on "waters of the U.S." clarifications have been strictly limited to the Section 404 permit program. A change to the "waters of the U.S." definition though, has implications for ALL CWA programs. This modification goes well beyond solely addressing the problems within the Section 404 permit program. These effects have not been fully studied nor analyzed.

Changes to the "waters of the U.S." definition within the CWA will have far-reaching effects and unintended consequences to a number of state and local CWA programs. As stated before, the proposed economic analysis needs to be further fleshed out to recognize all waters that will be jurisdictional, beyond the current data of Section 404 permit applications. CWA programs, such as the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, or Spill Prevention, Control and Countermeasure (SPCC) programs, will be impacted.

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[24] 531 U.S. 159, 174 (2001).

[25] *Id.*

[26] 547 U.S. 715, 729 (2006).

[27] *Id.*

Key Definitions are Undefined

The proposed rule extends the "waters of the U.S." definition by utilizing new terms—"tributary," "uplands," "significant nexus," "adjacency," "riparian areas," "floodplains" and "neighboring"—that will be used to claim jurisdiction more broadly. All of these terms will broaden the types of public infrastructure that is considered jurisdictional under the CWA.

"Tributary"—The proposed rule states that a tributary is defined as a water feature with a bed, bank, ordinary high water mark (OHWM), which contributes flow, directly or indirectly, to a "water of the U.S." A tributary does not lose its status if there are man-made breaks (bridges, culverts, pipes or dams) or natural breaks upstream of the break. The proposed rule goes on to state that **"A tributary...includes rivers, streams, lakes, ponds, impoundments, canals, and ditches..."**[28]

For counties that own and manage public safety infrastructure, the potential implication is that roadside ditches will be treated the same as rivers and streams, while the functions and purposes of both are significantly different. Public safety ditches should not be classified as tributaries. Further fleshing out the exemptions for certain types of ditches, which is discussed later in the letter, would be beneficial.

"Uplands"—The proposed rule recommends that "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" are exempt, however, the term "uplands" is undefined.[29] This is problematic. County public safety ditch systems—roadside, flood, drainage, stormwater—can be complex. While they are generally dug in dry areas, they run through a transitional area before eventually connecting to "waters of the U.S." It is important to define the term "uplands" to ensure the exemption is workable.

"Significant Nexus"—The proposed rule states that "a particular category of waters either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable or interstate waters."[30]

This definition uses the watershed approach to determine jurisdiction—a watershed is an area of land where all of the rivers, streams, and other water features drain to the same place. According to the EPA, "Watersheds come in all shapes and sizes. They cross county, state, and national boundaries. In the continental U.S., there are 2,110 watersheds, including Hawaii, Alaska, and Puerto Rico, there are 2,267 watersheds."[31]

There are very few parts of the country that are not in a watershed. This definition would create burdens on local governments who maintain public safety ditches and infrastructure near natural waterbodies; this infrastructure could be considered jurisdictional under the "significant nexus" definition.

"Adjacent Waters"— Under current regulation, only those wetlands that are adjacent to a "waters of the U.S." are considered jurisdictional. However, the proposed regulate broadens the regulatory reach to "adjacent waters," rather than just to "adjacent wetlands." This would extend jurisdiction to "all waters," not just "adjacent wetlands." The proposed rule defines "adjacent as "bordering, contiguous or neighboring."[32]

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[28] 79 Fed. Reg. 22199.

[29] *Id.*

[30] *Id.*

[31] U.S. Envtl. Prot. Agency, "What is a Watershed?,"*available at* http://water.epa.gov/type/watersheds/whatis.cfm.

[32] 79 Fed. Reg. 22199.

Under the rule, adjacent waters include those located in riparian or floodplain areas.[33]

Expanding the definition of "adjacency," will have unintended consequences for many local governments. Stormwater and floodwater infrastructure and facilities are often located in low-lying areas, which may be considered jurisdictional under the new definition. Since communities are highly dependent on these structures for public safety, we would encourage the agencies to assess the unintended consequences.

"Riparian Areas"—The proposed rule defines "riparian area" as "an area bordering a water where the surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." Riparian areas are transitional areas between dry and wet areas.[34] Concerns have been raised that there are very few areas within the U.S. that would not meet this definition, especially if a riparian area boundary remains undefined.

"Floodplains"—The proposed definition states that floodplains are defined as areas with "moderate to high water flows."[35] These areas would be considered "water of the U.S." even without a significant nexus. Under the proposed rule, does this mean that any area, that has the capacity to flood, would be considered to be in a "floodplain?"

Further, it is major problem for counties that the term "floodplain" is not tied to, or consistent with, the generally accepted and understood definition used by the Federal Emergency Management Agency (FEMA). Notwithstanding potential conflicts with other Federal agencies, the multiple federal definitions could create challenges in local land use planning, especially if floodplain designations are classified differently by various agencies.

Aside from potential conflicts between Federal agencies, this would be very confusing to landowners and complicated to integrate at the local level. These definitions could create conflict within local floodplain ordinances, which were crafted to be consistent with FEMA National Flood Insurance Program (NFIP) rules. It is essential that floodplain definitions be consistent between and among all Federal agencies.

"Neighboring"—"Neighboring" is a term used to identify those adjacent waters with a significant nexus. The term "neighboring" is used with the terms riparian areas and floodplains to define the lateral reach of the term neighboring. [36] Using the term "neighboring," without limiting qualifiers, has the potential to broaden the reach of the CWA. No one county is alike, nor are the hydrologic and geological conditions across the U.S. Due to these unique challenges, it is often difficult to craft a one-size-fits-all regulatory approach without considering regional or local differences. Moreover, there could be a wide range of these types of differences within one state or region.

Recommendations:

- **Redraft definitions to ensure they are clear, concise and easy to understand**
- **Where appropriate, the terms used within the proposed rule should be defined consistently and uniformly across all federal agencies**

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

- **Create a national map that clearly shows which waters and their tributaries are considered jurisdictional**

The Section 404 Permit Program is Time-Consuming and Expensive for Counties

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. Over the years, numerous local governments and public agencies have expressed concerns that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under Section 404 has significant financial implications for local governments and public agencies.

In recent years, certain Corps districts have inconsistently found public safety ditches jurisdictional, both for construction and maintenance activities. Once a ditch falls under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined.

Based on our counties' experiences, while the jurisdictional determination process may create delays, lengthy and resource intensive delays also occur AFTER federal jurisdiction is claimed. Once jurisdictional, the project triggers application of other federal laws like environmental impact statements, National Environment Policy Act (NEPA) and the Endangered Species Act (ESA). These impacts involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense. There also may be special conditions attached to the permit for maintenance activities. These specific required conditions result in a lengthy negotiation process with counties. A number of California counties have communicated this process can easily take easily three or more years, with costs in the millions for one project.

One Midwest county studied five road projects that were delayed over the period of two years. Conservatively, the cost to the county for the delays was $500,000. Some counties have missed building seasons waiting for federal permits. These are real world examples, going on now, for many our counties. They are not hypothetical, "what if" situations. These are actual experiences from actual counties. The concern is, if more public safety ditches are considered jurisdictional, more counties will face similar problems.

Counties are liable for ensuring their public safety ditches are maintained and there have been cases where counties have been sued for not maintaining their ditches. In 2002, in *Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a flood control channel that failed due to overgrowth of vegetation. Counties are legally responsible for public safety infrastructure, regardless of whether or not the federal agencies approve permits in a timely manner.

It is imperative that the Section 404 permitting process be streamlined. Delays in the permitting process have resulted in flooding of constituent and business properties. This puts our nation's counties in a precarious position—especially those who are balancing small budgets against public health and environmental protection needs.

The bottom line is, county ditch systems can be complex. They can run for hundreds of miles continuously. By their very nature, they drain directly (or indirectly) into rivers, lakes, streams and eventually the ocean. At a time when local governments throughout the nation are only starting to experience the beginnings of economic recovery,

proposing far reaching changes to CWA's "waters of the U.S." definition seems to be a very precarious endeavor and one which should be weighed carefully knowing the potential implications.

County Experiences with the Section 404 Permit Process

During discussions on the proposed "waters of the U.S." definition change, the EPA asked NACo to provide several known examples of problems that have occurred in Section 404 jurisdictional determinations, resulting in time delays and additional expenses. These examples have been provided to the agencies.

One Midwest county received Federal Highway Authority funding to replace two old county bridge structures. The Corps determined that because the project would impact 300 feet of a roadside ditch, the county would have to go through the individual permit process. The county disagreed with the determination but decided to acquiesce to the Corps rather than risk further delay and the withdrawal of federal funding. The cost associated with going through the Corps process required the county to significantly scale back its intended project in order to stay on time and budget. Ultimately, the project's completion was still delayed by several months.

The delay that can result from regulating local drainage features is evidenced by another Midwestern county that wanted to conduct a storm water improvement project to address local flooding concerns. The project entailed adding a second structure to a concrete box culvert and replacing a corrugated metal culvert. These structures were deemed jurisdictional by the Corps because they had a "bank on each side" and had an "ordinary high water mark. Thus, the county was forced to go through the individual permit process.

The delay associated with going through the federal permit process nearly caused the county to miss deadlines that would have resulted in the forfeiture of its grant funds. Moreover, because the project was intended to address flooding concerns, the delay in its completion resulted in the flooding of several homes during heavy rains. The county was also required to pay tens of thousands in mitigation costs associated with the impacts to the concrete and metal structures. Ultimately, no changes were recommended by the Corps to the project, and thus, no additional environmental protection was provided by going through the federal process.

Based on Current Practices—How the Exemption Provisions May Impact Counties

While the proposed rule offers several exemptions to the "waters of the U.S." definition, the exclusions are vague and imprecise, and may broaden jurisdiction in a number of areas. Specifically, we are concerned about the exemptions on ditches and wastewater treatment systems.

"Ditches"— The proposed rule contains language to exempt certain types of ditches: 1) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and 2) Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.[37]

For a ditch to be exempt, it must be excavated and drain only to a dry area and be wet less than 365 days a year. This is immediately problematic for counties. County ditches are not dug solely in dry areas, because they are designed to drain overflow waters to "waters of the U.S."

Counties own and manage different types of public safety ditches—roadside, drainage, flood control, stormwater—that protect the public from flooding. They can run continuously for hundreds, if not thousands, of miles throughout

[37] *Id.*

the county. Very few county ditches just abruptly end in a field or a pond. Public safety ditches are generally dug in dry areas, run through a transition area, before connecting directly or indirectly to a "water of the U.S."

Under the proposed rule, if dry ditches eventually connect, directly or indirectly, to a "water of the U.S.," will the length of the ditch be considered jurisdictional waters? Or will portions of a dry ditch be considered exempt, even though the ditch's physical structure interconnects with a jurisdictional river or stream?

The exclusion also states that ditches that do not "contribute to flow," directly or indirectly to "waters of the U.S.," will be exempt. The definition is problematic because to take advantage of the exemption, ditches must demonstrate "no flow" to a river, stream, lake or ocean. Most ditches, by their nature, have some sort of flow in rain events, even if those ditches are dry most of the year. **Since the proposed rule indicates that perennial, intermittent or ephemeral flows could be jurisdictional, the agencies need to further explain this exclusion.[38] Otherwise, there will be no difference between a stream and a publicly-owned ditch that protects public safety.**

The agencies have reiterated that the proposed rule leaves in place the current exemption on ditch maintenance activities.[39] EPA has indicated this exemption is automatic and that counties do not have to apply for the exemption if they are performing maintenance activities on ditches. **However, in practice, our counties have reported the exemption is inconsistently applied by Corps districts across the nation. Over the past decade, a number of counties have been required to obtain special Section 404 permits for ditch maintenance activities.**

These permits often come with tight special conditions that dictate when and how the county is permitted to clean out the relevant ditch. For example, one California county has a maintenance permit for an earthen stormwater ditch. They are only permitted to clear grass and debris from the ditch six months out of the year due to ESA impacts. This, in turn, has led to multiple floodings of private property and upset citizens. In the past several years, we've heard from a number of non-California counties who tell us they must get Section 404 permits for ditch maintenance activities.

Some Corps districts give a blanket exemption for maintenance activities. In other districts, the ditch maintenance exemption is very difficult to obtain, with narrow conditions governing the types maintenance activities that are considered exempt. Additionally, a number of Corps districts are using the "recapture provision" to override the exemption.[40] Under the "recapture clause," previously exempt ditches are "recaptured," and must comply for the Section 404 permitting process for maintenance activities.[41] Additionally, Corps districts may require documentation to original specifications of the ditch showing original scope, measurements, etc.[42] Many of these ditches were hand-dug decades ago and historical documentation of this type does not exist.

Other districts require entities to include additional data as part of their request for an exemption. One Florida county applied for 18 exemptions at a cost of $600,000 (as part of the exemption request process, the entity must provide data and surveying materials), three months later, only two exemptions were granted and the

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[38] 79 Fed. Reg. 22202.

[39] See, 33 CFR 232.4(a)(3) & 40 CFR 202.3(c)(3).

[40] U.S. Army Corps of Eng'r, Regulatory Guidance Letter: Exemption for Construction or Maintenance of Irrigation Ditches & Maint. of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007).

[41] *Id.*

[42] *Id.* at 4.

county was still waiting for the other 16 to be granted. At that point, the county was moving into its seasonal rainy season and fielding calls from residents who were concerned about flooding from the ditches.

This is what is happening to counties now. If the approval process for ditch maintenance exemptions is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety ditches.

It is the responsibility of local governments to ensure the long-term operation and protection of public safety infrastructure. **The federal government must address problems within the current CWA Section 404 regulatory framework, to ensure that maintenance activities on public safety infrastructure do not require federal approval. Without significantly addressing these problems, the federal agencies will hinder the ability of local governments to protect their citizens.**

Recommendations:

- **Exclude ditches and infrastructure intended for public safety**
- **Streamline the current Section 404 permitting process to address the delays and inconsistencies that exist within the existing decision-making process**
- **Provide a clear-cut, national exemption for routine ditch maintenance activities**

"Waste Treatment Systems"—Water treatment refers to the process of taking waste water and making it suitable to discharge back to the environment. The term "waste treatment" can be confusing because it is often linked to wastewater or sewage treatment. However, this can also include water runoff from landscape irrigation, flushing hydrants, stormwater runoff from roads, parking lots and rooftops.

The proposal states that "waste treatment systems,"—including treatment ponds or lagoons, designed to meet the requirements of the CWA—are exempt.[43] In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from CWA, but due to the broad nature of the proposed rule, we believe the agencies should also exempt other constructed wetland and treatment facilities which may be included under the proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, setting basins, ponds, artificially constructed wetlands (i.e. green infrastructure) and artificially constructed groundwater recharge basins.

It is important that all constructed features built for the purpose of water quality treatment or runoff control be exempt, whether or not it was built for CWA compliance. Otherwise, this sets off a chain reaction and discourages further investment which will ultimately hurt the goals of the CWA.

Recommendations:

- **The proposed rule should expand the exemption for waste treatment systems if they are designed to meet *any* water quality requirements, not just the requirements of the CWA**

[43] 79 Fed. Reg. 22199.

Counties Need Clarity on Stormwater Management and Green Infrastructure Programs

Under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities which discharge pollutants from any point source into "waters of the U.S." are required to obtain a permit; this includes localities with a Municipal Separate Storm Sewer System (MS4). An MS4 is defined as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" owned by a state, tribal, local or other public body, which discharge into "waters of the U.S."[44] They are designed to collect and treat stormwater runoff.

Since stormwater management activities are not explicitly exempt under the proposed rule, NACo is concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S."

In various conference calls and meetings over the past several months, the agencies have stressed that municipal MS4s will not be regulated as "waters of the U.S." However, EPA has indicated that there could be "waters of the U.S." designations within a MS4 system, especially if a natural stream is channelized within a MS4. This means an MS4 could potential have a "water of the U.S." within its borders, which would be difficult for local governments to regulate.

MS4s are subject to the CWA and are regulated under Section 402 for the treatment of water. However, treatment of water is not allowed in "waters of the U.S." This automatically sets up a conflict if an MS4 contains "waters of the U.S." Would water treatment be allowed in the "waters of the U.S." portion of the MS4, even though it's disallowed under current law? Additionally, if MS4s contained jurisdictional waters, they would be subject to a different level of regulation, requiring all discharges into the stormwater system to be regulated along with regulating discharges from a NPDES system.

The definitional changes could easily be interpreted to include the whole MS4 system or portions thereof which would be a significant change over current practices. It would also potentially change the discharge point of the MS4, and therefore the point of regulation. Not only would MS4 permit holders be regulated when the water leaves the MS4, but also when a pollutant enters the MS4. Since states are responsible for water quality standards of "waters of the U.S." within the state, this may trigger a state's oversight of water quality designations within an MS4. **Counties and other MS4 permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new "waters of the U.S." meet designated water quality standards.**

This would be problematic and extremely expensive for local governments to comply with these requirements. Stormwater management is often not funded as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, health, etc. Our county members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a "water of the U.S.," they may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

[44] 40 CFR 122.26(b)(8).

EPA has indicated these problems could be resolved if localities and other entities create "well-crafted" MS4 permits. In our experience, writing a well-crafted permit is not enough—localities are experiencing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. A number of Maryland counties have been sued over the scope and sufficiency of their approved MS4 permits.

In addition, green infrastructure, which includes existing regional stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.

While jurisdictional oversight of these "waters" would occur at the federal level, actual water quality regulation would occur at the state and local levels, becoming an additional unfunded mandate on our counties and agencies.

Recommendations:

- **Explicitly exempt MS4s and green infrastructure from "waters of the U.S." jurisdiction**

States Responsibilities Under CWA Will Increase

While the EPA and the Corps have primary responsibility for water quality programs, everyday CWA implementation is shared with the states and local governments.[45] Under the CWA, states are required to identify polluted waters (also known as impaired waters) and set Water Quality Standards (WQS) for them. State WQS are intended to protect jurisdictional "waters of the U.S.," such as rivers, lakes and streams, within a state. As part of the WQS process, states must set designated uses for the waterbody (e.g. recreation, drinkable, fishable) and institute Total Maximum Daily Loads (TMDL) for impaired waters.

Currently, WQS regulation focuses on waters regulated under federal law, however, NACo is concerned the proposed rule may broaden the types of waters considered jurisdictional. This means the states will have to regulate more waters under their WQS and TMDL standards. This would be extremely costly for both the states and localities to implement.

In EPA's and the Corps economic analysis, it states the proposed rule "may increase the coverage where a state would...apply its monitoring resources...It is not clear that additional cost burdens for TMDL development would result from this action."[46] The data used to come to this conclusion is inconclusive. As discussed earlier, the agencies used data from 2009-2010 field practices for the Section 404 program as a basis for the economic analysis. This data is only partially relevant for the CWA Section 404 permit program, it is not easily interchangeable for other CWA programs.

Because of vague definitions used in the proposed rule, it is likely that more waters within a state will be designated as "waters of the U.S." As the list of "waters of the U.S." expand, so do state responsibilities for

[45] Cong. Research Serv., Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia.

[46] Econ. Analysis of Proposed Revised Definition of Waters of the United States, U.S. Envtl. Prot. Agency (EPA) & U.S. Army Corps of Eng'r (Corps), (March 2014) at 6-7.

WQS and TMDLS. The effects on state nonpoint-source control programs are difficult to determine, but they could be equally dramatic, without a significant funding source to pay for the proposed changes.

Recommendation:

- **NACo recommends that the federal agencies consult with the states to determine more accurate costs and implications for the WQS and TMDL programs**

County Infrastructure on Tribal Lands May Be Jurisdictional

The proposed rule reiterates long-standing policy which says that any water that that crosses over interstate lines—for example if a ditch crosses the boundary line between two states—falls under federal jurisdiction. But, this raises a larger question. If a ditch runs across Native American land, which is considered sovereign land, is the ditch then considered an "interstate" ditch?

Many of our counties own and maintain public safety infrastructure that runs on and through Native American tribal lands. Since these tribes are sovereign nations with self-determining governments, questions have been raised on whether county infrastructure on tribal land triggers federal oversight.

As of May 2013, 566 Native American tribes are legal recognized by the Bureau of Indian Affairs (BIA).[47] Approximately 56.2 million acres of land is held in trust for the tribes[48] and it is often separate plots of land rather than a solidly held parcel. While Native American tribes may oversee tribal roads and infrastructure on tribal lands, counties may also own and manage roads on tribal lands.

A number of Native American tribes are in rural counties—this creates a patchwork of Native American tribal, private and public lands. Classifying these ditches and infrastructure as interstate will require counties to go through the Section 404 permit process for any construction and maintenance projects, which could be expensive and time-consuming.

NACo has asked the federal agencies to clarify their position on whether local government ditches and infrastructure on tribal lands are currently regulated under CWA programs, including how they will be regulated under the final rule.

Recommendation:

- **We request clarification from the federal agencies on whether ditches and other infrastructure that cross tribal lands are jurisdictional under the "interstate" definition**

Endangered Species Act as it Relates to the Proposed Rule

NACo is concerned that provisions of the proposed rule may interact with provisions of the Endangered Species Act (ESA) and its implementing regulations in ways that may produce unintended negative outcomes.

For instance, when a species is proposed for listing as endangered or threatened under ESA, large swaths of land may be designated as critical habitat, that is essential to the species' protection and recovery. Critical

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[47] U.S. Dept. of the Interior, Indian Affairs, *What We Do, available at http://www.bia.gov/WhatWeDo/index.htm*.

[48] *Id.*

habitat requires special management and conservation, which can have enormous economic impacts on county governments and private landowners.

This effect is intensified when the Section 404 permit program is triggered. Section 7 consultation under the ESA could be required, which can be time-consuming and expensive, especially for public safety projects. Some counties are already reporting strict ESA requirements on maintenance of public safety ditches.

To further compound the issue, the vague terms used in the proposed rule such as "floodplains," may also trigger ESA compliance. In recent years, the Federal Emergency Management Agency (FEMA) has been sued for not considering the habitat needs of threatened and endangered species in National Flood Insurance Program (NFIP) floodplain designations. Local governments in certain states, who participate in the NFIP, must now certify they will address ESA critical habitat issues in floodplain areas. **This litigation-driven approach circumvents local land use planning authority and creates an atmosphere of mistrust rather than providing incentives to counties and private landowners to actively engage in endangered species conservation.**

If the agencies plan to use broad definitions within the proposed rule, regulation by litigation would seem to be an increasingly likely outcome. These issues need to be carefully considered by the agencies.

Ensuring that Local Governments Are Able to Quickly Recover from Disasters

In our nation's history, our citizens have experienced both manmade and natural disasters. Counties are the initial line of defense, the first responders in protection of its residents and businesses. Since local governments are responsible for much of what constitutes a community—roads and bridges, water and sewer systems, courts and jails, healthcare, parks, and more—it is important that local governments quickly recover after disasters. This includes removing wreckage and trash from ditches and other infrastructure that are considered jurisdictional.[49]

Counties in the Gulf Coast states and the mid-west have reported challenges in receiving emergency waivers for debris in ditches designated as "waters of the U.S." after natural and manmade disasters. This, in turn, damages habitat and endangers public health. NACo would urge the EPA and the Corps to revisit that policy, especially if more waters are classified as "waters of the U.S."

Conclusion

We appreciate the opportunity to be a part of this process. NACo acknowledges the efforts taken by both EPA and the Corps to conduct outreach on the proposed rule. This is a priority issue for our nation's counties who are responsible for environmental protection and public safety.

As stated earlier, we believe that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this proposal. This is problematic because counties are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches. Furthermore, the unknown impacts on other CWA programs are equally problematic, the degree and cost of regulation will increase dramatically if these features are redefined as "waters of the U.S." **We urge you to withdraw the rule until further study on the potential impacts are addressed.**

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[49] Disaster Mitigation: Reducing Costs & Saving Lives: Hearing before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt., H. Comm. on Transp. & Infrastructure, 113th Cong. (2014) (statement of Linda Langston, President, Nat'l Ass'n of Counties).

We look forward to working together with our federal partners, as our founding fathers intended, to protect our nation's water resources for generations to come. If you have any questions, please feel free to contact Julie Ufner, NACo's Associate Legislative Director at Jufner@naco.org or 202.942.4269.

Sincerely,

Matthew D. Chase
Executive Director
National Association of Counties

November 14, 2014

Ms. Donna Downing
Jurisdiction Team Leader, Wetlands Division
U.S. Environmental Protection Agency
Water Docket, Room 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Ms. Stacey Jensen
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

RE: Proposed Rule on "Definition of "Waters of the United States" Under the Clean Water Act," Docket No. EPA-HQ-OW-2011-0880

Dear Ms. Downing and Ms. Jensen:

On behalf of the nation's mayors, cities, counties, regional governments and agencies, we appreciate the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rule on *"Definition of "Waters of the United States" Under the Clean Water Act."* We thank the agencies for educating our members on the proposal and for extending the public comment period in order to give our members additional time to analyze the proposal. We thank the agencies in advance for continued opportunities to discuss these, and other, important issues.

The health, well-being and safety of our citizens and communities are top priorities for us. To that end, it is important that federal, state and local governments all work together to craft reasonable and practicable rules and regulations. As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast impact that a change to the definition of "waters of the U.S." will have on all aspects of the Clean Water Act (CWA). That is why several of our organizations and other state and local government partners asked for a transparent and straight-forward rulemaking process, inclusive of a federalism consultation process, rather than having changes of such a complex nature instituted though a guidance document alone.

As described below, we have a number of overarching concerns with the rulemaking process, as well as specific concerns regarding the proposed rule. In light of both, we have the following requests:

1. We strongly urge EPA and the Corps to modify the proposed rule by addressing our concerns and incorporating our suggestions to provide greater certainty and clarity for local governments; and
2. We ask that EPA and the Corps issue a revised proposed rule with an additional comment period, so that we can be certain these concerns are adequately addressed; or
3. Alternatively, if an additional comment period is not granted, we respectfully call for the withdrawal of this proposed rule and ask the agencies to resubmit a proposed rule at a later date that addresses our concerns.

Overarching Concerns with the Rulemaking Process

While we appreciate the willingness of EPA and the Corps to engage state and local government organizations in a voluntary consultation process prior to the proposed rule's publication, we remain concerned that the direct and indirect impacts of the proposed rule on state and local governments have not been thoroughly examined because three key opportunities that would have provided a greater understanding of these impacts were missed:

1. Additional analysis under the Regulatory Flexibility Act, which examines economic impacts on small entities, including cities and counties;
2. State and local government consultation under Executive Order 13132: Federalism, which allows state and local governments to weigh in on draft rules before they are developed or publicly proposed in order to address intergovernmental concerns; and
3. The agencies' economic analysis of the proposed rule, which did not thoroughly examine impacts beyond the CWA 404 permit program and relied on incomplete and inadequate data.

Additionally, we believe there needs to be an opportunity for intergovernmental state and local partners to thoroughly read the yet-to-be-released final connectivity report, synthesize the information, and incorporate those suggestions into their public comments on the proposed rule. These missed opportunities and our concerns regarding the connectivity report are discussed in greater detail below.

1. The **Regulatory Flexibility Act (RFA)** requires federal agencies that promulgate rules to consider the impact of their proposed rule on small entities, which under the definition includes cities, counties, school districts, and special districts of less than 50,000 people. RFA, as amended by the Small Business Regulatory Enforcement Fairness Act, requires agencies to make available, at the time the proposed rule is published, an initial regulatory flexibility analysis on how the proposed rule impacts these small entities. The analysis must certify that the rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). The RFA SISNOSE process allows federal agencies to identify areas where the proposed rule may economically impact a significant number of small entities and consider regulatory alternatives that will lessen the burden on these entities. The RFA process was not undertaken for this rule.

Based on analysis by our cities and counties, the proposed rule will have a significant impact on all local governments, but on small communities particularly. Most of our nation's cities and counties—more than 18,000 cities and 2,000 counties—have populations less than 50,000. The RFA SISNOSE analysis would be of significant value to these governments.

2. **Executive Order 13132: Federalism** requires federal agencies to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that a change in the definition of "waters of the U.S." imposes only indirect costs, the agencies state that the proposed rule does not trigger Federalism considerations. We wholeheartedly disagree with this conclusion and are convinced there will be both direct and indirect costs for implementation.

Additionally, while EPA initiated a Federalism consultation for its state and local partners in 2011, the process was prematurely shortened. In the 17 months between the initial Federalism consultation and the publication of the proposed rule, the agencies changed directions several times (regulation versus guidance). In those intervening 17 months between the consultation and the publication of the proposed rule, the agencies failed to continue substantial discussions, thereby not fulfilling the intent of Executive Order 13132.

3. The ***Economic Analysis of Proposed Revised Definition of Waters of the U.S.*** is flawed because it does not include a full analysis of the proposed rule's impact on all CWA programs beyond the 404 program (including the National Pollutant Discharge Elimination System (NPDES), total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process, and Spill Prevention, Control and Countermeasure (SPCC) programs). Since a number of these CWA programs directly affect state and local governments, it is imperative the analysis provide a more comprehensive review of the actual costs and consequences of the proposed rule on these programs.

Moreover, we remain concerned that the data used in the analysis is insufficient. The economic analysis used 2009-2010 data of Section 404 permit applications as a basis for examining the impacts of the proposed rule on all CWA programs. It is insufficient to compare data from the Section 404 permit program and speculate to the potential impacts to other CWA programs. Additionally, 2009-2010 was at the height of the recession when development (and other types of projects) was at an all-time low. The poor sample period and limited data creates uncertainty in the analysis's conclusions.

In addition to the missed opportunities, we are concerned about the timing of the yet-to-be-finalized *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* report, which will serve as the scientific basis for the proposed rule. In mid-October, EPA's Science Advisory Board (SAB), which was tasked with reviewing the document, sent a letter with detailed recommendations on how to modify the report. The SAB raised important questions about the scope of connectivity in their recommendations, which will need to be addressed prior to finalizing the report. We recommend EPA and the Corps pause this rulemaking effort until after the connectivity report is finalized to allow the public an opportunity to comment on the proposed rule in relation to the final report.

In a November 8, 2013 letter from the U.S. Conference of Mayors, National League of Cities and National Association of Counties to the Office and Management and Budget Administrator, we highlight the various correspondences our associations have submitted since 2011 as part of the guidance and rulemaking consideration process. (See attached.) We share this with you to demonstrate that we have been consistent in our request for a federalism consultation, concerns regarding the cost-benefit analysis, and concerns about the process and scope of the rulemaking. With these comments, we renew those requests.

Requests:

- Conduct an analysis to examine if the proposed rule imposes a significant economic impact on a substantial number of small entities per the Regulatory Flexibility Act.
- Initiate a formal state and local government federalism consultation process per Executive Order 13132: Federalism to address local government concerns and issues of clarity and certainty.
- Perform a thorough economic analysis inclusive of an examination of impacts of the proposed rule on all CWA programs using deeper and more relevant data. We urge the agencies to interact with issue-specific national associations to collect these data sets.
- Reopen the comment period for the proposed rule once the connectivity report is finalized for a minimum of 60 days.

Specific Concerns Regarding the Proposed Rule

As currently drafted, there are many examples where the language of the proposed rule is ambiguous and would create more confusion, not less, for local governments and ultimately for agency field staff responsible for making jurisdictional determinations. Overall, this lack of clarity and uncertainty within the language opens the door unfairly to litigation and citizen suits against local governments. To avoid such scenarios, setting a clear definition and understanding of what constitutes a "waters of the U.S." is critical. We urge you to consider the following concerns and recommendations in any future proposed rule or final rule.

Key Definitions

Key terms used in the proposed rule such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring" will be used to define what waters are jurisdictional under the proposed rule. However, since these terms are either broadly defined, or not defined at all, this will lead to further confusion over what waters fall under federal jurisdiction, not less as the proposed rule aims to accomplish. The lack of clarity will lead to unnecessary project delays, added costs to local governments and inconsistency across the country.

Request:

- Provide more specificity for proposed definitions such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," "neighboring," and other such words that could be subject to different interpretations.

Public Safety Ditches

While EPA and the Corps have publically stated the proposed rule will not increase jurisdiction over ditches, based on current regulatory practices and the vague definitions in the proposed rule, we remain concerned.

Under the current regulatory program, ditches are regulated under CWA Section 404, both for construction and maintenance activities. There are a number of challenges under the current program that would be worsened by the proposed rule. For example, across the country, public safety ditches, both wet and dry, are being regulated under Section 404. While an exemption exists for ditch maintenance, Corps districts inconsistently apply it nationally. In some areas, local governments

have a clear exemption, but in other areas, local governments must apply for a ditch maintenance exemption permit and provide surveys and data as part of the maintenance exemption request.

Beyond the inconsistency, many local governments have expressed concerns that the Section 404 permit process is time-consuming, cumbersome and expensive. Local governments are responsible for public safety; they own and manage a wide variety of public safety ditches—road, drainage, stormwater conveyances and others—that are used to funnel water away from low-lying areas to prevent accidents and flooding of homes and businesses. Ultimately, a local government is liable for maintaining the integrity of their ditches, even if federal permits are not approved by the federal agencies in a timely manner. In *Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey, California liable for not maintaining a levee that failed due to overgrowth of vegetation.

The proposed rule does little to resolve the issues of uncertainty and inconsistency with the current exemption language or the amount of time, energy and money that is involved in obtaining a Section 404 permit or an exemption for a public safety ditch. The exemption for ditches in the proposed rule is so narrowly drawn that any city or county would be hard-pressed to claim the exemption. It is hard—if not impossible—to prove that a ditch is excavated wholly in uplands, drains only uplands and has less than perennial flow.

Request:

- Provide a specific exemption for public safety ditches from the "waters of the U.S." definition.

Stormwater Permits and MS4s

Under the NPDES program, all facilities which discharge pollutants from any point source into a "waters of the U.S." are required to obtain a permit, including local governments with Municipal Separate Storm Sewer Systems (MS4s). Some cities and counties own MS4 infrastructure that flow into a "waters of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program. These waters, however, are not treated as jurisdictional waters since the nature of stormwater makes it impossible to regulate these features.

It is this distinction that creates a conflict between the stormwater program and the definition of "waters of the U.S." in the proposed rule and opens the door to citizen suits. Water conveyances including but not limited to MS4s that are purposed for and servicing public use are essentially a series of open ditches, channels and pipes designed to funnel or to treat stormwater runoff before it enters into a "waters of U.S." However, under the proposed rule, these systems could meet the definition of a "tributary," and thus be jurisdictional as a "waters of the U.S." The language in the proposed rule must be clarified because a water conveyance cannot both treat water and prevent untreated water from entering the system.

Additionally, waterbodies that are considered a "waters of the U.S." are subject to state water quality standards and total maximum daily loads, which are inappropriate for this purpose. Applying water quality standards and total maximum daily loads to stormwater systems would mean that not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. This, again, creates a conflict between the stormwater program and the definition of "waters of the U.S." in the proposed rule.

Request:

- Provide a specific exemption for water conveyances including but not limited to MS4s that are purposed for and servicing public use from the "waters of the U.S." definition.

Waste Treatment Exemption

The proposed rule provides that "waste treatment systems, including treatment ponds or lagoons, *designed to meet the requirements of the Clean Water Act*" (emphasis added) are not "waters of the U.S." In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from the CWA, but due to the broad nature of the proposed rule, we believe the agencies should also exempt other constructed wetland and treatment facilities which may inadvertently fall under the proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, setting basins, ponds, artificially constructed wetlands (i.e. green infrastructure) and artificially constructed groundwater recharge basins. Therefore, we ask the agencies to specifically include green infrastructure techniques and water delivery and reuse facilities under this exemption.

A. Green Infrastructure

With the encouragement of EPA, local governments across the country are utilizing green infrastructure techniques as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. These more beneficial and aesthetically pleasing features, which include existing stormwater treatment systems and low impact development stormwater treatment systems, are not explicitly exempt under the proposed rule. Therefore, these sites could be inadvertently impacted and require Section 404 permits for green infrastructure construction projects if they are determined to be jurisdictional under the new definitions in the proposed rule.

Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. Moreover, if these features are defined as "waters of the U.S.," they would be subject to all other sections of the CWA, including monitoring, attainment of water quality standards, controlling and permitting all discharges in these features, which would be costly and problematic for local governments.

Because of the multiple benefits of green infrastructure and the incentives that EPA and other federal agencies provide for local governments to adopt and construct green infrastructure techniques, it is ill-conceived to hamper local efforts by subjecting them to 404 permits or the other requirements that would come with being considered a "waters of the U.S."

B. Water Delivery and Reuse Facilities

Across the country, and particularly in the arid west, water supply systems depend on open canals to convey water. Under the proposed rule, these canals would be considered "tributaries." Water reuse facilities include ditches, canals and basins, and are often adjacent to jurisdictional waters. These features would also be "waters of the U.S." and as such subject to regulation and management that would not only be unnecessarily costly, but

discourage water reuse entirely. Together, these facilities serve essential purposes in the process of waste treatment and should be exempt under the proposed rule.

Requests:

- Clarify the waste treatment exemption by stating that green infrastructure practices and water delivery and reuse facilities meet the requirements of the exemption.
- Expand the waste treatment exemption to include systems that are designed to meet *any* water quality requirements, not just the requirements of the CWA.
- Provide a specific exemption for green infrastructure and water delivery and reuse facilities from the "waters of the U.S." definition.

NPDES Pesticide Permit Program

Local governments use pesticides and herbicides in public safety infrastructure to control weeds, prevent breeding of mosquitos and other pests, and limit the spread of invasive species. While the permit has general requirements, more stringent monitoring and paperwork requirements are triggered if more than 6,400 acres are impacted in a calendar year. For local governments who have huge swathes of land, the acreage limit can be quickly triggered. The acreage limit also becomes problematic as more waterbodies are designated as a "waters of the U.S."

Additional Considerations

Finally, we would like to offer two additional considerations that would help to resolve any outstanding confusion or disagreement over the breath of the proposed rule and assist local governments in meeting our mutual goals of protecting water resources and ensuring public safety.

Appeals Process

Many of the definitions in the proposed rule are incredibly broad and may lead to further confusion and lawsuits. To lessen confusion, we recommend the agencies implement a transparent and understandable appeals procedure for entities to challenge agency jurisdictional determinations without having to go to court.

Request:

- Institute a straight-forward and transparent process for entities to appeal agency jurisdictional determinations.

Emergency Exemptions

In the past several years, local governments who have experienced natural or man-made disasters have expressed difficulty obtaining emergency clean-up waivers for ditches and other conveyances. This, in turn, endangers public health and safety and jeopardizes habitats. We urge the EPA and the Corps to revisit that policy, especially as more waters are classified as "waters of the U.S." under the proposed rule.

Request:

- Set clear national guidance for quick approval of emergency exemptions.

Conclusion

On behalf of the nation's mayors, cities, counties, regional governments and agencies, we thank you for the opportunity to comment on the proposed rule. Changing the CWA definition of "waters of the U.S." will have far-reaching impacts on our various constituencies.

As local governments and associated agencies, we are charged with protecting the environment and protecting public safety. We play a strong role in CWA implementation and are key partners in its enactment; clean and safe drinking water is essential for our survival. We take these responsibilities seriously.

As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast impact the proposed "waters of the U.S." rule will have on our local communities. We look forward to continuing to work with EPA and the Corps as the regulatory process moves forward.

Sincerely,

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Clarence E. Anthony
Executive Director
National League of Cities

Matthew D. Chase
Executive Director
National Association of Counties

Joanna L. Turner
Executive Director
National Association of
Regional Councils

Brian Roberts
Executive Director
National Association of County
Engineers

Peter B. King
Executive Director
American Public Works
Association

Susan Gilson
Executive Director
National Association of Flood and
Stormwater Management Agencies

November 8, 2013

The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street N.W.
Washington D.C. 20503

RE: EPA's Definition of "Waters of the U.S." Under the Clean Water Act Proposed Rule and Connectivity Report (Docket ID No. EPA-HQ-OA-2013-0582)

Dear Administrator Shelanski:

On behalf of the nation's mayors, cities and counties, we are writing regarding the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rulemaking to change the Clean Water Act definition of "Waters of the U.S." and the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, which EPA indicated will serve as a basis for the rulemaking. We appreciate that EPA and the Corps are moving forward with a rule under the Administrative Procedures Act, as our organizations previously requested, however, we have concerns about the process and the scope of the rulemaking.

Background

In May 2011, EPA and the Corps released Draft Guidance on Identifying Waters Protected by the Clean Water Act (Draft Guidance) to help determine whether a waterway, water body or wetland would be jurisdictional under the Clean Water Act (CWA).

In July 2011, our organizations submitted comments on the Draft Guidance, requesting that EPA and the Corps move forward with a rulemaking process that features an open and transparent means of proposing and establishing regulations and ensures that state, local, and private entity concerns are fully considered and properly addressed. Additionally, our joint comments raised concerns with the fact that the Draft Guidance failed to consider the effects of the proposed changes on all CWA programs beyond the 404 permit program, such as Total Maximum Daily Load (TMDL) and water quality standards programs and the National Pollutant Discharge Elimination System (NPDES) permit program.

In response to these comments, EPA indicated that it would not move forward with the Draft Guidance, but rather a rulemaking pertaining to the "Waters of the U.S." definition. In November 2011, EPA and the Corps initiated a formal federalism consultation process with state and local government organizations. Our organizations submitted comments on the federalism consultation briefing in December 2011. In early 2012, however, EPA changed course, putting the rulemaking on hold and sent a final guidance document to the Office of Management and Budget (OMB) for interagency review. Our organizations submitted a letter to OMB in March 2012 repeating our concerns with the agencies moving forward with a guidance document.

Most recently, in September 2013, EPA and the Corps changed course again and withdrew the Draft Guidance and sent a draft "Waters of the U.S" rule to OMB for review. At the same time, the agencies released a draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.*

Concerns

While we acknowledge the federalism consultation process that EPA and the Corps began in 2011, in light of the time that has passed and the most recent developments in the process toward clarifying the jurisdiction of the CWA, we request that EPA and the Corps hold a briefing for state and local governments groups on the differences between the Draft Guidance and the propose rule that was sent to OMB in September. Additionally, if EPA and the Corps have since completed a full cost analysis of the proposed rule on all CWA programs beyond the 404 permit program, as our organizations requested, we ask for a briefing on these findings.

In addition to our aforementioned concerns, we have a new concern with the sequence and timing of the draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it fits into the proposed "Waters of the U.S." rulemaking process, especially since the document will be used as a basis to claim federal jurisdiction over certain water bodies. By releasing the draft report for public comment at the same time as a proposed rule was sent to OMB for review, we believe EPA and the Corps have missed the opportunity to review any comments or concerns that may be raised on the draft science report actually inform the development of the proposed rule. We ask that OMB remand the proposed rule back to EPA and the Corps and that the agencies refrain from developing a proposed rule until after the agencies have thoroughly reviewed comments on the draft science report.

While you consider our requests for additional briefings on this important rulemaking process and material, we also respectfully request additional time to review the draft science report. We believe that 44 days allotted for review is insufficient given the report's technical nature and potential ramifications on other policy matters.

As partners in protecting America's water resources, it is essential that state and local governments have a clear understanding of the vast affect that a change to the definition of "Waters of the U.S." will have on all aspects of the CWA. We look forward to continuing to work with EPA and the Corps as the regulatory process moves forward.

Sincerely,

Tom Cochran	Clarence E. Anthony	Matt Chase
CEO and Executive Director	Executive Director	Executive Director
The U.S. Conference of Mayors	National League of Cities	National Association of Counties

cc: Gina McCarthy, Administrator, U.S. Environmental Protection Agency
Lt. General Thomas P. Bostick, Commanding General and Chief of Engineers, Army Corps of Engineers

CCI
COLORADO COUNTIES, INC.
Educate · Advocate · Empower

RESOLUTION TO REDEFINE
"WATERS OF THE UNITED STATES" (WOTUS)

WHEREAS, The United States Environmental Protection Agency (USEPA) and the United States Army Corps of Engineers (USACE) of the Federal Government have jointly issued a proposal to redefine "Waters of the United States" (WOTUS); and

WHEREAS, this proposal to redefine WOTUS is also known as the "Proposed Rule on "Definition of 'Waters of the United States' Under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880"; and

WHEREAS, County governments, including Colorado Counties, are responsible for the construction and maintenance of roads, bridges, water quality systems and other infrastructure like roadside ditches, storm water systems, green infrastructure and drinking water facilities; and

WHEREAS, local governments, including Counties, and other local government associated agencies are charged with protecting the environment and protecting public safety; and

WHEREAS, local governments, including Counties, and other local government associated agencies play a strong role in Clean Water Act (CWA) implementation, are key partners in its enactment, and take our responsibilities seriously; and

WHEREAS, NACo supports "common-sense environmental protection" and believes that there is a need for a clear, concise and workable definition for "Waters of the U.S." to reduce confusion and costs within the federal permitting process; and

WHEREAS, NACo has communicated to the USEPA and USACE the importance of the local, state, and federal partnership in crafting practical rules to ensure clean water without impeding counties' fundamental infrastructure and public safety functions; and

WHEREAS, NACo has communicated to USEPA and USACE the essential need for state and local governments to have a clear understanding of the vast impact the federal proposal to redefine WOTUS will have on our local communities; and

WHEREAS, The National Association of Counties (NACo) has voiced serious concerns, has requested more clarity, and has communicated that the federal proposal to redefine WOTUS has had a flawed consultation process with Counties, an incomplete analysis of economic impacts, and falls short of the goal of reducing confusion and costs; and

WHEREAS, expanded federal oversight and increased ambiguity on the definition of WOTUS and/or implementation of regulations would create delays in critical work, drain local budgets, and not have any increased environmental benefit; and

WHEREAS, NACo submitted joint comments in a joint letter dated November 14, 2014 *(attached here as Exhibit A)* to the Federal Registry with the American Public Works Association, National Association of County Engineers, National Association of Flood & Storm water Management Agencies, National Association of Regional Councils, National League of Cities, and the U.S. Conference of Mayors; and

WHEREAS, at least one Colorado County having natural hot springs that have been developed for recreational use at municipal pool complexes, vapor caves, and soaking pools at a number of lodging and recreational establishments, has identified that these natural hot springs whose waters are mineral rich and unaltered from their natural water quality should be exempt from additional water quality regulations imposed by the proposed redefinition of Waters of the U.S.; and

WHEREAS, the Colorado Counties, Inc. (CCI) 2014-2015 policy statement regarding water states, " CCI recognizes adequate supplies of water are critical to the agricultural industry and that water is one of Colorado's most precious natural resources," and " CCI supports efforts to maintain and seek state primacy of federal water quality programs and believes provision of adequate funding to counties is essential to ensure compliance with the federal Clean Water Act".

NOW THEREFORE, BE IT RESOLVED:

CCI adopts the concerns and recommendations expressed in the NACo November 14, 2014 joint letter (Exhibit A) and listed below:

1. We strongly urge USEPA and the USACE to modify the proposed rule by addressing concerns and suggestions below to provide greater certainty and clarity for local governments:

a) Conduct an analysis to examine if the proposed rule imposes a significant economic impact on a substantial number of small entities per the Regulatory Flexibility Act; and

b) Initiate a formal state and local government federalism consultation process per Executive Order 13132: Federalism, which allows state and local governments to weigh in on draft rules before they are developed or publicly proposed in order to address intergovernmental concerns was not performed, so as to address local government concerns and issues of clarity and certainty; and

c) Perform a thorough economic analysis inclusive of an examination of impacts of the proposed rule on all CWA programs using deeper and more relevant data, not just on the CWA 404 program. We urge the agencies to interact with issue-specific national associations to collect these data sets; and

d) Reopen the comment period for the proposed rule once the connectivity report is finalized for a minimum of 60 days; and

e) Provide more specificity for proposed definitions such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," "neighboring," and other such words that could be subject to different interpretations; and

f) Provide a specific exemption for public safety ditches from the "Waters of the U.S." definition; and

g) Provide a specific exemption for water conveyances including but not limited to MS4s that are purposed for and servicing public use from the "Waters of the U.S." definition; and

h) Clarify the waste treatment exemption by stating that green infrastructure practices and water delivery and reuse facilities meet the requirements of the exemption; and

i) Expand the waste treatment exemption to included systems that are designed to meet *any* water quality requirements, not just the requirements of the CWA; and

j) Provide a specific exemption for green infrastructure and water delivery and reuse facilities from the "Waters of the U.S." definition; and

k) Examine the acreage limit of 6,400 acres that can be impacted in a calendar year as local governments often have huge swathes of land and can quickly trigger the acreage limit, especially if more water bodies are designated as a "Waters of the U.S."; and

l) Institute a straight-forward and transparent process for entities to appeal agency jurisdictional determinations; and

m) Set clear national guidance for quick approval of emergency exemptions.

2. We ask that the USEPA and the USACE issue a revised proposed rule with an additional comment period, so that we can be certain these concerns are adequately addressed; or

3. Alternatively, if an additional comment period is not granted, we respectfully call for the withdrawal of this proposed rule and ask the agencies to resubmit a proposed rule at a later date that addresses our concerns; finally,

4. CCI shares the concern that Colorado's developed and undeveloped hot springs whose mineral-rich thermal waters have been flowing into Colorado water bodies, including those currently designated as "Waters of the U.S." should be made exempt to water quality regulations that would require treatment of these natural waters.

Adopted by Colorado Counties, Inc.
December 2, 2014

Environment and Public Works WOTUS Hearing "Impacts of the Proposed Water of the United States Rule on State and Local Governments" February 4, 2015 Follow-Up Questions for Written Submission to Commissioner Sallie Clark.

Ranking Member Senator Boxer

Ms. Clark, in the county you represent, small streams, some of which do not flow year round, provide between 70 and 86 percent of the surface drinking water supply. Do you believe polluters should be able to dump pollutants into or completely destroy the small streams that are a significant source of drinking water in your county?

Senator Boxer, thank you so much for your question. As a previous Marion County, Calif. Supervisor, you know that clean water is essential to all of our nation's counties, who play vital roles in protecting our citizens by preserving local resources, maintaining public safety and promoting economic development.

In my testimony, I talked about the importance of clean water to my county. Despite being one of the most populous counties in Colorado, El Paso County faces constant risks of wildfires, drought and flooding. In the past several years, we've had two major wildfires in the Waldo Canyon and Black Forest areas, totaling about $40 million in damage and burning more than 32,500 acres. These fires in our county have significantly changed our landscape; the county is now home to charred, barren hillsides and the vegetation that once protected the area from stormwater runoff is now gone, resulting in dangerous flash floods. Our county has been fully focused on not only pre- and post-disaster mitigation, but also improving our infrastructure through public safety projects that will protect our citizens and businesses. Over $50 million has been invested to date to repair these vital watersheds.

Counties also enact zoning and other land use ordinances to safeguard valuable natural resources and protect our local communities depending on state law and local responsibility. Counties provide extensive outreach and education to residents on water quality and stormwater impacts. We also establish rules on illicit discharges and fertilizer ordinances, remove septic tanks, work to reduce water pollution, adopt setbacks for land use plans and are responsible for water recharge areas, green infrastructure and water conservation programs.

However, counties do need certainty and the proposed rule contains many key terms that have not been adequately defined. This is problematic since our counties are ultimately liable for maintaining the integrity of county-owned public safety infrastructure. Furthermore, the unknown impacts on other Clean Water Act Programs are equally problematic, which is why we've asked the agencies to conduct further outreach and consultation with the state and local governments that implement those program.

The health, well-being and safety of our residents and communities are a top priority for us. It is important that federal, state and local governments all work together to craft reasonable and practical rules that work for all levels of government.

Timothy Mauck Testimony

Senate Environment and Public Works and House Transportation and Infrastructure Hearing:
Impacts of the Proposed Waters of the United States Rule on State and Local Governments

Submitted January 30th, 2014

My name is Timothy Mauck. I was elected to the Clear Creek Board of County Commissioners in 2010 and reelected in 2014.

Clear Creek County is a historic gold and silver mining community located in the Rocky Mountains 30 minutes west of Denver. We have a population of about 9,000 residents, and are the proud home of four 14,000 foot peaks, the Loveland Ski Area, and the Henderson Mine – North America's largest producer of primary molybdenum.

As Commissioner, I have focused on economic development, enhancing Clear Creek's recreational and tourism industries and working to bring about sensible development strategies to improve transportation along the Interstate 70 Mountain Corridor. I am passionate about hunting and angling and am an active member of Trout Unlimited and Ducks Unlimited, and a 4-H youth archery instructor.

I also serve on the boards of the Denver Regional Council of Governments, Jefferson Center for Mental Health, and as chair of the Clear Creek Greenway Authority and Clear Creek Fire Authority boards.

As an elected county commissioner, I am testifying to convey how important clean water is for my community. The proposed clean water rule will protect the headwaters, tributaries, and wetlands that are essential for providing the high quality water that supports the hunting, fishing, rafting, and outdoor recreation that are an economic backbone for my community. Clean water from streams and wetlands also provide drinking water for thousands of our residents.

Clear Creek County is truly a headwater county. We are bordered by the continental divide and provide clean water for downstream communities within the Denver Metropolitan Area. In fact, Clear Creek flows right into the Coors Brewing Company brewery in Golden, Colorado, before merging into the South Platte River which provides drinking water for Colorado residents and irrigation for our agricultural industries. We are also facing the legacy impacts of historic silver and gold mining in the area. We have struggled with maintaining water quality due to mine runoff, and have worked consistently to treat contaminated water and reclaim abandoned mine sites. I know too well the impacts of contaminated water and the costs and time it takes to mitigate and treat it. I also know Clear Creek has made a remarkable rebound over the past 30 years, as we have made progress – like so much of the country – toward the Clean Water Act goals of fishable, swimmable waters.

In addition, these strides in water quality, while important in their own right, have also made Clear Creek County an outdoor recreation destination. By river segment, Clear Creek hosts the 2nd most commercial rafting trips in Colorado, behind only the Arkansas River which is the number one rafting destination in the world. Whitewater rafting alone has a total economic impact to the community of approximately $23 million[1]. Hunting and angling generates also a total economic impact of nearly $6

[1] Commercial River Use in the State of Colorado: http://www.croa.org/wp-content/uploads/2015/01/2014-Commercial-Rafting-Use-Report.pdf

million to the county. This is not only the story of Clear Creek but also across Colorado and the nation. According to the National Shooting Sports Foundation, hunting and angling's total economic impact is $192 billion[2]. Outdoor recreation in Colorado generates $13.2 billion and employs more than 124,000 people. Across the country, it generates $646 billion and 6.1 million jobs[3]. Many of these jobs are dependent on clean water, and will benefit from the EPA and Army Corps of Engineer's efforts.

In fact, 55% of stream miles in the historic range of native trout in our state are intermittent or ephemeral, and would clearly be protected by the clean water rule. The upper stretches of the world famous Arkansas River nearby are 68% intermittent or ephemeral[4]. Even with seasonal flow, these waters provide habitat for trout, or simply maintain the water quality needed by fish in downstream rivers. As a duck hunter, too, I've spent many cold mornings in the wetlands, sloughs, and creeks feeding the South Platte and know how important it is to protect these places from irresponsible development.

As an elected official with the responsibility of looking after our county's finances I am also concerned about undue regulatory burden. I have read and considered the comments on the rule submitted by the National Association of Counties (NACO), and while I take their opinions very seriously, I respectfully disagree with their position. NACO and others have expressed concerns about the rule's potential for overreach, but the EPA and Corps of Engineers have consistently demonstrated that this rule is not an expansion of Clean Water Act authority. Instead, it will restore jurisdiction to fewer of the waters than had been covered from the passage of the Clean Water Act in 1972 until the first Supreme Court decision in 2001 weakened the law. During that time period, the population of Clear Creek County increased from approximately 5,900 to 9,400. Colorado's population nearly doubled from 2.2 million to 4.4 million[5]. The state's gross domestic product increased more than ten-fold from $13.6 to $181 billion[6]. Furthermore, natural gas production increased from 116 trillion cubic feet to 817 trillion cubic feet, and coal production increased from 5,500 short tons to 33,000 tons[7].

If opponents of the rule are worried about returning to the previous jurisdiction of the Clean Water Act, they should realize that protecting intermittent and ephemeral streams and wetlands is fully consistent with population growth, energy production, and economic development writ-large.

Indeed, the rule should help provide more regulatory certainty and more timely review of permit applications. Currently, the need for case-by-case jurisdictional determinations on intermittent and ephemeral streams – nearly all of which are ultimately found jurisdictional – creates significant backlogs and delays. By clarifying and simplifying the question of jurisdiction for these tributaries and adjacent wetlands, applicants should be able to more quickly get the substance of their proposals reviewed without those lengthy delays created by doing case-by-case jurisdictional analyses.

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[2] Hunting and Fishing: Bright Stars of the American Economy: http://www.nssf.org/PDF/research/bright%20stars%20of%20the%20economy.pdf

[3] The Outdoor Recreation Economy: http://outdoorindustry.org/advocacy/recreation/economy.html

[4] Waters of the United States, Colorado: http://www.tu.org/sites/default/files/colorado_wotus.pdf

[5] US Census Data: https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&met_y=population&idim=county:08019&hl=en&dl=en#!ctype=l&strail=false&bcs=d&nselm=h&met_y=population&scale_y=lin&ind_y=false&rdim=country&idim=county:08019&idim=state:08000&ifdim=country&hl=en_US&dl=en&ind=false

[6] Real Gross Domestic Product By State: http://www.eia.gov/state/seds/sep_use/notes/use_gdp.pdf

[7] State Energy Data System 1960-2012: http://www.eia.gov/state/seds/seds-data-complete.cfm?sid=CO

Another consistent criticism of the rule has been about process. A multitude of interests have called for everything from a complete withdrawal of the rule, to a one year delay, to requesting another comment period after having a chance to incorporate feedback provided in the comment period that closed in November. While I understand the need for further clarity on some outstanding issues, so do the EPA and Corps of Engineers. The proposal specifically asked in multiple locations for recommendations on how to address certain issues. The ongoing discussion about the Clean Water Act's jurisdiction is also not a new one. We have been dealing with the impacts of unclear jurisdiction for nearly a decade and a half. We have seen a series of guidance and rulemakings, both proposed and finalized, as well as numerous court cases. The issues and positions of interested parties have been widely known for years. I fail to see how another year or even 60 days will resolve the outstanding issues for all parties. In the meantime I am ready to have my county's headwaters and wetlands clearly protected under the Clean Water Act.

That brings me to the recently finalized report from the EPA's Scientific Advisory Board entitled *The Connectivity of Streams to Wetlands and Downstream Waters.* Once again, the information contained within this report is a synthesis of long-existing information and peer-reviewed science. The report clearly demonstrates that the agency would be scientifically justified in going further with its current rule. The chemical, biological, and hydrological connectivity of intermittent and ephemeral streams and wetlands is not new information to those who have been involved in this years-long process.

I am not alone as a local elected official who supports this rule. More than 280 local elected officials signed letters in support of this rule during the comment period. Cities as large as Pittsburgh, Philadelphia, Austin, Boston and Baltimore passed resolutions or submitted comments in favor of the rule, as did counties from New Jersey to Michigan[8]. Collectively, a non-exhaustive count of the residents whose elected officials support clean water on their behalf exceeds 10 million people, a strong showing on top of the more than 800,000 supportive comments the EPA received. Those are impressive numbers to someone who represents a county of only 9,500 people, but we share their passion for protecting our waters.

Although we are small, we are expected to grow in the future. An expansion of Interstate 70 is underway, and along with it a growth in home and road development for those from nearby metropolitan areas seeking solace in the mountains. In addition, we face a challenge of economic diversification as we approach the end of the life of the Henderson Mine, which provides a large portion of our property tax base. There are hundreds of mine claims that exist in undeveloped or underdeveloped areas, many of which are very near headwater streams. The rule will help us balance the need for diversification while providing the necessary protection for streams and wetlands as we encourage development of all kinds.

Finally, I will conclude by conveying that this issue extends beyond my duties as an elected official, or even the economic benefits provided by clean water. As someone who grew up hunting and fishing with my father throughout Colorado, I have a deeply personal connection to clean water. My outdoor pursuits begin in the early summer chasing trout at elevations of 10,000 feet just above my home. By fall, I follow these same headwaters as they flow into the South Platte, and meander northeast of Denver to the agricultural communities of Brush and Fort Morgan where I hunt waterfowl. The Clean Water Act is an indispensable part of providing those hunting and fishing opportunities and passing America's sporting tradition across generations. In all my time spent on the water, I see firsthand a

[8] Local officials support the Administration's proposal to protect clean water: http://org.salsalabs.com/o/2155/p/salsa/web/common/public/content?content_item_KEY=12837

simple truth: what happens upstream in the headwaters and connected wetlands makes its way downstream to our rivers and streams. The proposed rule simply recognizes this reality.

From a personal passion about hunting and angling, to my responsibility as a county commissioner to provide clean water for drinking and outdoor recreation, I strongly support the Waters of the United States rule. The EPA and Corps of Engineers can, and undoubtedly will provide more clarity to interested parties about what waters are and are not covered. I urge the committee to allow this process to play out without delaying, derailing, or significantly altering the intent of the rule.

U.S. House of Representatives
Committee on Transportation and Infrastructure

U.S. Senate Committee on Environment and Public Works

Joint Hearing on "Impacts of the Proposed Waters of the United States Rule on State and Local Governments"

February 4, 2015

Testimony of Lemuel M. Srolovic
Bureau Chief, Environmental Protection Bureau
Office of New York State Attorney General Eric T. Schneiderman

The Office of New York State Attorney General Eric T. Schneiderman appreciates this opportunity to submit testimony supporting the "waters of the United States" rule proposed by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers.[1] As set forth more fully below, this administrative action is critically important. The rulemaking seeks to provide much-needed clarification to the question whether the federal Clean Water Act applies to a particular water body. The answer to that question is vital because – while the Act does not apply to every water within the United States – the statute's comprehensive application to the nation's waters is essential for continuing progress towards meeting the Congressional goal embodied in the statute – "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[2] Presently, jurisdictional decisions related to "waters of the United States" are made on a case-by-case basis, subject to fractured and inconsistent legal interpretation by the courts, fostering uncertainty, delay and further litigation. This rulemaking seeks to clarify the applicability of the Clean Water Act, thereby accelerating jurisdiction decisions and making them more predictable and less costly. This clarity will not only better serve to restore and protect our waters, but also better serve the interests of states in implementing federal and their own state water pollution control programs, and public and private entities involved in activities subject to the Act.

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[1] 79 Fed. Reg. 22188 (April 21, 2014).
[2] 86 Stat. 816, § 101(a), 33 U.S.C. § 1251(a).

Background

In the early 1970s, the United States faced a water pollution crises. In 1969, petroleum and chemical-soaked debris ignited, and the Cuyahoga River in Cleveland, Ohio burst into flames.[3] That same year, surveys found that over 41 million fish were killed from pollution, including some 26 million that were killed in in Lake Thonotosassa in Florida from food processing plant discharges.[4]

In New York, bacteria levels in the Hudson River were recorded at levels 170 times the safe limit.[5] The Bronx River – New York City's only freshwater river – once the home of beaver and other wildlife, had degenerated into what one official called an "open sewer." Central New York's Onondaga Lake literally stank in the summer and was frequently referred to as "The Most Polluted Lake in the Country." Motorists driving by the lake would roll up their windows.

Responding to this crisis, Congress in 1972 fundamentally re-wrote the federal water pollution control law by enacting the Clean Water Act. The old law had addressed water pollution by authorizing federal cures for water pollution problems on an ad hoc water-by-water, polluter-by-polluter basis. But that narrow approach had failed to protect the nation's waters. In 1972, Congress determined that America's waters were "severely polluted," "in serious trouble," and that the "federal water pollution control program . . . has been inadequate in every vital respect."[6]

With the Clean Water Act, Congress replaced that failed scheme with a comprehensive approach to pollution control that, depending on the type of discharge, prohibits the release of any pollutant into the nation's waters from a point source absent either: 1) a state or federal National Pollutant Discharge Elimination System; or 2) a dredge and fill discharge permit. And the waters protected by the act are broad, covering "virtually all surface water in the country."[7]

In the four decades since its enactment, the States, the EPA and the Army Corps have implemented the pollution discharge prohibition and the other provisions and programs of the Clean Water Act, achieving remarkable progress in improving water quality in the United States. In the mid-1980s, biologists counting fish in the lower section of the Cuyahoga River would tally fewer than 10 individual

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[3] http://blog.cleveland.com/metro/2009/01/after_the_flames_the_story_beh.html
[4] R. Adler, J. Landman & D. Cameron, The Clean Water Act *20 Years Later* (1993) at 5.
[5] *Id.*
[6] *Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981).
[7] *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

fish. In 2008, biologists found 40 different fish species in the river, including steelhead trout, northern pike and other fish that require clean water.[8] Lake Thonotosassa is now a popular fishing destination. And in New York, a beaver returned to the Bronx River in 2006. Onondaga Lake is continuing its recovery. The lake that decades ago supported only six species of pollution-tolerant fish in 1970, now supports over 60 species of fish. In fact, a few years ago the North American Fishing Club named Onondaga Lake one of America's top ten bass fishing destinations. Integrating the maxim that an "ounce of prevention is worth a pound of cure" with sound watershed science, the Clean Water Act has been highly successful in its mission of restoring and protecting the Nation's waters.

The "waters of the United States" rulemaking brings together sound science and extensive experience in implementing the Act to move beyond case by case jurisdiction decisions and to define as much as possible the categories of waters that comprise the waters of the United States, while retaining flexibility to apply the rule consistent with regional differences in this large and hydrologically diverse nation.

Agency Rulemaking is Needed to Clarify the Statutory Term "Waters of the United States"

Since the Supreme Court's plurality decision in *Rapanos v. United States,* 547 U.S. 715 (2006), a complex and confusing split has developed among the federal courts regarding which waters are "waters of the United States" and therefore within the Act's jurisdiction. The federal circuits have embraced at least three distinct approaches in instances of uncertain Clean Water Act jurisdiction, with some courts adopting Justice Kennedy's significant nexus test, some adopting the plurality's test, and some tending to defer to the agencies' fact-based determinations. Many courts have actively avoided ruling on the controlling law, highlighting the need for agency clarification. The confusion and disagreement in the courts have produced inconsistent outcomes and contribute to the ongoing uncertainty regarding the Act's application. Providing clear categories of waters subject to the Act through the agencies' rulemaking would alleviate much of the jurisdictional uncertainty and allow for more efficient administration of the Act. The rule's clarity would greatly benefit States by easing the considerable administrative burden of having to make many fact-based determinations employing uncertain tests.

[8] http://blog.cleveland.com/metro/2009/01/after_the_flames_the_story_beh.html

The Supreme Court's decision in *Rapanos* presented the lower courts with the complex problem of how to apply a plurality decision where the concurring opinion is not a logical subset of the plurality opinion. See *United States v. Johnson*, 467 F.3d 56, 63 (1st Cir. 2006) (discussing the complexity of applying a plurality decision when none of the opinions' reasoning commands a majority of the Justices). What has emerged is a confusing circuit split with courts adopting at least three or four different approaches to the jurisdictional question posed by *Rapanos*-like cases – with no single approach controlling in a majority of the federal courts.

Some of the cases addressing "waters of the United States" following *Rapanos* have been decided under the test from *Marks v. United States*, which directs courts to adopt as binding "that position taken by those Members [of the court] who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977); *United States v. Robinson*, 505 F. 3d 1208, 1221–22 (11th Cir. 2007); *United States v. Gerke Excavating Inc.*, 464 F.3d 723 (7th Cir. 2006). Other cases have been decided using Justice Stevens' instruction from his *Rapanos* dissent, which directs lower courts to recognize federal regulatory jurisdiction any time either the plurality's test or Justice Kennedy's test would find jurisdiction proper. *See Rapanos*, 547 U.S. at 810; *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006). Still other cases upheld regulatory jurisdiction only when the agency asserting jurisdiction provided fact-based evidence of a reasonable ground for doing so in accordance with the EPA and Army Corps' *Rapanos* Guidance document. *See Deerfield Plantation Phase II-B Prop. Owners Ass'n v. United States Army Corps of Eng'rs*, 501 F. App'x 268, 275 (4th Cir. 2012).

Not surprisingly, court decisions addressing the jurisdictional question posed by *Rapanos* have produced highly inconsistent outcomes. The Ninth Circuit, which has decided approximately one-third of all post-*Rapanos* jurisdictional cases, has not adopted a unified standard. *Compare United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007) (recognizing Justice Kennedy's opinion as the "controlling rule of law") *with N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 780–81 (9th Cir. 2011) (the court did not "foreclose the argument that Clean Water Act jurisdiction may also be established under the plurality's standard") and *Sequoia Forestkeeper v. United States Forest Service*, No. CV F 09-392 LJO JLT, 2011 U.S. Dist. LEXIS 26447, at 12–13 (E.D. Cal. 2011) (interpreting *Wilcox* as a "change in the controlling law" and applying the plurality test). A significant number of post-*Rapanos* cases have been decided in jurisdictions where courts seek to avoid resolving which test controls by

applying both the plurality's test and the significant nexus test. *See, e.g., United States v. Hamilton*, 952 F. Supp. 2d 1271, 1274 (D. Wyo. 2013) ("The Tenth Circuit has yet to decide which of these tests controls . . . [b]ut happily, this Court need not choose here . . . ."); *United States v. Cundiff*, 555 F.3d 200, 207–210 (6th Cir. 2009) (reserving the issue of which test controls); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 215–18 (2d Cir. 2009), *aff'g Simsbury-Avon Pres. Soc'y, LLC. V. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 224–230 (absent binding instruction, "this Court will consider . . . both the plurality's and Justice Kennedy's standards"); *Haniszewski v. Cadby*, No. 03-CV-0812, 2013 U.S. Dist. LEXIS 179359, at 19 (W.D.N.Y. 2013) (applying the plurality's test); *Foti v. City of Jamestown Bd. Of Pub. Utils.*, No. 10-CV-575, 2011 U.S. Dist. LEXIS 119540, at 41–43 (W.D.N.Y. 2011) (applying the significant nexus test).

Clearly, this inconsistent and unpredictable state of affairs regarding which waters are "waters of the United States" does not serve to protect water quality, the interests of States in implementing federal and their own state water pollution control programs, nor the interests of the public and private entities – and people – who implement activity that is subject to regulation if performed within jurisdictional waters.

The Proposed Rule Ensures the Statute's Protection of State Waters Downstream of Other States

The proposed "waters of the United State" rule is grounded in solid, peer-reviewed science. A EPA report on more than 1,200 peer-reviewed and published scientific studies shows the connectedness of upstream and downstream water,[9] In its review of the draft report, the EPA Scientific Advisory Board found that it "provides strong scientific support for the conclusion that ephemeral, intermittent, and perennial streams exert a strong influence on the character and functioning of downstream waters and that tributary streams are connect to downstream waters."[10] The Board also found that the report substantiated "the conclusion that floodplains and waters and wetlands in floodplain settings support the physical, chemical, and biological integrity of downstream waters." Because of these connections, pollution from wetlands and relatively small or infrequently flowing upland streams impacts the health of associated larger downstream waters (such as rivers, lakes, estuaries, and oceans).

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[9] See EPA Office of Research and Development, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (January 15, 2015).

[10] See letter from Dr. David T. Allen, Chair, Scientific Advisory Board, and Dr. Amanda D. Rodewald, Chair, SAB Panel for the Review of EPA Water Body Connectivity Report to the Honorable Gina McCarthy, Administrator, EPA (October 17, 2014).

Each of the forty-eight continental states has a traditional navigable river or lake within its borders with a portion of that waterbody within the borders of one or more other states. (*See* attached Appendix.) And each of the continental states is both *upstream* and *downstream* of one or more other states. New York, for example, is downstream of 13 states, and is upstream of 19 states. (*See* attached maps of States Upstream and Downstream of New York.)

The "waters of the United States" rulemaking advances the Clean Water Act's protection of state waters downstream of other states by securing a national, federal "floor" for water pollution control, thereby maintaining the consistency and effectiveness of the downstream states' water pollution programs. The federal statute preempts many common-law remedies traditionally used to address interstate water pollution, leaving the act and its regulatory provisions as the primary mechanism for protecting downstream states from the effects of upstream pollution.[11] Critically, by protecting interstate waters, the proposed rule allows states to avoid imposing disproportionate limits on in-state private and public sources to offset upstream discharges which might otherwise go unregulated.

A Robust Clean Water Act is Economically Critical to States and Municipalities

A robust Clean Water Act is important to States and municipalities because it not only protects our waters but it saves billions of dollars in taxpayer money. For example, the New York City Watershed is a 2000 square mile area located primarily in upstate New York. It is the source of drinking water for 9 million residents. Nearly all of the City's water is unfiltered, and that's a good thing. To build a filtration plant to clean the water would cost taxpayers over $10 billion in capital and millions more in annual operation and maintenance. But the City does not have to build that enormously expensive plant. That's because the Clean Water Act and other pollution prevention programs work together to prevent the water from getting "dirty" in the first place so that it does not need to be filtered. The water pollution prevention measures that protect New York City's drinking water supply are a prime example that an ounce of prevention truly is worth a pound of cure.

In addition to saving States and municipalities – and thereby, taxpayers – money, clean water is critical to wildlife, and wildlife is vitally important to States' commercial and recreational interests. A survey by the U.S. Fish & Wildlife Service

[11] *See City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (federal common law preempted by Clean Water Act); *Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 494 (1987) (common law of an affected state preempted).

and U.S. Census Bureau found that in 2011, residents and non-residents spent $9.2 billion on wildlife recreation – hunting, angling and watching wildlife – in New York.[12] The American Sportfishing Association's 2013 *Sportfishing in America* report found that New York ranked #2 among the States by angler expenditures (after Florida), with retail sales totaling nearly $2.7 billion, and the multiplied or ripple economic effect totaling nearly $4.5 billion.[13]

Thus, New York's economy is linked to clean water, which in turn relies on the efficient and consistent application of the Act's jurisdiction to waters upstream of the State.

Conclusion

The "waters of the United States" rulemaking is an important action to advance the Congressional objective embodied in the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the Nation's Waters." 33 U.S.C. § 1251(a). The rulemaking seeks to establish clear categories of waters within the protection of the law. The proposed rule is based on sound science, and takes into account the practical and ecological realties of our Nation's interconnected waters. Clarifying the "waters of the United States" will serve to protect water quality, promote the consistent and efficient implementation of state water pollution programs across the country in accordance with the principles of "cooperative federalism" on which this landmark statute is based, and serve the interests of public and private entities involved in activities subject to the Act.

We look forward to completion of a final rule.

[12] U.S. Fish & Wildlife Service and U.S. Census Bureau, *2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation – New York* at 5.
[13] American Sportfishing Association, *Sportfishing in America* (2013) at 5, 8.

APPENDIX

Navigable Water Within Each Continental U.S. State With a Portion of the River or Lake in One or More Other States[1]

State	Navigable Water	States with Upstream or Border Portions	Notes
AL	Chattahoochee River	GA	1
AZ	Colorado River	CO, UT, NV, CA	1
AR	Arkansas River	CO, KS, OK	1
CA	Colorado River	CO, UT, AZ, NV	1
CO	Navajo Reservoir (San Juan River)	NM	2,3
CT	Connecticut River	NH, MA, VT	1
DC	Potomac River	WV, VA, MD	1
DE	Delaware River	NY, PA, NJ	1
FL	Apalachicola River	GA	1
GA	Savannah River	SC	1
ID	Snake River	WY, OR, WA	1
IL	Lake Michigan	MI, WI, IN	1

[1]This table lists only one water body for each State, although most States have many such water bodies. For purposes of this appendix, the District of Columbia is treated as a State.

State	Navigable Water	States with Upstream or Border Portions	Notes
IN	Lake Michigan	MI, WI, IL	1
IA	Missouri River	MT, ND, SD, NE	1
KS	Missouri River	MT, ND, SD, NE, IA, MO	1
KY	Mississippi River	MN, WI, IA, IL, MO, TN	1
LA	Mississippi River	MN, WI, IA, IL, MO, KY, TN, AR, MS	1
ME	Piscataqua River	NH	1
MD	Potomac River	WV, VA, DC	1
MA	Connecticut River	NH, VT	1
MI	Lake Michigan	IN, WI, IL	1
MN	Mississippi River	WI	1
MS	Mississippi River	MN, WI, IA, IL, MO, KY, TN, AR, LA	1
MO	Missouri River	MT, ND, SD, NE, IA, KS	1
MT	Yellowstone River	WY	1
NE	Missouri River	MT, ND, SD, IA, MO	1

State	Navigable Water	States with Upstream or Border Portions	Notes
NV	Colorado River	CO, UT, AZ	2
NH	Piscataqua River	ME	1
NJ	Delaware River	NY, PA, DE	1
NM	Navajo Reservoir (San Juan River)	CO	2,3
NY	Delaware River	PA	1
NC	Roanoke River	VA	1
ND	Missouri River	MT	1
OH	Ohio River	PA, WV, KY	1
OK	Arkansas River	CO, KS	1
OR	Snake River	WY, ID	1
PA	Delaware River	NY, NJ	1
RI	Mount Hope Bay	MA	1
SC	Savannah River	GA	1
SD	Missouri River	MT, ND, NE	1
TN	Mississippi River	MN, WI, IA, IL, MO, KY, AR	1
TX	Rio Grande	CO, NM	1
UT	Green River	WY, CO	2,4

State	Navigable Water	States with Upstream or Border Portions	Notes
VT	Lake Champlain	NY	5
VA	Potomac River	WV, MD, DC	1
WA	Columbia River	OR	1
WV	Ohio River	PA, OH	1
WI	Mississippi River	MN, IA	1
WY	Green River (Flaming Gorge Reservoir)	UT	2

Notes

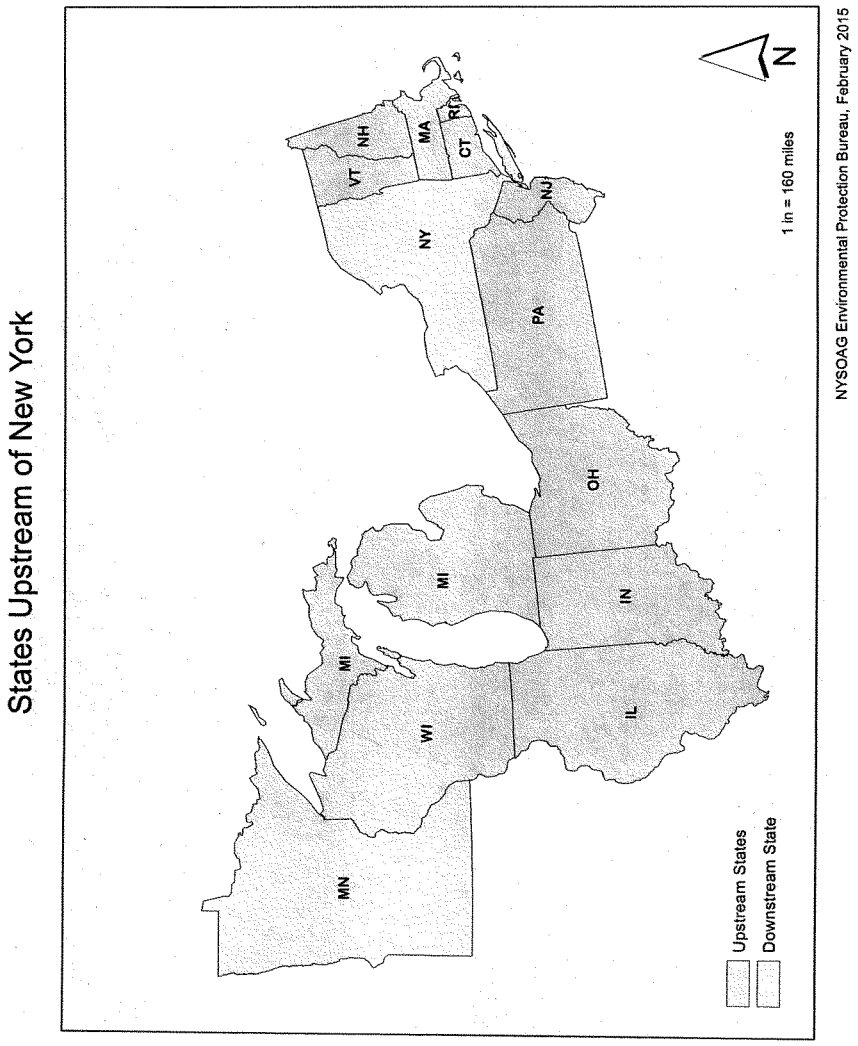
1. U.S. Army Corps of Engineers, *Bridges Over the Navigable Waters of the United States* (1961).

2. *Comments of the Western Water Alliance to the U.S. Environmental Protection Agency*, Docket ID OW-2002-0050, April 16, 2003.

3. *Wreyford v. Arnold*, 477 P.2d 332 (N.M. 1970).

4. *United States v. Utah*, 283 U.S. 801 (1931).

5. U.S. Army Corps of Engineers, *Navigation in Vermont*, http://www.nae.usace.army.mil/water/navigation2.asp?mystate=VT (accessed January 11, 2006).


States Upstream of New York
VT
NH
MA
RI
CT
NJ
NY
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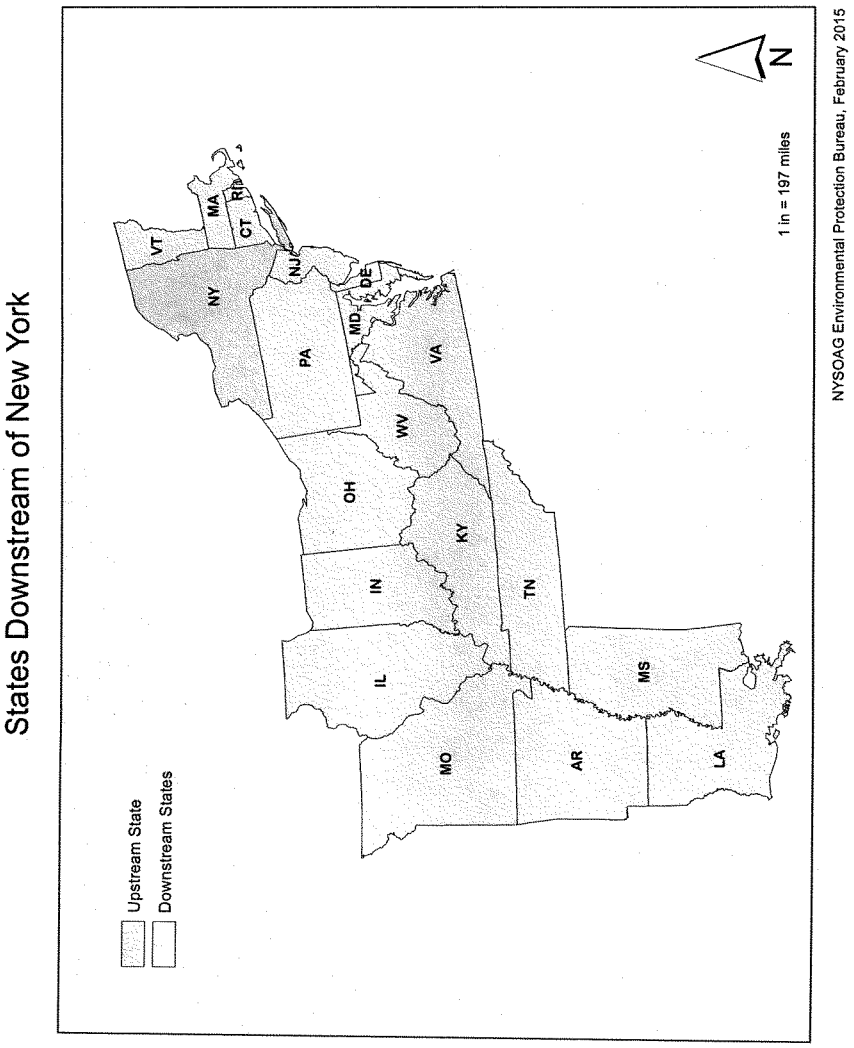
1 in = 160 miles
Upstream States
Downstream State
NYSOAG Environmental Protection Bureau, February 2015


States Downstream of New York
Upstream State
Downstream States
VT
MA
RI
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NY
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IN
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MO
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1 in = 197 miles
NYSOAG Environmental Protection Bureau, February 2015

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

March 10, 2015

Honorable James M. Inhofe, Chairman
Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 20510-6175

Honorable Barbara Boxer, Ranking Member
Senate Committee on Environment and Public Works
456 Dirksen Senate Office Building
Washington, DC 20510-6175

Chairman Inhofe and Ranking Member Boxer:

Thank you for the opportunity to testify before the Senate Environment and Public Works Committee on February 4, 2105 regarding the "Impacts of the Proposed Wasters of the United States Rule on State and Local Governments."

Pursuant to the further request of the Committee, I am pleased to submit responses to the follow-up questions of Senator Boxer related to the hearing.

* * *

Ranking Member Senator Boxer

1. **Mr. Srolovic, your testimony highlights some of the legal confusion that has resulted from the Supreme Court's decision. What is the practical impact of this confusion on the protection of water bodies that provide drinking water and places of recreation for our communities?**

    a. **What are the consequences of not clearly protecting the thousands of miles of headwater streams and wetlands that are at risk after the confusion Supreme Court Decision?**

The federal courts are deeply split on which standard for defining waters of the United States applies under *Rapanos v. United States*, 547 U.S. 715 (2006). Many courts have refrained from deciding the issue because of the legal confusion, while others have made *ad hoc*

judgments on a case-by-case basis on whether a particular water body falls within the definition – without benefit of the full scientific expertise of the Army Corps and EPA. In light of confusion in the law and the limitations of courts in making difficult scientific judgments, there is great risk of errors by courts that can result in harm to headwaters and wetlands whose protections are vital for ensuring water quality.

The proposed rule, in contrast, relies on the painstaking application of scientific expertise by the Army Corps and EPA to define categories of waters that qualify as waters of the United States based on their impact on and nexus to downstream waters. Not only does the proposed rule thereby protect our waters, but it also serves the regulated community by promoting more efficient decision making by administrative agencies and avoiding lengthy and expensive litigation.

2. Mr. Srolovic, one of the reasons Congress passed the Clean Water Act was to create a level playing field nationally and ensure a polluter in one state could not simply sent their pollution downstream for another state to address.

a. How does the proposed clean water rule uphold this fundamental principle?

The proposed rule takes into account the practical and ecological realities of our Nation's interconnected waters to prevent dischargers in one state from sending their pollutants downstream to other states. Water flows downhill, and each of the lower 48 States has one or more water bodies that are downstream of one or more other State. The proposed rule protects the upstream network of tributaries and wetlands that feed downstream waters by restricting upstream pollutant discharges and dredging and filling activities in those waters. Upstream waters, singly and in the aggregate, transport physical, chemical and biological pollution that affects the function and condition of downstream waters. Thus, the proposed rule also protects downstream waters located in other states.

b. Why is it important to maintain a uniform level of protection nation-wide?

While the Clean Water Act gave downstream states "a strong voice in regulating their own pollution," it provided them with only an advisory role in regulating pollution that originates outside their borders. *Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 490 (1987). A state may not establish a separate permit system to regulate out-of-state sources. *Id.* at 491. And the Act's comprehensive regulation of upstream sources preempts traditional common-law remedies that downstream states might otherwise have for upstream sources of pollution. *See City of Milwaukee v. Illinois,* 451 U.S. 304, 317 (1981) (federal common law preempted); *Oullette,* 479 U.S. at 494 (common law of an affected state preempted).

Given the Clean Water Act's focus on controlling pollution at its source, *see* 33 U.S.C. § 1251(a), the broad geographic interconnection among waters, and the limited power of downstream states to control pollution sources in upstream states, a uniform level of protection Nation-wide is both essential, and part and parcel of the Act itself. The Clean Water Act's minimum "floor" of national water pollution control is critical to preserving a level playing field among states, and preventing the "race to the bottom" and "Tragedy of the

Commons" resulting from the absence of such minimum protections. *See NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977). By protecting interconnected, often interstate waters, the proposed rule allows states to avoid imposing disproportionate limits on in-state sources to offset upstream discharges in another state which might otherwise go unregulated.

3. Mr. Srolovic, some claimed at the hearing that the proposed Waters of the US rule would be an unprecedented expansion of the Clean Water Act. Can you please explain how the rule compares to the historic jurisdiction of the Clean Water Act, and how the Clean Water Act was applied prior to 2001?

The proposed rule would not expand the regulatory definition of waters of the United States. Instead, it's provisions narrow the historic jurisdiction of the Clean Water Act in accordance with the Supreme Court's decisions in *SWANCC v. Army Corps*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). Beginning in 1977, the regulatory definition for waters of the United States sought to extend the Act's jurisdiction to the limits of Congressional authority under the Commerce Clause. The current regulatory definition of waters of the United States includes waters that could affect interstate or foreign commerce. 33 C.F.R. § 1328.2; 40 C.F.R. § 122.2.

The proposed rule eliminates that basis for jurisdiction under the Act. In 2001, *SWANCC* struck down the Migratory Bird Rule, under which waters of the United States were defined to include any intrastate water which is used or would be used as habitat for migratory birds. In accordance with *SWANCC*, the proposed rule excludes migratory birds as a basis for intrastate waters to qualify as waters of the United States. The proposed rule also narrows the regulatory definition of waters subject to the Act's jurisdiction in accordance with the Supreme Court's 2006 ruling in *Rapanos*. In *Rapanos*, Justice Kennedy's opinion provided that wetlands would qualify as waters of the United States if they have a significant nexus to waters that are or were navigable in fact or that could reasonably be made so. Thus, the proposed rule includes within the definition of waters of the United States only waters that the Army Corps and EPA have determined possess that significant nexus.

* * *

Thank you again for the opportunity to testify before the Senate Environment and Public Works Committee. Please feel free to contact me if I can be of additional service to the Committee.

Sincerely,

Lemuel M. Srolovic
Bureau Chief
Environmental Protection

SBA Office of Advocacy
www.sba.gov/advocacy
Advocacy: the voice of small business in government

October 1, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Maj. Gen. John Peabody
Deputy Commanding General
Civil and Emergency Operations
U.S. Army Corps of Engineers
Attn: CECW-CO-R 441 G Street, NW
Washington, D.C. 20314-1000

Re: Definition of "Waters of the United States" Under the Clean Water Act [1]

Dear Administrator McCarthy and Major General Peabody:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments regarding the proposed rule to the U.S. Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA, and together, "the agencies"). Advocacy believes that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act (RFA) because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking.

The Office of Advocacy and the Regulatory Flexibility Act

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so our views do not necessarily reflect those of SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[2] requires small entities to be considered in the federal rulemaking process. The RFA requires federal agencies to consider the impact of their proposed rules on small businesses. When a rule is expected to have a significant economic impact on a substantial number of small entities, agencies must evaluate the impact, consider less

[1] Definition of Waters of the United States Under the Clean Water Act, 79 *Fed. Reg.* 22188 (April 21, 2014).
[2] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

burdensome alternatives, and in the case of EPA, convene a Small Business Advocacy Review panel.[3] The RFA directs Advocacy to monitor agency compliance with the RFA. To this end, Advocacy may file written comments reflecting small business concerns about the impact of a rulemaking.[4] Because of small business concerns with the proposed rule, Advocacy held a roundtable on July 21, 2014 and has heard from numerous small entities in many industries.

Background

The Clean Water Act (CWA) was enacted in 1972 to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[5] The CWA accomplishes this by eliminating the "discharge of pollutants into the navigable waters."[6] The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas."[7] Existing regulations currently define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.[8]

The CWA requires a permit in order to discharge pollutants, dredged, or fill materials into any body of water deemed to be a "water of the United States."[9] The EPA generally administers these permits, but EPA and the Corps jointly administer and enforce certain permit programs under the Act.[10]

The extent of the Act's jurisdiction has been the subject of much litigation and regulatory action, including three Supreme Court decisions. Actions of the Court have expanded and contracted the definition, especially regarding wetlands and smaller bodies of water.

- In 1985, the Supreme Court determined that adjacent wetlands may be included in the regulatory definition of "waters of the United States."[11]
- In 2001, the Court held that migratory birds' use of isolated "nonnavigable" intrastate ponds was not sufficient cause to extend federal jurisdiction under the CWA.[12]
- In 2006, the Supreme Court considered whether wetlands near ditches or man-made drains that eventually empty into traditional navigable waters were

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[3] 5 U.S.C. § 603, 605.
[4] The Small Business Jobs Act of 2010 (Pub. L. 111-240 § 1601) also requires agencies to give every appropriate consideration to Advocacy's written comments on a proposed rule. This response must be included in an explanation or discussion accompanying the final rule's publication in the *Federal Register* unless the agency certifies that the public interest is not served by doing so.
[5] 33 U.S.C. § 1251(a) (1972).
[6] Id. at § 1251(a)(1).
[7] Id. at § 1362(7).
[8] 33 C.F.R. § 328.3(a); 40 C.F.R. §230.3(s).
[9] 33 U.S.C. §§ 1311(a), 1342, 1344.
[10] Id. at § 1344.
[11] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134-135 (1985).
[12] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001).

considered "waters of the United States."[13] Justice Scalia, writing for the plurality, determined that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' [. . .] are 'adjacent to' such waters and covered by the Act."[14] Justice Kennedy concurred in the judgment, but concluded that the Corps must establish the existence of a "significant nexus" when it asserted jurisdiction over wetlands adjacent to non-navigable tributaries.[15]

The courts have left much uncertainty regarding what constitutes a "water of the United States." Such uncertainty has made it difficult for small entities to know which waters are subject to jurisdiction and CWA permitting.

To address this uncertainty, the EPA and Corps proposed this rule which would revise the regulatory definition of "waters of the United States" and would apply to all sections of the Clean Water Act. The proposed rule defines "waters of the United States" within the framework of the CWA as the following seven categories:

- 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;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.[16]

The proposed rule defines several terms for the first time: "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus"; and it clarifies the terms, "adjacent" and "wetlands."[17] The rule leaves the regulatory definitions of "traditional navigable waters," "interstate waters," "the territorial seas," and "impoundments" unchanged.[18]

Regulatory Flexibility Act Requirements

The RFA states that "[w]henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or

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[13] *Rapanos v. United States*, 547 U.S. 715, 729 (2006).
[14] Id. at 742.
[15] Id. at 779 (Kennedy, J., concurring).
[16] 79 *Fed. Reg.* at 22,198.
[17] See Id. at 22,263, for the complete definitions of "adjacent," "neighboring," "riparian area," "floodplain," "tributary," "wetlands," and "significant nexus."
[18] Id.

publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis [IRFA]. Such analysis shall describe the impact of the proposed rule on small entities."[19]

Under Section 609(b) of the RFA, EPA is required to conduct small business advocacy review panels, often referred to as SBREFA panels, when it is unable to certify that a rule will not have a significant economic impact on a substantial number of small businesses. SBREFA panels consist of representatives of the rulemaking agency, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), and the Chief Counsel for Advocacy. SBREFA panels give small entity representatives (SERs) a chance to understand an upcoming proposed rule and provide meaningful input to help the agency comply with the RFA. SERs help the panel understand the ramifications of the proposed rule and significant alternatives to it.

Section 605(b) of the RFA allows an agency to certify that a rule will not have a significant economic impact on a substantial number of small entities in lieu of preparing an IRFA.[20] When certifying, the agency must provide a factual basis for the certification.[21] In the current case, the agencies have certified that revising the definition of "waters of the United States" will not have a significant economic impact on a substantial number of small businesses.

The Proposed Rule Has Been Certified in Error

Advocacy believes that the agencies have improperly certified this rule. Advocacy, and the small businesses we have spoken to, believe that

- The agencies used an incorrect baseline for determining their obligations under the RFA;
- The rule imposes costs directly on small businesses; and
- The rule will have a significant economic impact on small businesses.

A. The Agencies Use the Incorrect Baseline for its Regulatory Flexibility Act Certification

Advocacy believes that the agencies used the wrong baseline for their RFA certification. In certifying the rule, the agencies state that, "This proposed rule is narrower than that under the existing regulations...fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations."[22] On this

[19] 5 U.S.C. §603.
[20] 5 U.S.C. §605.
[21] Id.
[22] Id.

basis the agencies conclude that, "This action will not affect small entities to a greater degree than the existing regulations."[23]

The "existing regulations" that the agencies refer to in this reasoning is the 1986 rule defining the scope of waters of the United States. Compared to the 1986 definition, the proposed changes represent a narrowing of coverage. However, in the economic analysis accompanying the rule, the agencies assess the regulation vis-à-vis current practice and determine that the rule increases the CWA's jurisdiction by approximately 3 percent.[24] The agencies' certification and economic analysis contradict each other.

Advocacy believes that the proper baseline from which to assess the rule's impact is current practice. Guidance from the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) substantiates this view. OIRA's Circular A-4 provides guidance to federal agencies on the development of regulatory analysis.[25] It states that "The baseline should be the best assessment of the way the world would look absent the proposed action."[26] The 1986 regulation has been abrogated by several Supreme Court cases and is no longer in use.[27] The Corps and EPA also issued a guidance document in 2008 which sought to bring jurisdictional determinations in line with these Supreme Court cases.[28] The 1986 regulation does not represent the current method for determining jurisdiction and has not served that purpose for more than thirteen years. Using an obsolete baseline improperly diminishes the effects of this rule. Advocacy agrees with the agencies' economic analysis that uses current practice as the appropriate baseline for evaluating the rule.

B. The Rule Imposes Costs Directly on Small Businesses

The second basis for the certification appears to be the agencies' position that the impact on small businesses will be indirect, hence not requiring an initial regulatory flexibility analysis or a SBAR panel.[29] EPA cites *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission*[30] and *American Trucking Associations, Inc., v. EPA*[31] in support of their certification.[32] Advocacy believes that the agencies' reliance on *Mid-Tex* and *American Trucking* is misplaced because the proposed rule will have direct effects on small businesses.

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[23] Id.
[24] Id.
[25] Office of Management and Budget, *Circular A-4*, http://www.whitehouse.gov/omb/circulars_a004_a-4/#e (September 17, 2003).
[26] Id.
[27] See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001); *Rapanos v. United States*, 547 U.S. 715, 729 (2006).
[28] Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*, December 2, 2008, http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm .
[29] 79 *Fed. Reg.* at 22,220.
[30] *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission (FERC)*, 773 F.2d 327, 342 (D.C. Cir. 1985).
[31] *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).
[32] 79 *Fed. Reg.* at 22,220.

In *Mid-Tex*,[33] the Federal Energy Regulatory Commission (FERC) issued regulations instructing generating utilities how to include costs of construction work in their rates. Although the generating utilities were large businesses, their customers included small entities, to whom they may or may not have been able to pass on these costs through any rate changes.[34] The issue raised in this case was whether the agency had improperly certified the rule because it failed to consider the impact on the small business customers. The court concluded that an agency is required to file an IRFA only in cases where a regulation directly affects small businesses;[35] if it does not, an agency may properly certify.

In *Mid-Tex*, the proposed regulation's applicability to small businesses is akin to the FERC regulation's applicability to the generating utilities themselves, not their customers, as EPA seems to believe. Generating utilities were an intervening actor between the regulatory agency and the small business customers; the utilities had a substantial amount of discretion as to whether they would pass on their construction costs to their small entity customers and, if so, how much of those costs they would pass on.

Such is not the case with this rule. First, there is no intervening regulated actor. In *Mid-Tex*, the generating utilities were the entities regulated and bound by FERC guidelines, and it was not certain that they would pass on the costs of the new guidelines to their small business customers. In the current case, the Clean Water Act and the revised definition proposed in this rule directly determine permitting requirements and other obligations. It is unquestionable that small businesses will continue to seek permits under the Clean Water Act. Therefore they will be subject to the application of the proposed definition and the impacts arising from its application.

Second, the rule defines the scope of jurisdiction of the Clean Water Act without any discretion left to any entity or intermediary. The rule does not, for example, set a goal for which types or how many waters must be included in jurisdiction, leaving the Corps or states to determine the exact definition of waters of the United States in particular instances. This rule establishes the definition and all small entities are bound by it.

In *American Trucking*,[36] the EPA's certification of rules to establish a primary national ambient air quality standard (NAAQS) for ozone was challenged. The basis of the EPA's certification was that the NAAQS regulated small entities indirectly through state implementation plans. The rules gave states broad discretion to determine how to achieve compliance with the NAAQS.[37] The rules *required* EPA to approve any state plan that met the standards; it could not reject a plan based upon its view of the wisdom of a state's choices.[38] Under these circumstances, the court concluded that EPA had properly

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[33] 773 F.2d at 342.
[34] Id. The generating utilities were not required to pass on the rate increases and in some cases were limited by state law in how much of the rate increase could be passed on to customers.
[35] Id.
[36] 175 F.3d 1027 (D.C. Cir. 1999).
[37] Id.
[38] Id. at 1044.

certified because any impacts to small entities would flow from the individual states' actions and thus be indirect.[39]

EPA's proposed rule is distinguishable from the regulations at issue in *American Trucking*. The states were intervening actors with broad discretion regarding how to implement the federal standards. The EPA rules only told the states what the goal was; the states were left to develop the plans that would implement those goals and thereby impose impacts on small businesses.[40] In the current case, the agencies are not defining a goal nor are they authorizing any third party to determine the means and methods for reaching the goal. To the contrary, the agencies are defining the term governing the applicability of their own CWA programs. A change in the scope of the definition of "waters of the United States" necessarily leads to an increase in the scope and impact of the CWA since the programs thereunder only apply to waters that fall within this definition. The agencies, not a third party, determine whether a given body of water is within the jurisdiction of the requirements of the Clean Water Act and therefore subject to it.

Small businesses have also provided specific examples of how this rule will directly impact them. For example, during a May hearing of the U.S. House of Representatives Committee on Small Business, Jack Field of the Lazy JF Cattle Co. testified that the rule would essentially eliminate an exemption for normal farming practices that he relies upon to do things such as building a fence to control his grazing cattle.[41] The proposed rule would eliminate the exemption for farmers whose actions do not comply with Natural Resources Conservation Services standards.[42]

Small entities in the utility industry have expressed that this proposed rule could eliminate the advantages of Nationwide Permit 12 – Utility Line Projects (NWP 12). Utility companies use NWP 12 to construct and maintain roads that provide access to the utility grid. Under NWP 12 a "single and complete" project that results in less than a ½ acre loss of waters of the U.S. is allowed to proceed under NWP 12 rather than obtain an individual CWA permit.[43] Currently, each crossing of a road over a water of the U.S. is treated as a "single and complete" project. The proposed rule creates large areas in which NWP 12 could no longer be used at all. Under this proposed rule waters in the same riparian area or floodplain all become adjacent waters and therefore waters of the U.S. If all of the waters in the riparian area or floodplain are treated as one interconnected water of the U.S. it would be virtually impossible for small utility companies to use NWP 12. Small utilities would need to apply for the more costly and time consuming individual

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[39] Id. at 1045.
[40] Id. at 1044.
[41] Testimony of Jack Field, Owner Lazy JF Cattle Co. at U.S. House of Representatives Committee on Small Business Hearing entitled "Will EPA's Waters of the United States Rule Drown Small Businesses?", May 29, 2014 at http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=373099.
[42] 79 Fed. Reg. at 22,194; Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices,79 Fed. Reg. 22,276.
[43] Reissuance of Nationwide Permits, 77 Fed. Reg. 10195 (February 21, 2012).

permits. This is a direct cost imposed solely as a result of the changes to the definition of the term "waters of the United States" proposed in this rule.

These examples, as well as comments that Advocacy has received from small entities in other industries, demonstrate that the impact of the proposed rule will be direct. Therefore, the agencies are required to measure the impacts of the rule and to determine whether those impacts are significant for a substantial number of small entities.

C. The Rule Will Have a Significant Economic Impact on Small Businesses

The economic analysis clearly indicates that this rule is likely to have a significant economic effect on small businesses. In the analysis, the agencies examine the anticipated changes to permitting under CWA Section 404 (development projects that discharge dredge or fill materials into waters of the U.S.). They find that in current practice 98 percent of streams and 98.5 percent of wetlands meet the definition of waters of the U.S.;[44] under the revised definition these figures rise to 100 percent.[45] They find zero percent of "other waters" (the seventh category in the revised definition) to be covered in current practice, but the revised definition would cover 17 percent of this category.[46] The agencies evidence an understanding that this increase in jurisdiction will lead to greater costs stating, "A change in assertion of CWA jurisdiction could result in indirect costs of implementation of the CWA 404 program: a greater share of development projects would intersect with jurisdictional waters, thus requiring the sponsors of those additional projects to obtain and comply with CWA 404 permits."[47]

The agencies estimate that CWA 404 permit costs would increase between $19.8 million and $52.0 million dollars annually, and they estimate that section 404 mitigation costs would rise between $59.7 million and $113.5 million annually.[48] These amounts do not reflect additional possible cost increases associated with other Clean Water Act programs, such as Section 402 permitting or Section 311 oil spill prevention plans.[49] The agencies further state that the economic analysis done with respect to the 404 program increase is likely not representative of the changes that may occur with respect to 402 and 311 permitting,[50] leaving small businesses without a clear idea of the additional costs they are likely to incur for these Clean Water Act programs.

The economic analysis also singles out a particular class of businesses potentially affected by the revised definition, yet fails to evaluate any of these potential effects. EPA acknowledges that "a large portion of traditional 402 permit holders are located nearby large water sources to support their operations."[51] The agencies do not identify how many

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[44] Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 11 (March 2014).
[45] Id.
[46] Id.
[47] Id. at 13. Advocacy disagrees with the agencies' assertion that this cost is indirect (see above).
[48] Id. at 16.
[49] Id. at 12.
[50] Id.
[51] Id.

of these businesses may be small nor do they discuss the expected impact of this rule on them. Yet this proposed rule would directly affect those small businesses that may be located next to large water sources and which fall within the 3 percent of waters that will be newly included in the definition "waters of the U.S."

Concerns raised by small businesses as well as the agencies' own economic analysis both indicate that small businesses will see a cost increase as a result of the revised definition. The EPA and the Corps have obligations under OMB guidance, and the RFA to measure and communicate this increase. Their certification of no small business impact is inappropriate in light of this information. Because of this probable small business impact, the RFA requires the agencies to complete an IRFA and a SBAR panel.

Conclusion

Advocacy and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the agencies submitted with the rule provides ample evidence of a potentially significant economic impact. Advocacy advises the agencies to withdraw the rule and conduct a SBAR panel prior to promulgating any further rule on this issue.

If we can be of any further assistance, please contact Kia Dennis, Assistant Chief Counsel, at (202) 205-6936.

Thank you for your attention to this matter.

Sincerely,

/s/ Winslow Sargeant, Ph.D.

Chief Counsel for Advocacy

/s/ Kia Dennis

Assistant Chief Counsel

/s/ Stephanie Fekete

Legal Fellow

SBA Office of Advocacy
www.sba.gov/advocacy

Fact Sheet

Advocacy: the voice of small business in government

Advocacy Comments on the EPA's and Corp's "Definition of Waters of the United States under the Clean Water Act"

On October 1, 2014 the Office of Advocacy (Advocacy) filed public comments with the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA, together the Agencies) in response to the proposed rule "Definition of Waters of the United States under the Clean Water Act".

- On April 21, 2014 the Agencies issued a proposed rule soliciting comments on the proposed definition of the term "waters of the United States" under the Clean Water Act.
- Advocacy's letter states that the Agencies improperly certified the rule. Advocacy believes that the rule will have direct effects on small businesses and that these effects will have a significant economic impact on a substantial number of small businesses.
- Advocacy believes EPA should have conducted a Small Business Advocacy Review Panel prior to releasing the rule for comment.
- Advocacy recommends that the Agencies withdraw the proposed rule and conduct a panel prior to re-proposing the rule.

For more information, visit Advocacy's website at http://www.sba.gov/advocacy or contact Kia Dennis at 202-205-6936.

AMERICA'S GREAT WATERS COALITION

Albemarle-Pamlico Sound • Apalachicola-Chattahoochee-Flint River Basin • Chesapeake Bay
Coastal Louisiana • Colorado River • Delaware River • Everglades • Galveston Bay • Great Lakes
Gulf of Maine • Lake Champlain • Long Island Sound • Mississippi River • Missouri River
Narragansett Bay • New York/New Jersey Harbor and Hudson Estuary • Ohio River
Puget Sound • Rio Grande • San Francisco Bay • St. Johns River

July 29, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: **Great Waters Coalition SUPPORTS Docket No. EPA-HQ-OW- 2011-0880**

The America's Great Waters Coalition is a national coalition of environmental and watershed groups dedicated to the protection and enhancement of the unique water resources throughout the United States. One of the Coalition's main goals is to defend and support the Clean Water Act. The Coalition strongly supports the proposed Waters of the U.S. rulemaking. The proposed rule impacts important aspects of the Clean Water Act that matter deeply to Great Waters Coalition members, including pollution permitting,[1] permitting for dredged or fill material,[2] and oil spill prevention.[3] Supreme Court decisions and subsequent agency guidance have caused confusion in establishing Clean Water Act jurisdiction and in implementing its programs. This uncertainty led to many waters not being sufficiently protected, as well as confusion, delay, and wasted resources within the regulated community and among the agencies making jurisdictional determinations and enforcing the Clean Water Act. The proposed rule will clarify the Clean Water Act's jurisdiction, reduce uncertainty, and protect America's waters. For these reasons, the Great Waters Coalition strongly supports the proposed rulemaking.

A. Confusion from Supreme Court Cases Created a Need for Clarity in Clean Water Act Jurisdiction.

The two Supreme Court cases, *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*,[4] and *Rapanos v. United States*,[5] created a lack of clarity in Clean Water Act jurisdiction, which led to a loss of Clean Water Act protections.[6] The resulting confusion has

[1] 42 U.S.C. § 1342, Clean Water Act § 402.
[2] 42 U.S.C. § 1344, Clean Water Act § 404.
[3] 42 U.S.C § 1321, Clean Water Act § 311.
[4] 531 U.S. 159 (2001).
[5] 547 U.S. 715 (2006). The *Rapanos* case produced five different opinions with no majority, as well as two different tests for determining Clean Water Act jurisdiction: relative permanence and significant nexus standards.
[6] Following the 2001 *SWANCC* case and agency guidance in 2003, an estimated 20 million acres of "isolated" (non-floodplain) waters have gone unprotected.

especially impacted small headwater and intermittently flowing streams and adjacent wetlands. The subsequent complexity of making Clean Water Act jurisdictional determinations has negatively impacted agencies' ability to timely identify waters of the United States and appropriately issue permits, and has hampered enforcement activities when violations occur.

B. Lack of Clarity in Clean Water Act Jurisdiction Threatens Water Quality and Our Communities.

The current uncertainty and cost of establishing Clean Water Act jurisdiction puts water quality, aquatic life, and human health, and communities at risk. Headwater streams and wetlands provide most of the flow to downstream waters. They supply drinking water to public drinking water systems, and clean water supplies crucial to local economies. They store and filter flood flows, protecting water quality, reducing flood flows that can threaten communities and community infrastructure, and they provide essential fish and wildlife habitat that support robust outdoor recreation and tourism industries. When these waters are polluted, dredged, or filled, we lose their important natural benefits. Lack of clarity in which waters are protected by the Clean Water Act creates an unacceptable state of affairs for all concerned: the general public, the regulated community, and the agencies themselves. The Great Waters Coalition strongly supports the clarifications provided in the proposed rulemaking in order to protect human health, water resources, and improve consistent application of the Clean Water Act. Sufficient protection of the nation's waters and consistent application of the Clean Water Act is essential to ensure the integrity of our economy and environment which are dependent on clean, safe water supplies.

C. The Rule Provides Important Clarifications to Clean Water Act Jurisdiction.

The Great Waters Coalition supports the many important clarifications provided by in the proposed rule: ***(1)*** defining the term "tributary," ***(2)*** affirming that waters of the U.S. categorically include all tributaries to traditionally navigable Waters and interstate waters, and ***(3)*** defining "neighboring" as it relates to "adjacency" for wetlands and other waterbodies, such as lakes or ponds. Furthermore, application of "adjacency" to both wetlands and other waterbodies will work in concert with the clarification on tributaries to restore protections for headwaters and downstream waters into which tributaries flow. The Great Waters Coalition strongly support the rule's recognition that adjacency does not require a permanent, unbroken hydrological connection to a traditionally navigable water, that wetlands physically separated from jurisdictional waters can still be adjacent, and that the wetlands and other waterbodies located within the riparian area or floodplain of a jurisdictional water will generally be considered neighboring, and thus adjacent.

D. The Rule Should Add Some Non-Floodplain Waters to the List of Waters Connected to Interstate Waters or Traditionally Navigable Waters.

The proposed rule should be strengthened in one key respect. The rule should categorically define as Waters of the U.S. at least some prairie potholes and other depressional, non-

floodplain waters where the scientific evidence demonstrates connectivity to downstream traditionally navigable waters or interstate waters. If the administrative record for this rulemaking includes such scientific evidence, the agencies should to modify the rule to restore protections for these important waters consistent with the science.

E. The Rule is Supported by the Most Up-to-Date, Peer-Reviewed Scientific Literature.

The Great Waters Coalition recognizes and applauds the EPA and Army Corps of Engineers for simultaneously producing a peer-reviewed scientific synthesis of the latest and most relevant scientific literature to inform the Waters of the U.S. rulemaking process. The draft document entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" is an exhaustive overview of science which promotes the understanding of the connectivity between tributaries, wetlands and downstream traditionally navigable waters. According to the draft, "all tributary streams including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers..."[7] The document also recognizes that "Wetlands and open-waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers... are physically, chemically, and biologically connected with rivers...."[8]

The Waters of the U.S. rulemaking is integrating both peer-reviewed scientific support, the legal direction of the Supreme Court rulings, and the established Clean Water Act categorical waters of the U.S. determinations in order to address the *SWANCC* and *Rapanos* Supreme Court decisions, clarify and streamline the process of jurisdictional determinations, and restore consistent and sound protections for the nation's critical water resources.

Conclusion

America's Great Waters Coalition strongly urges the agencies to move forward expeditiously to clarify Clean Water Act protections and ensure consistency and transparency in jurisdictional determinations.

Respectfully Submitted,

Lyman Welch
Water Quality Program Director
Alliance for the Great Lakes

Brian Smith
Associate Executive Director
Citizens Campaign for the Environment

Brian Moore
Legislative Director
Audubon

Jennifer Hecker
Director of Natural Resource Policy
Conservancy of Southwest Florida

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[7] Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, page 234.
[8] *Id.*

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Save the Dunes

Andy Bicking
Director of Public Policy
Scenic Hudson

Consortium of
Aquatic Science Societies

November 3, 2014

To Whom It May Concern:

We are writing today on behalf of CASS (the Consortium of Aquatic Scientific Societies), a group of scientific societies including the American Fisheries Society, the Association for the Sciences of Limnology and Oceanography, the Phycological Society of America, the Society for Freshwater Science, and the Society of Wetland Scientists. Our societies founded CASS in recognition of the integration among all aquatic systems. While water, and the scientists who study it, can sometimes be categorized by terms such as "lake", "river" or "ground water", our societies and scientists acknowledge the fundamental integration of aquatic ecosystems. The goal of CASS is to promote scientific study, education, and outreach about aquatic ecosystems. Our member societies represent more than 12,000 professional aquatic scientists from academia, government agencies, private industry, NGOs, and elsewhere. Most of the leading freshwater scientists in the United States belong to at least one of our societies.

We thank you for the opportunity to comment on the proposed definition of the "Waters of the United States" (Docket identification (ID) No. EPA-HQ-OW-2011-0880). This definition is central to the protection of the ecological quality of our waters and the benefits that they provide to the citizens of the United States, and we appreciate the care and time that has been put into developing the proposed definition. We agree that it would be highly desirable to have a definition that would allow for transparent, predictable, and consistent application of the Clean Water Act, and we applaud the critical and extensive use of scientific information in preparing the new rule.

In general, we believe that the proposed definition is reasonable, and is well supported by scientific studies, many of which are cited in the proposed rule. In particular, we strongly support many aspects of the proposed definition. Here are our specific comments on the proposed rule.

- ***We strongly support inclusion of headwater streams, including intermittent or temporary streams that do not have perennial flow.*** There is now ample scientific evidence (much of it cited in the proposed rule) that there are strong and varied physical, chemical, and biological connections between headwater streams, whether they have perennial flow or not, and downstream navigable or interstate waters. This clearly satisfies the requirement for "significant nexus". Furthermore, the proposed use of the presence of bed, banks, and an ordinary high-water mark to identify stream channels that should be included seems both practical to apply in the field and consistent with the scientific evidence regarding strong connections.
- ***We strongly agree that is important to include some "ditches" as "Waters of the United States".*** We acknowledge it may be politically necessary to exclude "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" and ditches that do not contribute water to jurisdictional waters from "Waters of the United

States" (but see our next comment). However, "ditches" that have perennial flow or that currently drain or formerly drained wetlands or lakes in many cases were built to modify or replace existing natural drainage features that would have qualified as "Waters of the United States", and typically are well connected with downstream waters, thereby satisfying the "significant nexus" criterion.

- ***We are concerned that the requirement for ditches excavated wholly in and draining only uplands to have perennial flow (p. 22203, 22219 of the Federal Register listing) is too restrictive.*** This requirement seems more restrictive than the guidance from *Rapanos* that ditches should have "*relatively* [emphasis added] permanent flow of water" to be included under "Waters of the United States", and at odds with the scientifically supported recognition elsewhere in the proposed rule of the importance of tributaries having non-perennial flow. We suggest that ditches excavated wholly in and draining only uplands be included in "Waters of the United States" if they contain flowing water more than 75% of the time.
- ***The criteria for determining that waters in riparian areas and floodplains are "adjacent waters" and therefore included in the "Waters of the United States" look reasonable, and are well supported by scientific research showing that waters in these areas have strong ecological connections to jurisdictional waters or their tributaries.*** A key question raised by this definition is how to define "floodplain" in terms of return intervals or other criteria (p.22209 of the Federal Register listing). The suggestion that the extent of the floodplain be determined "by best professional judgment" seems problematic, and allows for considerable uncertainty and inconsistency in the delineation of "adjacent waters", which seems incompatible with your broad goal of transparency, predictability, and consistency. We suggest that you adopt a more uniform approach, and choose a standard return interval (we suggest 100 years, because 100-year floodplains are widely mapped, and because bodies of water within the 100-year floodplain usually have obvious connections to jurisdictional waters) with which to define floodplains, perhaps allowing this standard to be overridden in exceptional cases by best professional judgment. Alternatively, if floodplain extent is to be determined by best professional judgment, the rule should more explicitly state what considerations are to be taken into account in applying this best professional judgment.
- As the draft rule notes, some "other waters" outside of waters that will be included by rule do in fact have a significant nexus with jurisdictional waters, particularly when certain kinds of these "other waters" (e.g., prairie potholes, Carolina bays) are considered in combination with other similarly situated waters. ***We encourage the USEPA to sponsor research to develop better indicators of ecological connectivity that allow for easier identification of significant nexus and therefore less case-by-case analysis of these "other waters".***
- ***The definition of "In the Region" (p. 22212 of the Federal Register listing) could be problematic and should be modified.*** The current definition (''in the region'' [means] the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry.") would seem to imply that if a body of water along a small tributary of a navigable water were being considered, only the watershed of that small tributary would be considered to be "the region". It would seem more natural, and more in keeping with the remainder of the proposed rule, to define "the region" as the watershed of the navigable water rather than the tributary.

- ***Finally, we are disappointed that the proposed rule fails to recognize the strong and ecologically vital connections between ground waters and surface waters.*** Ground water, shallow aquifers, and hyporheic waters (those immediately below streams, lakes and wetlands) are connected to those surface waters and determine their flows during dry periods. Essentially, such ground waters are underground tributaries of lakes, streams, rivers, and wetlands. Groundwater upwelling is crucial for successful spawning of trout and salmon in lakes, and creates cool-water refuges in summer for juvenile and adult salmonids as well as warm-water refuges in winter when streams and lakes are ice covered. Ground water inputs are critical to most wetlands, lakes and streams, as well as spatially intermittent streams, and thereby affect the quality and quantity of those waters and the biota and fisheries that surface waters support. Inadequately regulated mining, fossil fuel extraction, agriculture, and industrialization have all contributed to groundwater depletion and contamination. Therefore exempting ground waters from "Waters of the United States" makes no sense from a scientific perspective.

Thank you for your attention. Please do not hesitate to contact us if we may be of assistance. We may be reached via David Strayer (strayerd@caryinstitute.org), or through our current CASS coordinator, Dr. Adrienne Sponberg (sponberg@aslo.org).

Sincerely,

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Executive Director, American Fisheries Society

James J. Elser, Ph.D.
President, Association for the Sciences of Limnology and Oceanography

John W. Stiller, Ph.D.
President, Phycological Society of America

David L. Strayer, Ph.D.
President, Society for Freshwater Science

Jim Perry, Ph.D.
President, Society of Wetland Scientists

October 24, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy:

The undersigned public health organizations write in strong support of the U.S. Environmental Protection Agency's proposed Clean Water Act rule. The public health community recognizes that clean water and healthy populations are inextricably linked and that polluted water can expose Americans to harmful contaminants in numerous ways. The public depends on water not only for basic survival, but for recreation, bathing, cleaning and cooking. EPA should move forward with a strong rule that will improve water quality and protect the health of America's families and children.

EPA's proposed rule seeks to clarify the protection of streams and wetlands under the Clean Water Act, including streams that provide some portion of water to drinking water systems that serve nearly 117 million people. The proposed rule would clarify which waters are protected and which are not, allowing pollution control officials to better protect water quality and public health.

The Clean Water Act was designed to keep pollution, including carcinogens, nutrient runoff, sewage and oil, out of the nation's water bodies. This summer we witnessed a dramatic example of the kind of disruption that contaminated waterways can cause, when a toxic algal event in Lake Erie shut off the main drinking water supply for 400,000 people. While many factors contribute to harmful algal blooms, Lake Erie and other drinking water sources depend on wetlands and streams that help to protect water quality by filtering out pollutants and provide clean water to the populations they serve.

Clean water is one of our greatest necessities and a cornerstone of public health. We urge EPA to move forward with a strong, science-based rule that best protects public health from water pollution.

Sincerely,

Alliance of Nurses for Healthy Environments
American College of Preventive Medicine
American Public Health Association
Association of Public Health Laboratories
Children's Environmental Health Network
Physicians for Social Responsibility
Trust for America's Health

October 30, 2014

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: SUPPORT Docket No. EPA-HQ-OW- 2011-0880

As members of the Choose Clean Water Coalition, we work to protect and restore local streams and rivers leading to a healthy Chesapeake Bay. One of the Coalition's main goals is to defend and support the Clean Water Act. The Coalition strongly supports the proposed "Waters of the United States" rule.

Supreme Court decisions and subsequent agency guidance have caused confusion in establishing Clean Water Act jurisdiction and in implementing its programs. This uncertainty has led to many waters not being sufficiently protected, as well as confusion, delay, and wasted resources within the regulated community and among the agencies making jurisdictional determinations and enforcing the Clean Water Act. The proposed rule will clarify the Clean Water Act's jurisdiction, reduce uncertainty, and protect waters throughout the Chesapeake Bay watershed and across America. For these reasons, we strongly support the proposed rulemaking.

A. The Proposed Rule Is Supported By Legislative History.

When passing the Clean Water Act in 1972, Congress made it clear that the scope of the Clean Water Act was to be far-reaching. The Act's ambitious goal—"to restore and maintain the chemical, physical and biological integrity of the Nation's water"[1]—required extensive federal authority over the "Nation's waters." The record of Congress' deliberation demonstrates that that Congress intended the Clean Water Act "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[2] Congress recognized that "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[3] Given Congress' clear intent that the Clean Water Act address pollution at its source and its recognition that waters are interconnected, the scope of the proposed rule is well within Congressional intent and is legal.[4]

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[1] 33 U.S.C. § 1251(a).
[2] Sen. Conf. Rep. No. 92-1236, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3376 at 3822.
[3] S. Rep. No. 414 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News at 3752-53.
[4] *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842–843 (1984) (holding that if Congress' intent is clear, the Court and the agency must give effect to Congress' unambiguously expressed intent).

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers are entitled to deference in decisions about the scope of Clean Water Act authority based on their expert ecological judgment about the role that certain kinds of waters play in the aquatic system,[5] unless a particular interpretation "invokes the outer limits of Congress' power."[6] Where, as here, the proposed rule is based on copious scientific evidence and the agencies' judgment about whether the science reveals a "significant nexus" between various categories of waters and downstream navigable or interstate waters, the approach is a reasonable and lawful interpretation of the Clean Water Act.[7]

B. The Proposed Rule Will Protect Drinking Water in the Chesapeake Bay Watershed.

Approximately 11 million people—nearly two out of three—in the Chesapeake Bay watershed get their drinking water directly from the rivers and streams flowing into Chesapeake Bay.[8] All of these river and streams are dependent on high quality water from intermittent and ephemeral streams in their headwater areas - waters that would be protected by this proposed rule.

Delaware: In Delaware, over 280,000 people receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams.

Maryland: Nearly four million Marylanders receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams.

New York: Across New York, over eleven million people receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams.

Pennsylvania: More than 8 million Pennsylvanians receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams.

Virginia: Across Virginia, over 2.3 million people receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams.

West Virginia: More than one million West Virginians receive their drinking water from public systems that rely at least in part on intermittent, ephemeral or headwater streams. The Elk River disaster in Charleston, West Virginia—which impacted the drinking water source of upwards of 300,000 people—underscored the importance of protecting drinking water sources for all Americans.

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[5] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132-35 (1985).
[6] *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).
[7] *Rapanos v. United States*, 547 U.S. 715, 767 (2006) (Kennedy, J., concurring).
[8] U.S. Environmental Protection Agency, "National Hydrography Dataset Plus; Federal Safe Drinking Water Information System 4th Quarter 2006 Data."

C. The Proposed Rule Will Protect Sensitive Waters in the Chesapeake Bay Watershed.

One of the most important aspects of the proposed rule is its protection of intermittent and ephemeral streams. Protection of these sensitive headwaters is critical to safeguarding water quality and wildlife throughout the Chesapeake Bay watershed.

The Chesapeake Bay watershed has 147,149 miles of rivers and streams.[9] Thirty eight percent, or 56,689 of those miles, are intermittent or ephemeral streams that would be protected by the proposed rule.[10] In Maryland, sixteen percent or 3,874 of the state's 23,671 steam miles are intermittent or ephemeral. Approximately 32,000 miles—or 65 percent—of Virginia's streams could be considered headwater tributary streams.[11] The Susquehanna River watershed, which runs through New York, Pennsylvania, and a small part of Maryland, boasts 45,582 miles of streams and rivers. Twenty six percent—or 12,878 miles—of those streams are intermittent and would be protected under the proposed rule.

D. The Rule Should Be Expanded to Include Other Important and Sensitive Waters.

The Chesapeake Bay watershed is home to several types of important and sensitive waters that are not currently covered by the rule as *per se* jurisdictional. Coastal plain depressional wetlands[12] are critical to protecting water quality in Maryland, Delaware, and Virginia and should be categorically protected by the Clean Water Act. As noted by University of Georgia scientists in their reports *Physical, Chemical, and Biological Impacts of Geographically Isolated Wetlands on Waters of the United States*[13] and *Evidence of Significant Impacts of Coastal Plain Depressional Wetlands on Navigable Waters*,[14] coastal plain depressional wetlands significantly impact water quality of traditionally navigable waters. Specifically, "The chemical and physical impacts of isolated wetlands on downstream waters occur in part because their isolation allows for the retention of nutrients, sediment, and water, and the exclusion of these from river networks."[15] In the Chesapeake Bay watershed, where we struggle with excess nutrients and sediment in the Chesapeake Bay and throughout the watershed, protection of these wetlands that capture nutrients and sediment is critical to meeting water quality goals and the Chesapeake Bay Total Maximum Daily Load – all under the Clean Water Act.

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[9] United States Geological Service, *available at:* http://nhd.usgs.gov/ ftp://nhdftp.usgs.gov/DataSets/Staged/SubRegions/

[10] United States Geological Service, *available at:* http://nhd.usgs.gov/. ftp://nhdftp.usgs.gov/DataSets/Staged/SubRegions/

[11] Virginia Department of Environmental Quality comments on Advanced Notice of Public Rulemaking on definition of Waters of the US, EPA Docket OW-2002-0050, March 28, 2003.

[12] Coastal plain depressional wetlands, such as Delmarva bays, are found in the Chesapeake Bay watershed. *See* http://www.dnr.state.md.us/naturalresource/spring2001/delmarvabays.html

[13] *See* Attachment A.

[14] *See* Attachment B.

[15] *See* Attachment B. pg. 14 at 23.

Conclusion

We strongly urge the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to include coastal depressional wetlands in waters categorically protected under the Clean Water Act and then adopt the proposed rule.

Respectfully Submitted,

American Rivers
Anacostia Watershed Society
Audubon Naturalist Society
Clean Water Action
Conservation Pennsylvania
Conservation Voters of Pennsylvania
Delaware Nature Society
Earth Forum of Howard County
Friends of Dyke Marsh
Friends of the North Fork of the Shenandoah River
Izaak Walton League of America
James River Association
Loudoun Wildlife Conservancy
Maryland Academy of Science at the Maryland Science Center
Maryland Conservation Council
Maryland League of Conservation Voters
National Aquarium
National Parks Conservation Association
National Wildlife Federation
Nature Abounds
PennFuture
Pennsylvania Council of Churches
Port Tobacco River Conservancy
Potomac Conservancy
Prince William Conservation Alliance
Savage River Watershed Association
Severn River Association
Sidney Center Improvement Group
Sierra Club – Virginia Chapter
Southern Environmental Law Center
Virginia Conservation Network
West Virginia Rivers Coalition

AMERICAN
SUSTAINABLE
BUSINESS
COUNCIL

November 14, 2014

U.S Environmental Protection Agency
Washington , DC

RE: EPA-HQ-OW-2011-0880

Dear policymaker,

As a business leader, I support the Environmental Protection Agency's (EPA) proposed rule on water safety because it will give the business community more confidence that vital sources of clean water will be protected and will provide a consistent regulatory system based on sound science.

American businesses have always depended on the availability of clean water for their processes, and historically, the EPA's regulation in this area has been a successful example of the vital partnership between business and government. Whether companies are food producers, high-tech manufacturers of silicon wafers, providers of outdoor recreation or beer manufacturers, businesses rely on clean water to produce safe, high-quality products.

I applaud the EPA for taking steps to clarify that small streams, wetlands and other tributaries are protected by the Act. Degradation and loss of wetlands and small streams can increase the risk of floods, seriously threatening businesses. Moreover, dirty, polluted water creates unnecessary and sometimes very difficult economic challenges for communities and businesses alike. This action by the EPA is good for the environment and good for business.

Sincerely,

Richard Eidlin
Vice President, Policy & Campaigns
American Sustainable Business

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1401 NEW YORK AVE, NW
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ASBCOUNCIL.ORG

First Name	Last Name	City	State	Business or organization name	Business title
Julie	Moore	Raleigh	NC	Fiberactive Organics	Founder/CEO
Steve	weinberg	philadelphia	PA	national foundry products	Mr.
Irwin	Hoenig	Laurel	MD	Living Calmness	owner
Gia	Machlin	New York	NY	EcoPlum	President
Alex	Kahl	San Rafael	CA	Kahl Consultants	Owner
Kent	Searight	Portland	OR	3rd Rock Data	President
Sandra	Zylberman	Owings Mills	MD	HarborWest Design	President
Kevin	Sasse	Prescott	AZ	Granite Alley Garage	Owner
Karl	Ostrom	Vashon	WA	NBIS	Co-Director
Paul	Troyano	New Orleans	LA	Living Furniture	owner
Susan	Wiltse	Scotts	MI	Wiltse Kitchen	Co-Owner
Bruce	Gendvil	Las Vegas	NV	Berkshire Hathaway	sales executive
Jerry	Bates	Morrisonville	NY	Bates Apartments	Owner
Susan	peirce	lyons	CO	Canyonlights	owner
Karen	Ulring	San Francisco	CA	Psychotherapy Associates	LCSW
Marcia	Hutchinson	Sherborn	MA	GoodWorx Web Design	Director
Jerry	Chilson	Enumclaw	WA	JKF Chilson, Opals & More	owner
Stephen	Wyman	Georgetown	TX	Eemc	Founder
Mercedes	Lackey	Claremore	OK	High Flight Arts and Letters	Owner
Andreas	Wittenstein	San Geronimo	CA	BitJazz Inc.	President
Matthew	Cleveland	Elizabethtown	PA	Occasions Disc Jockeys	owner
Richard	Lawton	Point Pleasant Beach	NJ	Triple Ethos	Founder
Kathy	McGuire	Jupiter	FL	3 Pillar Solutions	Principle
Mary Kay	Elloian	Burlington	MA	Elloian Law	Attorney
Michael	Londo	Glen Ellyn	IL	Just in Time Direction	VP of Admin
Gregory	Blake	Irvine	CA	Biosynthetic Technologies	Dir. of Strategic Development
Rosalinda	Sanquiche	Saint Augustine	FL	Ethical Markets Media	Executive Director
Steven	Kostis	New York	NY	KKI	Jr. VP
Kathleen	Hutton	Plymouth	MA	World Wildlife Foudation	Webmaster
John	Sodrel	New Albany	IN	Sodrel Photography	Owner
Brenda	Balanda	Point Reyes Station	CA	Marin Sunshine Realty	Owner/Broker
Mark	White	Pittsburgh	PA	MW Liquidation Co.	Owner
Alicia	Keys	Portland	OR	A Keys Massage	Ms.
Carolyn	Barrett	Orange	NJ	BARRETT INTERNATIONAL TECHNOLOGY	Mrs.
Steve	Hersch	Kenmore	WA	HWF	Owner
Tim	Dolan	Bozeman	MT	Dolan's Painting Co	Mr.

James	Baron	Arlington	WA	Arlington Investments LLC	Manager
Charlotte	Flynn	Austin	TX	None	none
Kae	Bender	Lancaster	CA	SocioEnergetics Foundation	founder
David	Ulibarri	Chicago	IL	None	Mr.
Sinclair	George M.D. PhD.	Jupiter	FL	Profound Transitions	Manager
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Martha	Hauer	Peyton	CO	Planet Urine.com	Ms.
Pete	Anderson	San Jose	CA	Pete's Floors	owner
Leland	Griffin Jr	Trumansburg	NY	LWGRIFFIN'S SUPPLY LLC	owner
Phyllis	Andrews	Pioneer	CA	Wildwood Business Services	Owner
Tim	Brainerd	Natick	MA	None	none
Jessica	Brown	Portland	ME	Atlantis Curio	Owner
Arthur	Kennedy	Isla Vista	CA	SCOPE*TEK	sole propietor
Marti	Cockrell	Fort Worth	TX	Infinite Roofing	Vice President
Bob	Bechtold	Ontario	NY	Harbec	Pres.
Michael	Manes	Littleton	CO	Manes Consulting	Consultant
James	Schulman	Chicago	IL	Building Materials Reuse Association	Treasurer
Darren	Blankenship	FITCHBURG	WI	EarthShare	Midwest Regional Director
Savitri	Khalsa	Silver Spring	MD	Three Green Pears	owner
Caryn	Heilman	Adams	MA	Topia Inn	CoOwner
Kimberly	Lillig	Raleigh	NC	Kklillig ltd	Clinical social worker
Jesse	Beardslee	Hector	NY	Themis and Thread	Owner
Kelly	Lintecum		AZ	Arizona State University	Research Technician
bradford	diehl		TN	van op	owner
Marissa	Rosen	St. Louis	MO	TriplePundit	Social Media Director
Carol	Gloor	Savanna	IL	Law Office of Carol L. Gloor	Proprietro
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Executive Director
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November 14, 2014

Mr. Ken Kopocis
Deputy Assistant Administrator for Water
United States Environmental Protection Agency
1200 Pennsylvania Ave NW, MC 4101M
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon, Room 3E446
Washington, DC 20310-0108

Re: Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA–HQ–OW–2011–0880

Dear Deputy Assistant Administrator Kopocis and Assistant Secretary Darcy:

The Association of State Floodplain Managers (ASFPM) has compiled comments from its 35 Chapters (representing over 16,000 state and local officials and other professionals who are engaged in all aspects of floodplain management including hydrology and preservation of water resources) supports efforts to clarify the rules impacting the Clean Water Act. A clear and comprehensive definition of waters regulated by the United States is needed to maintain a firm foundation for §404 and other provisions of the Clean Water Act (CWA). ASFPM has prepared a list comments from its membership, policy committees and staff after their review of the Interpretive Rule Regarding Applicability of Clean Water Act Section 404(f)(1)(A), Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA–HQ–OW–2011–0880 as proposed by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers on March 25, 2014.

ASFPM has reviewed the rule as proposed by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to clarify existing definitions and procedures for application of those definitions. This letter provides our comments in response to their proposal: – *Definition of "Waters of the United states" Under the Clean Water Act* – as published in the

Federal Register on April 21, 2014 including supporting information contained in the preamble and appendices.

ASFPM SUPPORTS PROVISIONS OF THE PROPOSED RULE FOR THE FOLLOWING REASONS.

1. **The proposed rule provides much needed clarity and a clear scientific basis in regards to the scope of federal jurisdiction over waters of the United States in the wake of U.S. Supreme Court decisions including *SWANCC v U.S. Army Corps of Engineers*, and *Rapanos v. United States*.** These two decisions altered the previous understanding of Clean Water Act jurisdiction, but did not provide a clear and comprehensive definition to replace the existing rule and guidance on the waters protected under the Clean Water Act. The plurality decision in *Rapanos* in particular has resulted in uncertainty regarding the correct scope of federal regulation especially for wetlands. While many states operate under state, rather than federal law this has resulted in delays where both state and federal review are required, and engendered a lack of trust in the ability of state and federal agencies to appropriately apply water flood management regulations.

2. **The proposed rule was developed concurrently with a thorough review of current scientific literature by the EPA and subsequent development of EPA's Scientific Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and synthesis of the Scientific Evidence*** (Science Report). The Science report is important in that it documents the scientific basis for the proposed rule, clearly linking the protection of waters to the need for protection as defined in the Clean Water Act. ASFPM has also reviewed the current version of the Science Advisory Board panel/committee review of the report, as well as the draft recommendations of the Science Advisory Board panel/committee and in our opinion, this report combined with the Science Advisory Board panel/committee review and recommendations provides an adequate scientific demonstration of the importance of waters defined by the proposed rule as Waters of the United States, and the need for their protection and protection of the riparian floodplains (when present) to prevent increased flood risk.

3. **The proposed rule recognizes the importance of adjacent waters and wetlands, and provides a clear nexus with protection of these waters under the CWA.**

   Definition of all adjacent waters and wetlands as jurisdictional will increase regulatory predictability, and eliminate the need for more cumbersome case-by-case decisions regarding jurisdiction. The proposed rule and associated documentation cite key ecological services provided by adjacent waters, and provide a clear nexus with navigable waters of the United States. In an era of more extreme and unpredictable climate conditions, these critical resources buffer against flood and drought.

The proposed rule provides for regulation of certain categories of "other waters" (paragraph a(7) of the proposed definition of Waters of the United States) as a category, and without the need for case-by-case documentation of a significant nexus.
Jurisdiction over appropriate categories of "other waters" has been supported legally by the *Rapanos* decision, and scientifically by the EPA Science Report. This approach relies on a one time analysis of the nexus between the category and navigable waters, and greatly improves the predictability and efficiency of the permit process. We will not reiterate all of the reasons discussed in the SAB report and underlying literature for which "other waters" should be protected, but emphasize that on a broad basis, "other waters" can play a primary role in protecting water quality and managing water quantity, as well as providing critical fish and wildlife habitat.

ASFPM strongly supports the definition of appropriate categories of wetlands or waters as jurisdictional by rule, where supported by existing science and consistent with the requirements of the CWA. We believe that the literature reviewed by the Science Report includes sufficient scientific documentation to designate some categories of wetlands as jurisdictional by rule, and recommend that such designations be considered as part of developing a final rule.
We also encourage development of a process to expedite documentation of additional categories of other waters as jurisdictional by rule on a regional basis, as discussed under recommendations, below.

4. **The proposed rule provides for jurisdiction over certain "other waters" based on case-by-case documentation of a significant nexus, providing for protection of additional critically important waters and wetlands under the CWA.**

Both the *Rapanos* decision and the Science Report recognize that there may be a significant nexus between specific "other waters" and downstream navigable waters. This is true even where the strength of the connection and its significance varies greatly within a class or category of such waters – that is, jurisdiction may not extend to the entire category. In spite of the legal and scientific acceptance of the concept of protecting waters having a significant nexus, there has not been an established process to protect these individually important waters since the *Rapanos* decision. Therefore, ASFPM supports this provision in the proposed rule.

Protection of these waters may be of critical regional or local importance to provide flood storage and attenuation, prior to reaching navigable waters to provide flood risk reduction for downstream communities and protection of essential fish and wildlife habitat. We recognize that a regulation that is national in scope cannot reasonably define all instances in where

other waters have a significant nexus with waters of the U.S., and in these instances, a case-by-case decision is appropriate.

5. **The proposed rule recognizes the importance of protecting and managing stream networks in totality – including tributaries – to maintain the physical, chemical, and biological integrity of navigable waters.**

   All components of the stream continuum function together to protect the following: physical (channel and channel bank integrity), natural flood water storage, chemical (e.g. drinking water) and biological (e.g. habitat and migration) ecological services. These services are interrelated and not addressed by protection of only limited reaches of a stream. ASFPM supports the fundamental definition of streams and their tributaries in the proposed rule, based on the presence of physical structure which may include a bed, banks, floodplain and evidence of flow. This approach is consistent with most state legal definitions. It may, however, be helpful to discuss in more detail what the agencies are describing when they use the term "ephemeral" as it is used in the preamble to the proposed rule (or in future guidance), given that this term is defined differently by various states from both a legal and a scientific perspective. In addition some discussion of how the methodology used to identify streams takes into consideration their contribution to the physical, chemical, and/or biological integrity of navigable waters is recommended.

   We also recommend that the federal agencies consult with the states to develop or revise field procedures for identifying streams on a regional basis.
   We also recognize the complexity of drawing a line between regulated tributaries and unregulated man-made upland ditches, especially since many ditches were formed by modification of natural streams. However, this is a long standing problem. If uncertainty regarding jurisdiction in complex situations is not entirely resolved by the proposed rule, still the rule does not exacerbate the problem.
   A number of states have developed criteria that provide straight forward solutions to addressing these distinctions in a regulatory program, and we suggest that the federal agencies consult with the states to develop consistent criteria to distinguish between highly altered streams, regulated ditches and unregulated ditches.

ASFPM ALSO HAS CONCERNS REGARDING CERTAIN ASPECTS OF THE RULE, AND MAKES THE FOLLOWING RECOMMENDATIONS TO ADDRESS OUR CONCERNS. IN SPITE OF OUR OVERALL SUPPORT OF THE RULE, WE ARE HIGHLIGHTING THE FOLLOWING ISSUES WHICH WE BELIEVE MAY BE IMPROVED IN THE FINAL RULE.

1. **We strongly urge that the federal agencies emphasize and increase coordination with state and tribal co-regulators in development of the final rule and associated guidance, and in implementation.**

   Numerous states and tribes have developed effective and proven technical and field methods to document many of the connections and types of waters defined in the rule. We believe that where such procedures are consistent with the overall requirements of the rule, they should be readily accepted.
   Numerous states and tribes also have existing agreements with Corps Districts and other agencies regarding regulatory procedures that are addressed by or may be affected by the proposed rule. To the extent that such agreements can be maintained (recognizing the need for consistency with the overall rule), regulatory delays will be minimized.

2. **We urge the federal agencies to continue attention to distinguishing between the jurisdictional definition of Waters of the United States, and the waters that are assumable by states under §404(g) of the CWA.**

   The preamble to the proposed rule includes the statement:

   > *"Today's proposal does not affect the scope of waters subject to state assumption of the section 404 regulatory program under Section 404(g) of the CWA. ... The scope of waters that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language of the CWA. ..."*

   We concur with this statement, but also are of the opinion that a more definitive clarification of the scope of assumable waters is needed to facilitate ongoing development of state-federal coordination. It has become apparent that there is not a clear understanding between states interested in assumption and the federal agencies regarding the means by which assumable waters are to be identified. Therefore, ASFPM requests that EPA and the Corps consult with the states and tribes to revise the existing assumption regulations to clarify this issue, preferably through formation of a FACA subcommittee to develop consensus and provide transparency.

3. **ASFPM recommends development of implementation procedures and any necessary supporting rule language to allow for designation of categories of "other waters" found to have a significant nexus with downstream navigable waters as jurisdictional by rule on a state or regional basis.**

   As noted above, we support protection of "other waters" on a categorical basis where it is supported by science, but believe that designation of additional categories of protected "other waters" through a future national rulemaking will be cumbersome and is likely to overlook

locally important types of wetlands. Therefore, we recommend that the proposed rule, along with implementing guidance, allow for a process that includes the following attributes:

- The process should provide for designation of categories of "other waters" having a significant nexus with navigable waters within a defined geographic region, in accordance with the provisions of the proposed rule regarding Waters of the United States, following gathering of appropriate documentation, public notice, and review. Such a list could be updated every fifth year, or at some other suitable interval. This would allow for identification, study, and designation or removal of categories of waters over time.

- The process for designating categories of other waters that are jurisdictional by rule should be a collaborative one, involving one or more states or tribes and Corps Districts, and the EPA, along with other stakeholders.

- The process should provide for public review and comment of any proposed designations, and define a process for timely approval of the designated categories by the federal agencies.

4. **ASFPM recommends that the federal agencies adopt a definition of "floodplain" that takes into account biological, and hydrological as well as physical (hydraulic and geomorphological) considerations.** Questions have been raised regarding the proposed definition of a floodplain for purposes of identifying waters that are "adjacent" and therefore Waters of the United States by rule. While many organizations have suggested options to provide greater certainty – e.g. by specifying use of a specific flood interval or use of existing FEMA maps - ASFPM recognizes the shortcomings of both of these approaches.

   The default minimum FEMA standard 1% chance floodplain has no correlation to the interconnected waters of the United States from a biological, ecological or geomorphological standpoint. Rather, the basis for identifying FEMA floodplains has primarily been the result of identifying those areas that are the highest risk for property damage and human injury. That is why only 1/3 of the 3.5 million miles of streams, rivers and coasts have flood hazards identified and only half of those stream miles have detailed, engineering based studies. Further identification of floodplains for the purposes of FEMA flood studies have continued to be prioritized based on areas that have a high degree of risk to humans and budgetary constraints.

   In order to maintain the flexibility needed to accommodate a wide range of conditions based on the size and landscape position of the stream in question, we support the following

definition [1] because it recognizes biological and hydrological functions, and also acknowledges and allows for alignment with long established definitions used in established state floodplain programs.

> ***"The term floodplain means areas recognized by the federal government, states, local governments, or tribes that have been or may be inundated or are susceptible to being inundated by waters from any source when flows or water levels exceed normal levels. , including the bed and banks of the stream, river, ocean, or other body of water. It also includes areas subject to fluvial dynamics, channel migration, and other erosion or physical changes under flood conditions."***

We believe that there are sufficient methods available or under development (e.g. GIS and associated remote sensing data) to develop regional methods for identifying floodplains using this definition. The ability to align §404 and other CWA programs with existing state and tribal floodplain regulations by developing regional approaches will avoid a great deal of confusion that would occur with the use of two differing technical designations of the term "floodplain" in related regulatory programs. We recognize that this approach may reduce state to state consistency, but we believe that factor is outweighed by benefits of providing a clear and consistent regulatory framework within a state, as long as reasonable consistency with federal law is maintained.

There is widespread concern and uncertainty regarding the distinctions among unregulated or "upland" ditches, regulated tributaries, and activities that are (currently) exempted in ditches or tributaries. We strongly recommend additional clarification of these distinctions in the final rule and associated implementing guidance. Particularly that volume and flow need to be regulated if water routinely flows in the ditch following storm events. Roads are linear features that cut across wetlands, streams and other aquatic resources and sometimes become part of the overall stream system either through design or by accident. The phrase, "Ditches that do not contribute flow..." in the list of non-jurisdictional waters has raised the concern that channels that convey ***any*** amount of flow following storm events will be considered regulated. During final rulemaking, some exclusion for insignificant or de minimis flow may be considered.

ASFPM encourages the acceptance of technical and field methods developed by states and tribes, where consistent with CWA definitions and requirements. Methods that have already been proven to be efficient and accurate in a given region – e.g. use of regional soil attributes, geometry and configuration, types of available mapping, etc. should be used to support both state and federal jurisdictional decision to avoid duplication of effort and added cost.

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[1] See comments from ASFPM to EPA and the Corps of Engineers dated February 21, 2014 regarding The Connectivity of Streams and Wetlands to Downstream Waters

We generally concur with the comments made by the Association of Clean Water Administrators (ACWA) regarding this issue.

5. **In order to minimize regulatory delays associated with a significant nexus determination, or with distinguishing between regulated tributaries and unregulated ditches where such a distinction is unclear, we recommended continued use of preliminary jurisdictional determinations (JD's). This process allows a landowner to assume that jurisdictional waters "may be" present on a site, and to move directly to a permitting process and avoid the delays involved with obtaining a formal JD, especially where general permits are applicable.**

   We also recommend continuation of this option to "opt out" of a full approved JD in this manner in headwater areas where the upstream limits of "tributaries" may be uncertain and a permitting decision is more expeditious for the landowner.

   While the definition of "significant nexus" in the proposed rule is consistent with the decisions of the U.S. Supreme Court and is also scientifically defensible, it may continue to be extremely time consuming and impractical to evaluate and document the presence of a significant nexus in numerous individual regulatory decisions on a case-by-case basis particularly for aquatic resources that full under the "other waters" category. Documentation of a significant nexus in many ways parallels fact finding under the 404(b)(1) guidelines; that is, the documentation of ecological services that have a significant impact on the chemical, physical and biological integrity of downstream waters may guide a permit decision. Therefore, it may be simpler to move directly to a permitting decision. In that decision, the scope of the project impact on the wetland (or water) in question will also be taken into account, and if that impact is minimal, then a permit (or authorization under a general permit) may be approved. In short, the permit process may be more expeditious than documentation of a significant nexus.

   Also, numerous dredge and fill activities in small tributaries – such as routine stream crossings, culvert placement, bank stabilization and maintenance – may be covered by existing or future general permits. In these instances, detailed jurisdictional documentation may be unnecessarily time consuming. In headwater areas, it may be more practical to focus the regulatory process more on acceptable activities, and BMP's that should be associated with such activities, than on defining a line between regulated and unregulated channels where such a line is not easily identifiable on the landscape.

6. **The proposed rule includes language reiterating current exemptions for waste treatment systems. However, the regulation of natural or artificial waters that are used to convey or treat stormwater is not clear; this is a long standing issue that is further**

complicated by the proposed rule.

Regulations and exemptions for waters conveying stormwater should be clarified in the final rule and in implementing guidance. In additions, any distinctions between §404 dredge and fill requirements, and the regulatory scheme under §402 – including stormwater treatment – should be clarified.

- The basic underlying question of whether **stormwater** collection and treatment systems are considered to be wastewater treatment systems must be clarified. In some circumstances, artificial stormwater treatment ponds have reportedly been identified by federal agency staff as wastewater systems, but in other cases that have been treated as waters of the United States. Situations where natural waters are used to collect, store, convey, or filter stormwater become even more complicated.

  It should be noted that a regulatory system that works for dredge and fill activities may not be efficient for 402 permitting, and vice versa. Therefore it is likely that other regulatory tools – including exemptions (e.g. for maintenance), general permits, and so on - may be needed to effectively accommodate both program areas.

- Urban agencies are concerned with MS4 stormwater collection systems, and the extent to which these systems may become subject to §404 permitting.

- It is sometimes unclear whether cooling ponds are "waste treatment systems" or treated as such, particularly when a cooling pond is located in the jurisdictional water (i.e. mangroves).

- A number of questions have been raised regarding jurisdiction over natural waters used to convey and filter stormwater. In some instances, these waters have been used to convey stormwater since prior to regulation under the CWA.

- The distinction between wetlands or other waters that store or convey stormwater, and those wetlands used specifically to treat or filter stormwater, also raises questions regarding the scope of the wastewater system exemption.

Finally, ASFPM recognizes that the §402 and §404 programs have distinctly different goals and requirements as applied to stormwater management. Therefore, we urge that EPA recognize these distinctions in the final rule and in guidance.

8. **ASFPM recommends that the final rule include a clear schedule for implementation including provisions for grandfathering of actions approved by federal agencies under the**

existing jurisdictional regulations. Although EPA has stressed that the proposed regulation does not increase the scope of jurisdiction compared to the pre-Rapanos requirements, it seems clear that in some instances jurisdiction may expand in comparison to the post-Rapanos guidance that is currently in place. We assume that approved jurisdictional determinations will be effective until their normal expiration date, and that an activity previously permitted under the CWA will also be grandfathered. However, confirmation of these positions should be included in the final rule.

ASFPM SUGGESTS THAT THE FEDERAL AGENCIES COORDINATE WITH THE STATES AND TRIBES IN DEVELOPMENT OF GUIDANCE REGARDING IMPLEMENTATION OF THE FINAL RULE. WE RECOGNIZE THAT DETAILS OF ON-THE-GROUND IMPLEMENTATION CANNOT BE FULLY ADDRESSED IN A RULE, BUT THESE ISSUES WILL BE RIPE FOR COLLABORATIVE EFFORTS UPON PUBLICATION OF THE FINAL RULE.

Development of guidance materials on the following topics by the federal agencies and state co-regulators would benefit the states, permit applicants, and the general public.

- **Criteria and field/remote procedures[2] for identifying streams - particularly ephemeral streams.** This should be a joint effort by EPA/COE/States. Criteria should include not only bed and bank and OHWM, but also methods to determine that flow and biological or chemical processes are occurring that are important to downstream navigable waters.

- **Criteria and field/remote procedures for the identification of ditches - jurisdictional and non-jurisdictional.**

Guidance on how to develop a proposal as well as the review and decision-making process for a category of "other waters" that could be identified as jurisdictional (not requiring the significant nexus tests) on a regional basis. This will be needed if the recommendation discussed previously to develop a process for identifying categories of "other waters" is adopted.

ASFPM appreciates the complexity of developing a proposed rule given the complexities of the *SWANCC* and particularly the *Rapanos* Supreme Court decisions.. We would welcome the

Association of State Floodplain Managers, Inc.

opportunity to work with the federal agencies, the states and tribes, and other state nonprofit organizations in resolving concerns in the proposed rule, and/or in anticipated guidance. In spite of the concerns expressed above, we believe that the rule is necessary, and that overall it will improve the regulatory processes of the Clean Water Act, and we reiterate our support.

Should you have questions regarding these comments, please contact please contact contact Chad Berginnis, CFM, Executive Director at cberginnis@floods.org or by telephone at 608-828-6338.

Respectfully,

Chad Berginnis, CFM
ASFPM Executive Director

William Nechamen, CFM
ASFPM Chair

Healing Our Waters-Great Lakes Coalition

November 14, 2014

Water Docket, Environmental Protection Agency
Mail Code 2822T, 1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Attention: Docket ID No. EPA-HQ-OW-2011-0880

To whom it may concern:

On behalf of the Healing Our Waters-Great Lakes Coalition and more than XX nonprofit conservation organizations representing millions of concerned citizens in the Great Lakes region, we submit these comments in support of the proposed rule defining the scope of waters protected under the Clean Water Act.

The HOW Coalition believes that the proposed Clean Water Protection Rule is one of the many important steps to protect and restore our Great Lakes. We understand that the agencies have undertaken the authority granted to them by Congress under the Clean Water Act to legally clarify the statute's jurisdiction. Our coalition supports this rulemaking and this rule and urges the Environmental Protection Agency and the U.S. Army Corps of Engineers to finalize the rule quickly.

Clean Water Protections at Risk
For years the Clean Water Act protected all wetlands and streams, which was Congress' intent. Congress recognized the interconnectedness of U.S. waters when it passed the act in 1972. It clearly articulated its intent that the tributaries of navigable waters be protected when it stated in a January 1973 report: "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[1]

Now many of the waters on which the Great Lakes depend are at increased risk and have been for nearly a decade-and-a-half. Supreme Court decisions in 2001 (SWANCC vs. Army Corps of Engineers) and 2006 (Rapanos vs. United States) and subsequent agency actions have created a confusing, time-consuming, and frustrating process for determining what waters are protected under the Clean Water Act and state laws. This threat in particular leaves intermittent and headwater streams vulnerable to pollution and adjacent wetlands open to be filled and destroyed. Half of the streams in Great Lakes states do not flow all year, putting them, and adjacent wetlands, at risk of increased pollution and destruction. Over 117 million Americans get their drinking water from surface waters, including nearly 37 million people in Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York. More importantly, 83 percent of the population in Great Lakes states are dependent on public drinking water systems that rely in intermittent, ephemeral, and headwater streams (See Table 1).[2] In addition, according to the U.S. Fish and Wildlife Service, the rate of wetlands loss accelerated nationally by 140 percent from

[1] Congressional Research Service. 1973. "A Legislative History of the Water Pollution Control Act Amendments of 1972." Library of Congress, Washington, D.C. Volume 2, P. 77.
[2] U.S. Environmental Protection Agency. 2009. "Analysis of the Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S."

2004 to 2009, the years immediately after the Supreme Court rulings.[3] The Great Lakes region has already lost 66 percent of their historic wetlands (See Figure 1).[4]

Our Great Lakes are Connected and Important

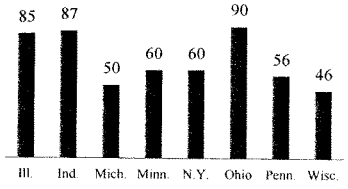
Protecting and restoring wetlands and streams is critical to the restoration and protection of the Great Lakes. According to a draft review of more than a thousand publications from peer-reviewed scientific literature conducted by an EPA Science Advisory Board, streams, tributaries (e.g., headwater, intermittent, ephemeral), and wetlands are clearly connected to downstream waters. The overwhelming science concludes that upstream waters in tributaries (intermittent, ephemeral, etc.) exert strong influence on the physical, biological, and chemical integrity of downstream waters. Common sense also tells us this is true. Pollution in a tributary is carried downriver into bigger and bigger waterways. Upstream waters also feed water to rivers and lakes, like the Great Lakes.

Table 1: Analysis of the Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S. Completed by U.S. EPA in July 2009

State	Population Served by Public Drinking Water Systems using surface water[5]	Population Dependent on Public Drinking Water Systems relying on I/E/H	% Population on Public Drinking Water Systems relying on I/E/H	Total Stream Miles in Source Protection Areas	Miles of I/E/H in SPAs	% of streams in SPAs that are I/E/H
Ill.	4,872,325	1,680,948	34%	9,894	5,688	57%
Ind.	1,951,112	1,703,230	87%	2,330	1,158	50%
Mich.	1,977,536	1,400,633	71%	1,342	551	41%
Minn.	1,068,598	978,928	92%	1,736	627	36%
N.Y.	11,471,432	11,146,815	97%	10,436	5,728	55%
Ohio	5,894,716	5,285,318	90%	11,605	6,978	60%
Penn.	8,215,216	8,035,216	98%	18,604	10,720	58%
Wisc.	1,392,700	391,531	28%	504	254	50%
Total	36,843,635	30,622,619	83%	56,453	31,703	56%

Additionally, other water features connected to rivers and lakes also play important roles. Healthy wetlands improve water quality by filtering polluted runoff from farm fields and city streets that otherwise would flow into rivers, streams, and water bodies across the country, including the Great Lakes. Wetlands and tributaries provide vital habitat to wildlife, waterfowl, and fish, reduce flooding, and replenish groundwater supplies. According to the SAB, all of this science provides an adequate basis for the key components of the proposed rule.

Figure 1: Percentage of Total Historic Wetlands Lost



A good example of how pollution upstream impacts bigger waters downstream is the recent drinking water crisis in Toledo, Ohio. Excess phosphorus and other pollutants washing off the land and impervious urban surfaces during heavy rains flow into the Maumee River, which empties into Lake Erie. Excess phosphorus mixes with a complicated brew of threats in the lake (like zebra and quagga mussels) driving the re-emergence of harmful algal blooms.[6] The

[3] Dahl, T.E. 2011. "Status and trends of wetlands in the conterminous United States 2004 to 2009." U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. P. 45.

[4] Dahl, T.E. 1990. "Wetlands Losses in the United States 1780's to 1980's." U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. P. 6.

[5] All data found at:
http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_results_state.pdf

[6] According to the Ohio Lake Erie Phosphorus Task Force, "... there are multiple contributors to phosphorus into Lake Erie, but agriculture is the leading source [of phosphorus] due to the majority of land use in agriculture in the Maumee River...." See: Ohio Department of Agriculture,

blooms that shut off Toledo's drinking water produced deadly toxins harmful to human health requiring city officials to issue 'do not drink' orders. To protect drinking water systems like Toledo's, it is vital to protect the source of drinking water upstream, which the proposed rule does by covering streams and tributaries that play a vital role in keeping our waters clean and ensuring access to safe drinking water.

Clean Water Rule Supports Great Lakes Restoration Investments
Recognizing the important role wetlands and streams play in the overall health of the Great Lakes, the region's business, environmental and government leaders endorsed a plan that calls for the restoration of more than 1 million acres of wetlands.[7] Over the last five years, the U.S. Congress and Obama Administration have invested more than $1.6 billion to restore the Great Lakes. These efforts are producing results in communities around the region—including the restoration of more than 115,000 acres of wetlands and other habitat.[8] The Clean Water Protection Rule will support Great Lakes restoration efforts and ensure that restoration gains are protected so that as we take one step forward we aren't also taking two steps back.

The clean water and restoration investments protected by the rule also support good-paying jobs and lay the foundation for long-term prosperity. Investments in Great Lakes restoration are creating jobs and leading to long-term economic benefits for the Great Lakes states and the country. A Brookings Institution report shows that every $1 invested in Great Lakes restoration generates at least $2 in return.[9] Research from Grand Valley State University shows that the return for certain projects is closer to 6-to-1.[10] The University of Michigan has also demonstrated that over 1.5 million jobs are connected to the Great Lakes, accounting for more than $60 billion in wages annually.[11] Great Lakes businesses and individuals account for about 33 percent of the U.S. gross domestic product, according to a profile of Bureau of Economic Analysis data presented by World Business Chicago.[12]

The Clean Water Protection Rule helps protect our investment in restoring and protecting our Great Lakes by safeguarding vital wetlands and other waterways from pollution and/or destruction.

What the Proposed Rule Does and Does Not Do
In particular, the proposal provides clear and predictable protections for many streams, wetlands, and other waters that are currently vulnerable. The effect of this is to give greater certainty to the regulated community by providing better guidance from federal and state regulators. This helps streamline the permitting process. It does this in part by providing a clearer, scientifically supported definition of tributaries than in the past, saying that streams must have a defined bed, bank, and ordinary high water mark and flow to water already covered by the Act. The proposal reiterates existing exemptions for farming, forestry, mining and other land use activities, and very explicitly for the first time excludes many ditches, ponds, and other upland water features important for farming and forestry.

While the proposal covers waters that have historically been covered by the Clean Water Act, it does not extend this coverage to new types of waters that have not historically been under the Act's jurisdiction, such as groundwater. This means that the rule does not expand coverage to any new ditches. In fact, upland drainage ditches with less than perennial water flow are explicitly excluded. The rule also does

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et.al. 2013. "Ohio Lake Erie Phosphorus Task Force II Final Report." P. 1. Members of this Task Force included the Ohio Department of Agriculture, Ohio Farm Bureau Federation, and Ohio Environmental Council, among others.
[7] Great Lakes Regional Collaboration. 2005. "Strategy to Restore and Protect the Great Lakes." Found at: http://www.glrc.us/documents/strategy/GLRC_Strategy.pdf
[8] U.S. Environmental Protection Agency. 2014. "Fiscal Year 15: Justification of Appropriation Estimates for the Committee on Appropriations." Washington, D.C. P. 267.
[9] Austin, et.al. 2007. "Healthy Waters, Strong Economy: The Benefits of Restoring the Great Lakes Ecosystem." Metropolitan Policy Program, The Brookings Institution. Washington, D.C. 16 pp.
[10] Isely, et.al. 2011. "Muskegon Lake Area of Concern Habitat Restoration Project: Socio-Economic Assessment." Grand Valley State University, Grand Rapids, Michigan. P. 23.
[11] Michigan Sea Grant. 2011. "The Great Lakes: Vital to our Nation's Economy and Environment." University of Michigan. 2 pp.
[12] Found at: https://www.worldbusinesschicago.com/files/data/GLSL_Economy_2013%20%282011%20data%29.pdf

not cover any artificial lakes, ponds, and artificial ornamental waters in upland areas or water-filled depressions created as a result of construction activity. These areas are explicitly exempted by the rule. For the sake of clarity, the rule also restates that agricultural practices are exempt under current law. The most common farming and ranching practices, including plowing, cultivating, seeding, minor drainage, harvesting for the production of food, fiber and forest products, are exempt under the CWA and that exemption is reiterated in the proposal.

Conclusion
The HOW Coalition strongly supports this rulemaking and the proposed rule. The Great Lakes region cannot protect the Great Lakes alone. They need the help from the Clean Water Act to ensure all Great Lakes rivers, streams, and wetlands can provide clean drinking water, habitat for wildlife, and safe opportunities for fishing, paddling, and swimming. The proposed clarifications will provide just that support.

Please do not hesitate to contact Chad Lord, our coalition's policy director, at (202) 454-3385 or clord@npca.org with questions.

Sincerely,

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Water Quality Director
Alliance for the Great Lakes

Katie Rousseau
Director, Clean Water Supply – Great Lakes
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Erin Crotty
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Kalamazoo River Sturgeon for Tomorrow

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League of Women Voters Lake Michigan Region

Susan Smith
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Stacy Doepner Hove
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Henry E. Koltz
Chair
Wisconsin Council of Trout Unlimited

George Meyer
Executive Director
Wisconsin Wildlife Federation

OUTDOOR ALLIANCE

OUTDOOR INDUSTRY ASSOCIATION

November 12, 2014

Donna Downing
Office of Water (4502– T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Ms. Stacey Jensen
Regulatory Community of Practice
(CECW–CO–R)
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

Re: 40 CFR Parts 110, 112, 116, *et al.* Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule

Dear Ms. Downing and Ms. Jensen:

Outdoor Alliance and Outdoor Industry Association (OIA) write this letter in support of efforts to define "Waters of the United States" and clarify Clean Water Act protections. Together, OIA and Outdoor Alliance represent the vast majority of the recreation industry and the active outdoor recreation community in America.[1]

On April 21, 2014, the Environmental Protection Agency and Army Corps of Engineers released a proposed rule–*Definition of "Waters of the United States" Under the Clean Water Act*. Outdoor Alliance and OIA have long supported efforts to define "Waters of the United States" and clarify Clean Water Act protections since Supreme Court cases in 2001 and 2006 created ambiguity about the Act's jurisdiction. Since this time, too

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[1] Outdoor Alliance is a coalition of five national, member-based organizations representing the human powered outdoor recreation community. The coalition includes Access Fund, American Canoe Association, American Whitewater, International Mountain Bicycling Association, and Winter Wildlands Alliance and represents the interests of the millions of Americans who paddle, climb, mountain bike, and backcountry ski and snowshoe on our nation's public lands, waters, and snowscapes.

Outdoor Industry Association (OIA) is the leading trade association and voice serving more than 4,000 manufacturers, distributors, suppliers, sales representatives and retailers in the active outdoor lifestyle. OIA supports the growth and success of the outdoor industry through its focus on government affairs, sustainability, outdoor consumer insights, industry trends and youth participation.

many wetlands and headwater streams have been compromised or lost, in turn harming downstream waters. Water quality and quantity are vital not only for clean drinking water, healthy people and ecosystems, and local economies but also to the quality of life in this country. Clean water and healthy headwater areas are particularly important for the outdoor industry and user community, who represent half of the American public, 6.1 million jobs and $646 billion in direct consumer spending each year.

142.6 million Americans participated in outdoor recreation last year according to the Outdoor Foundation's most recent study, and many of the people who recreate on our nation's lakes, rivers, and coasts experience primary contact with water and have a vested interest in the safety and quality of our public waters. Our members spend time in the mountains–swimming in mountain lakes, drinking from small streams, and paddling wild rivers. Through our outdoor adventures, we know that our nation is blessed with sparkling clean water at its source, and unfortunately witness firsthand its degradation by humans as rivulets become streams and streams become rivers.

Outdoor Alliance and OIA encourage the Environmental Protection Agency and U.S. Army Corps of Engineers to continue to focus on the best available science as you consider feedback from the public and make decisions about implementing about the proposed rule. Specifically, we support:

- Using a watershed approach, recognizing the connection between and importance of an aggregation of waters within a basin;
- Following the best available science when considering whether "other waters" are connected to jurisdictional waters. These waters provide important functions, including filtering pollution and preventing flooding, and they deserve protection under the Act; and
- As our scientific understanding of our nation's waters continues to evolve, allowing new information to inform whether "other waters" are jurisdictional and have a "significant nexus" to waters covered by the Act.

The headwater streams and wetlands that are addressed by the proposed rule are both the rivers and streams where our members recreate, or are directly connected to those waters. Few groups of people come into direct contact with untreated river water more frequently than kayakers, canoeists, and rafters. These activities take place in seasonal and rain-dependent streams and tributaries. When it rains and when snow melts, many small intermittent streams begin to flow. Although these streams may not look like much when flows are low, at high flows though they carry whatever sediment or pollution is in them downstream. These times of high flow are the exact times our members are on the

water, and more to the point, in the water. As a result, it is vitally important to our membership to ensure that these waters are protected under the Act.

Many of our members are also introducing river recreation to their children. We have an obligation to ensure the next generation of Americans enjoys the basic rights of a healthy environment and safe access to river recreation. Americans have come to expect that water quality will be protected for public health and outdoor recreation. In order to continue to meet this expectation, and to meet the goal of protecting and restoring our waters for recreating, drinking water, quality habitat and more, the Clean Water Act must be clarified to protect our nation's rivers, streams, and other water bodies.

Protecting the quality of traditionally navigable waters is not only important to us as outdoor recreation enthusiasts; activities on these waters also provide substantial economic benefits through recreational tourism.[2] Water is also the driver for customers to buy gear, footwear and apparel at their local retailer, plan a trip across the country to raft or kayak, and choose what community they live in. In order to protect and maintain these and other values, the proposed rule must protect the sensitive headwaters and wetlands that are important to all waters downstream.

Our members recreate on "traditional navigable waters," and we fully support protecting the quality of the waters that have a significant nexus to these waters. We also highlight our support for maintaining the definition of traditional navigable waters as those that include waters that currently, are susceptible to, or have historically been used for commercial recreational purposes. The capacity of a stream to support recreational paddling directly dictates the capacity of that stream to support commerce in the form of recreational guiding services, fee-based stream access, transportation of people or goods, and other commercial ventures.

[2] According to the Outdoor Industry Association, 24 million Americans paddle kayaks, canoes, and rafts, resulting in 308,000 jobs and $36 Billion of total economic benefits (http://outdoorindustry.org/research/economicimpact.php?action=detail&research_id=26).

We appreciate the Environmental Protection Agency and Army Corps of Engineers' efforts to clarify Clean Water Act Protections. Thank you for considering our comments.

Sincerely,

Adam Cramer	Steve Barker
Executive Director	Executive Director
Outdoor Alliance	Outdoor Industry Association

cc: Brady Robinson, Executive Director, Access Fund
Wade Blackwood, Executive Director, American Canoe Association
Mark Singleton, Executive Director, American Whitewater
Mike Van Abel, Executive Director, International Mountain Bicycling Association
Mark Menlove, Executive Director, Winter Wildlands Alliance
Lee Davis, Executive Director, The Mazamas
Martinique Grigg, Executive Director, The Mountaineers

For more information contact: Lorette Picciano, Executive Director of *Rural Coalition*, (202) 628-7160, lpicciano@ruralco.org or Rudy Arredondo, President of *National Latino Farmers and Ranchers Trade Association*, (202) 628-1440, hola_5@hotmail.com.

November 14, 2014

Administrator Gina McCarthy
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: **Revised Definition of "Waters of the United States" under the Clean Water Act (CWA)**

Dear Administrator McCarthy,

We, the 106 undersigned organizations, who use and depend on our rivers systems from the headwaters, wetlands and tributaries to floodplains and bays, call on you to put the Clean Water Act (CWA) back to work on all U.S. waters. We join our diverse voices with the farmers, ranchers, and other rural leaders quoted herein and undersigned, in a joint call to EPA to restore clarity by approving a final Waters of the USA rule.

We support the rule for the reasons Mr. Alfonzo Abeyta, a fifth generation Colorado rancher, highlights in a new video on why restoring CWA[1] protection is important for agriculture and rural communities: [1] *"Farmers know that everything is connected. Snow from the mountains feeds the streams. The streams feed the rivers. The rivers feed us. You can't grow food without water... without water nothing survives... it is our job to protect it." (http://www.rmfu.org/colorado-farmer-r-e-m-featured-in-waters-of-the-u-s-video/)*

We support the Clean Water Act because it has worked -in every state— improving water quality, stemming the loss of wetlands and safeguarding streams, lakes and wetlands. That is, it worked until two Supreme Court decisions—*Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers* (2001) and *Rapanos v. United States* (2006)—created uncertainty regarding what waters are protected, and curtailed CWA's scope.

Water is the lifeblood for agriculture, small businesses and recreation. We don't want to go back to the day when two-thirds of our waterways were too polluted for fishing, swimming or drinking. Therefore those of us in rural communities, agriculture and other small business need the full protection of the Clean Water Act restored to the countless miles of tributary and seasonal streams, wetlands and rivers that sustain our communities.

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[1] *Video clip (1:10—1:22): "Farmers know that everything is connected. Snow from the mountains feed the streams. The streams feed the rivers. The rivers feed us. You can't grow food without water... it is our job to protect it."* (http://www.rmfu.org/colorado-farmer-r-e-m-featured-in-waters-of-the-u-s-video/)

Communities need a strong CWA to address severe and continuing threats like chemicals from mining operations that leaked arsenic into the Alamosa River in Colorado, killing all the fish and compromising the water supply; the arsenic, boron, chromium, and manganese from coal ash, dumped for years into the Dan River by Duke Energy, exceeding the facility's "compliance boundary" and polluting rural water supplies; as well as the tides of phosphorus washed from fertilized farms, cattle feedlots and leaky septic systems upstream that contributed to an algae bloom in Lake Erie which compromised water sources for the cities. We are concerned about the growing contamination in many areas that leaves waterways still too polluted to sustain agriculture, recreation and many other uses.

As producers and others who depend on clean water, we know well that how water is cared for upstream affects river systems downstream. Small streams feed our local sources of drinking water and support traditional irrigation systems and agriculture for tribal, *acequia,* historic land grant and our diverse farming communities. Wetlands protect our communities from flooding, and support fish, wildlife, livestock and recreation. The entire river system provides drinking water sources in rural areas and cities alike, and is vital to small businesses[2] as well.

We support the rule because we recognize our shared responsibility to protect our entire river systems— including the streams and wetlands that nourish the rivers—for fishing, boating, recreation, flood control, local water systems and to meet the needs of our communities, our farmers, ranches and fishers, our businesses, and protect these bioregions for future generations.

Many of the undersigned groups have submitted their own comments supporting the completion of the rulemaking process while proposing specific and beneficial improvements. We believe EPA should take these views into account in issuing the final rule.

As farmers and small businesses that share the water, we need a regulatory scheme that is clear, predictable, timely, and focused on protecting aquatic resources. We support the rule's exemptions for commonplace farm and ranch operations and incentives for voluntary conservation practices. We also urge EPA and NRCS to review and retain all of the exemptions and exclusions from the Clean Water Act for the farming and agriculture community including exempting them from the need to obtain a 404 permit when using any of 56 conservation practices – practices that are good for farmers, ranchers, and for clean water.

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[2] *A national scientific poll conducted for the American Sustainable Business Council found 80% of small business owners favor federal protection of upstream headwaters and wetlands as proposed in the new "Waters of the U.S." rule. Support for clean water was broad and deep regardless of political affiliation—78% of Republicans and 73% of independents, joined 91% of Democrats in supporting the clarifying of federal rules to apply to headland waters and wetlands. 71% of small business owners said that clean water is necessary for jobs and a healthy economy, 67% are concerned that water pollution could hurt their business in the future and 62% say that government regulation is needed to prevent water pollution. (Poll conducted by Lake Research Partners, on June 4-10, 2014, of small business owners (2 to 99 employees), with a margin of error of +/- 4.2%, is available online here: http://bit.ly/CleanWaterReport*

We further urge the EPA, the Army Corps of Engineers and the USDA Natural Resources and Conservation Service to strengthen protections and include resources in the rule to protect the rights of Tribal nations and traditional acequia and land grant communities, to uphold requirements for tribal consultation and action, and to help acequia and land grant communities and all diverse farmers and ranchers comply with the rule.

We all—in the agriculture, rural, environmental, conservation, sports men and women and business communities—support this rule and accept our shared responsibility to protect the water that one in three people in this nation depend upon to live. Final approval of the "Waters of the U.S." rule – with improvements proposed in the comment process – would provide clarity that we as a society depend up clean water and the essential benefits that it brings to communities, residents, fish, wildlife, and plants. We urge you to finalize this rule expeditiously to restore protections to many of the waters originally protected by the Clean Water Act and ensure the health of our waterways. We don't want to go backwards.

Sincerely,

Rural Coalition/Coalición Rural, Washington, DC
National Latino Farmers and Ranchers Trade Association, Washington, DC
American Sustainable Business Council, Washington, DC
Community Food and Justice Coalition, Oakland, CA
Earthjustice, Washington, D.C.
Federation of Southern Cooperatives/Land Assistance Fund, Atlanta, GA
Food & Water Watch, Washington, DC
National Family Farm Coalition, Washington, DC
National Hmong American Farmers, Inc., Fresno, CA
National Immigrant Farming Initiative, Washington, DC
North Carolina Association of Black Farmers Land Loss Prevention Project, Durham, NC
Slow Food USA, Brooklyn, NY
Union of Concerned Scientists, Washington, DC

#ProsumingPermaculture, Brooklyn, NY
Adelante Mujeres, Forest Grove, OR
Agri-Tech Producers, LLC, Columbia, SC
Agricultural Missions, Inc, Louisville, KY
Alabama State Association of Cooperatives, Forkland, AL
Alianza Nacional de Campesinas, Oxnard, CA
American Federation of Government Employees Local 3354 Saint Louis, MO
American Indian Mothers Inc., Shannon, NC
Arthur Christopher Community Center Charleston, SC
Ashtabula, Geauga, Lake Counties Farmers Union, Windsor, OH
Atrisco Land Grant Elders Board, Atrisco, NM
BioRegional Strategies, Truchas, NM
Black Farmers and Agriculturalists Association, Tillery, NC
Black Veterans for Social Justice, Brooklyn, NY
Calpulli Huey Papalotl, Berkeley, CA

Center for Family Farm Development, Inc., Decatur, GA
Church Women United in New York State, Rochester, NY
Citizens For Water, New York City, NY
Classic Organic, Gaviota, CA
Community Farm Alliance, Frankfort, KY
Concerned Citizens of Tillery, NC
Concerned Citizens of Wagon Mound and Mora County, Wagon Mound, NM
Conservation Stewards, Denver, CO
Damascus Citizens for Sustainability, Narrowsburg, NY
Eat Ideas Farm, Ann Arbor, MI
Ecohermanas, Washington, DC
Edible San Diego Magazine, San Diego, CA
Eye of Heru Study Group, Detroit, MI
Factory Farming Awareness Coalition, Oakland, CA
Fair World Project Portland, OR
Family Farm Defenders, Madison, WI
Farm to Table Food Services, Oakland, CA
Farms Nor Arms, Petaluma, CA
Farmworker Association of Florida Apopka, FL
Friends of Batiquitos Lagoon, Encinitas, CA
Golden Drum, Brooklyn, NY
Greene County Democrat, Eutaw, AL
Growing Power, Milwaukee, WI
Indian Country Agriculture And Resource Development Corporation (ICARD), Anadarko, OK
Indian Nations Conservation Alliance, Twin Bridges, MT
Institute for Agriculture and Trade Policy, Minneapolis, MN
Iowa Citizens for Community Improvement, Des Moines, IA
Jesus People Against Pollution, Columbia, MS
Kentucky Resources Council, Frankfort, KY
King Solomon Baptist Church, Sapulpa, OK
La Mujer Obrera, El Paso, TX
Latham Family Farms, Oklahoma City, OK
Lideres Campesinas, Oxnard, CA
Los Jardines Institute (The Gardens Institute), Albuquerque, NM
Mossville Environmental Action Now, Westlake, LA
Natural Contents Kitchen, Narrowsburg, NY
Nebraska Sustainable Agriculture Society, Ceresco, NE
New Mexico Land Grant Consejo, Albuquerque, NM
North American Climate Conservation and Environment (NACCE), Roosevelt, NY
Northeast Organic Dairy Producers Alliance, Deerfield, MA
Northeast Sustainable Agriculture Working Group (NESAWG), New Paltz, NY
Northwest Atlantic Marine Alliance, Gloucester, MA
Northwest Forest Worker Center Albany, CA
NYH2O, New York, NY
Ocean Beach People's Organic Food Market, San Diego, CA

Oklahoma Black Historical Research Project, Oklahoma City, OK
Organic Consumers Association, Finland, MN
Peaceroots Alliance, Petaluma, CA
Pesticide Action Network Oakland, CA
PLDA Housing Development Corporation, Gainesville, AL
Pululu Farm, Arroyo Seco, NM
Pululu Farm, Taos, NM
Rocky Mountain Farmers Union, Denver, CO
Root 'N Roost Farm, Livingston Manor, NY
Roots of Change, Oakland, CA
Rural Advancement Fund, Orangeburg, SC
Rural Vermont, Montpelier, VT
San Diego Community Garden Network, San Diego, CA
San Joaquin Del Rio de Chama Land Grant, Gallina, NM
Seattle Wholesome Nutrition, Seattle, WA
Shoreline Study Center, Encinits, CA
SoHo Trees, Brooklyn, NY
Sustainable Pathway to Urban Prosperity, Spencer, OK
The Brice Institute, Wind Gap, PA
The Second Chance Foundation New York, NY
Town of Atrisco Grant –Merced, Atrisco, NM
United Farmers USA, Manning, SC
Well Springs Community Services, Inc., Boley, OK
West County Toxics Coalition, Richmond, CA
WhyHunger, New York, NY
Winston County Self Help Cooperative, Louisville, MS
World Farmers, Lancaster, MA
Youth Agriculture Resource Preservation Organization, Awendaw, SC
Youth Agriculture Resource Preservation Organization, Georgetown, SC
Youth Agriculture Resource Preservation Organization, Ladson, SC
Youth Agriculture Resource Preservation Organization, Mount Pleasant, SC
Youth Agriculture Resource Preservation Organization, Oklahoma City, OK
Youth Agriculture Resource Preservation Organization, Round O, SC

Society of Wetland Scientists www.sws.org
an international organization dedicated to the conservation, management and scientific understanding of the world's wetland resources

To: EPA

From: James Perry, President of the Society of Wetland Scientists (SWS)

Re: Subject: EPA-HQ-OW-2011-0880. **SWS Comment on the EPA proposed rule** on waters of the US, compiled by SWS members Joy Zedler, Daniel Larkin, and Carter Johnson

SWS is an international membership organization of more than 3,000 wetland professionals dedicated to fostering sound wetland science, education, and management.

SWS supports the EPA proposed rule on waters of the US as follows:

• **The proposed rule is science-based,** following EPA's review of over 1,000 peer-reviewed papers on the physical, chemical, and biological connections by which streams, wetlands, and open-waters affect downstream waters such as rivers, lakes, and oceans. The review is comprehensive, clear, technically accurate, and it summarizes solid science. The proposed rule correctly addresses the provision of clean water, which is a well-known function of wetlands. Here, we emphasize and expand on the following topics:

A. The quality of downstream waters depends on materials that are (or are not) discharged upstream in the watershed and carried by streams to wetlands that can remove materials and cleanse the water.
B. The system of connected streams and wetlands includes wetlands that perform in aggregate, both synergistically and cumulatively. We illustrate this for the Prairie Pothole Region (PPR).
C. Because water quality is degraded during and after flooding, SWS supports the need to protect wetlands to reduce flood risk.

A. **The quality of downstream waters depends on materials that are (or are not) discharged upstream in the watershed and carried by streams to wetlands that can remove materials and clean the water.**

- *Isolated wetlands* can improve water elsewhere in a landscape by trapping and retaining surface or groundwater discharges that would otherwise carry pollutants downstream.

- Non-isolated streams and wetlands are often *connected as a system*, either via surface water or groundwater. Wetlands that are connected improve water quality by performing *complementarily* along the water's flow path, with sequential contributions to the removal of solid and dissolved materials depending on the quality (e.g., particle size and weight) of the materials and the condition of the wetland (frozen or thawed, nutrient starved or eutrophic, deep or shallow, etc.). *The arrangement of wetlands on the landscape (size, density, position, etc.) influences water quality variables and flooding. The system is complex* and modelers now see the need to consider wetlands in aggregate (Zhang et al. 2012).

Quoting Zhang et al (2012) further:

"Understanding the implications of wetlands on downstream lake phosphorus concentration requires detailed landscape and hydrological information about the catchments of individual wetland units (Tompkins et al. 1997)."

"When inflow phosphorus concentration of a wetland is very high, it is likely that the wetland's effect on phosphorus retention exceeds its effect on consuming water and thus makes the phosphorus concentration lower at the outlet of wetland."

- *Larger areas* of wetland in a watershed *remove larger amounts of materials*. Johnston et al. (1990) found a threshold effect—reduced water quality where watershed area dropped below10%. This non-linear relationship indicates a synergism, not a simple addition.

- Water quality services are *not just a linear/additive function* of wetland area. High-quality water requires large wetland complexes *and* small wetlands dispersed across watersheds. Landscape heterogeneity and wide scattering of wetlands across the landscape are positive predictors of water quality (Moreno-Mateos et al. 2008). 'Scattered and numerous wetlands are better than few and aggregated ones, because within the whole catchment they will increase landscape complexity (patch density and heterogeneity) and accordingly reduce the amount of TDS in water" (ibid.; TDS = total dissolved solids).

- Detenbeck et al. (1993) showed that, for 33 watersheds near Minneapolis, downstream lakes had higher water quality where there were upstream wetlands in *close proximity* to the downstream lake. Similarly, Newbold (2005) found that "Targeted site selection in four small watersheds in the Central Valley resulted in predicted levels of nitrogen attenuation two to eight times greater than that from maximizing wetland area without consideration of the location of the restoration sites." This modeling study indicated high sensitivity to wetland *distribution*, not just wetland *area*.

B. **The system of connected streams and wetlands includes wetlands that perform in aggregate** within watersheds and/or landscapes (the latter being a more appropriate concept for flat topography, as in the prairie pothole region). Materials added to small streams and/or small wetlands, in aggregate, have cumulative effects downstream. The concept of performing in aggregate pertains to spatial and temporal frameworks. Small amounts of material added to many waters upstream adds up to a large loading downstream, as do small amounts of material added frequently over time. The early understanding of cumulative impacts and functioning in aggregate has withstood the test of rigorous research.

- Wetlands in aggregate can function *synergistically* (i.e., the whole is greater than the sum of the parts). For example, vernal pools support "meta-populations" of plants and animals. Meta-populations are sustained even if one more more sub-portions decreases; the probability of at least one sub-population persisting is greater where propagules can easily move from one pool to another. Several pools in close proximity can sustain populations (e.g., an annual plant or amphibian) better than fewer pools located at greater distances from one another.

- The concept that *wetlands perform in aggregate* over space and time was embodied in early predictions that the effects of losing multiple wetlands or that degradation across many wetlands would need

to be considered in a *cumulative impact assessment* (Brinson 1988, Hemon and Benoit 1988, O'Brien 1988, Preston and Bedford 1988, Siegel 1988, and Winter 1988). Their advice 25 years ago still holds: functions of wetlands should not be viewed independently; the cumulative function of all wetlands in a watershed may differ from simply adding the functions of individual wetlands.

Quotes from Johnston et al. 1990:

"The relationship between basin storage (as percentage of basin area in wetlands and lakes) and relative flood flow is non-linear in the empirical models developed by Jacques & Lorenz (1988), so that our data yielded a critical threshold at about 10%. Small wetland losses in watersheds with < 10% wetlands could have a major effect on flood flows. A similar threshold was found for wetlands in Wisconsin watersheds by Novitzki (1979).

"Cumulative impact assessment differs substantially from the approach used by existing wetland evaluation systems (Reppert et al. 1979; U.S. Army Corps of Engineers 1980; USFWS 1980; Adamus 1983) because it evaluates the collective function of a group of wetlands, rather than the contribution of an individual wetland.

"Our results indicate the importance of considering wetland position in the landscape when evaluating cumulative function. All wetlands in a watershed do not behave alike with regard to water quality function, which may explain why previous attempts to relate percent wetland to drainage basin water quality have generally been unsuccessful (Whigham & Chitterling 1988).

"Therefore, the position of wetlands in the watershed appears to have a substantial effect on water quality, particularly with regard to sediment and nutrients."

Additional relevant points by wetland scientists:

"Understanding the relationship between *wetland cover in the watershed* and coastal marsh *water quality* is important not only for the purpose of predicting natural variation in water quality, but also for understanding the implications of wetland loss that often occurs as a result of human development (Wolter and others 2006). Like Johnston and others (1990), we found wetland cover to be a significant factor determining COND levels [specific conductivity]. Wetlands have the ability to filter dissolved ions and nutrients in surface runoff (Hemond and Benoit 1988; Johnston et al. 1990) and can therefore help reduce ionic concentrations. As expected, we also found that *greater wetland cover is* related to lower levels of TNN in marshes at the watershed outflow. This is consistent with a large body of literature that outlines the importance of wetlands in the nitrogen cycle." (DeCatanzaro et al. 2009) (TNN = total nitrate nitrogen)

"Regional landscape setting influences local wetland relationships with TP and color through cross-scale interactions, and lake TP and color are controlled by *both local-scale wetland extent and regional-scale landscape variables*." (Fergus et al. 2011)

Complex effects of upstream wetlands on downstream waters:

The following *Prairie Pothole Region* (PPR) case study illustrates one clear finding from the EPA/COE science review and proposed rule, namely, there is great complexity in the ways that upstream wetlands influence downstream waters. The complexity of processes involved and their highly variable influence in

space and time make it difficult to assign level or degree of connectivity to any given wetland, wetland complex, or even watershed. This difficulty in turn makes the regulatory mission challenging.

- *Four main functions of wetlands in the PPR produce interconnectedness: fill and spill; recharge/discharge; biodiversity inoculum; groundwater flux.* As detailed below, three of these functional connections (fill-spill; recharge-discharge; biodiversity inoculum) between pothole wetlands and downstream waters are supported by solid, peer-reviewed, science. All functional pothole wetlands fill with water and contribute biodiversity inoculum; a large percentage of pothole wetlands spill water that often joins downstream waters; virtually all functional pothole wetland complexes contribute to recharge and discharge that lengthens the hydroperiod of more permanent wetlands and increases the chance that surface water spills and enters downstream waters; movement of water from pothole wetlands to deep groundwater that then enters downstream surface waters is likely to occur but is difficult to determine from field studies. Parsing out which pothole wetland provides each of the four functions and documenting how often each occurs is not tractable from a research perspective. The few uncertainties should not be the enemy of the far more numerous certainties. *The dominant message from the EPA science review and this SWS assessment is that connections between pothole wetlands and downstream waters are strong and undeniable.*

1. *Fill and spill.* Perhaps the clearest hydrological connection between prairie wetlands and downstream waters is their capture and storage of rainstorm and snow pack runoff (*fill function*). Calculations presented in the science review show that substantial amounts of water can be held back from streams and rivers by pothole wetlands, thus reducing flood magnitude and frequency. In a large proportion of prairie wetlands, however, especially in easterly parts of the prairie pothole region (PPR) with moderate to high rainfall (Millett et al. 2009), wetlands cannot capture and hold all water inputs. In these areas, integrated drainage networks have formed over time from spilled water (spill function), and connectivity between wetland basins and downstream waters is direct and observable. While spilling is more likely and voluminous in wetter regions, it can occur in drier, more westerly PPR regions during periods of deluge such as those observed in the 1990s (Winter and Rosenberry 1998). Most of the ten wetlands at Orchid Meadows, a long-studied wetland complex in eastern South Dakota (central PPR), overflowed frequently and contributed substantial volumes of water via channel outflow to a deep, recreational lake (Johnson et al. 2004, van der Kamp and Hayashi 2009). *Both fill and spill functions occur in prairie wetlands across the PPR*; the spill function is more evident in the integrated drainage network of the central and eastern PPR.

2. Recharge/discharge. A second well-studied process identified in the science review, termed recharge/discharge, connects members of a wetland complex to each other hydrologically. *However, the physical connection between less permanent pothole wetlands and downstream waters was not identified or discussed in the EPA science review.* In the PPR, topographically higher wetlands (usually those classified as temporary or seasonal in permanence category) recharge shallow groundwater that discharges into lower semi-permanent wetlands. This topographically driven, regional-local flow system functions when water percolates through fracture cracks in the glacial till beneath wetland basins. The permeability of the tills depends on the degree of fracturing that is best developed in surface soils. The amount of water that discharges from higher wetlands into lower ones can be sufficient to lengthen the hydroperiod of receiving wetlands and to shift them from seasonal to semi-permanent. The water budgets of wetlands in complexes do not balance in mathematical models without accounting for the recharge function (Johnson et al. 2010). In this way, investigators have found a link between the more ephemeral wetlands, often occurring in higher landscape positions, and downstream water. More specifically, recharge maintains deeper semi-permanent

wetlands increasing the frequency and volume of spilling into downstream waters after snow melt and rain storms. *This physical connection between less permanent pothole wetlands and downstream waters is a useful addition to the EPA science review.*

3. Groundwater flux. Major questions raised in the EPA science review were: How connected are pothole wetlands to deeper groundwater? Do pothole wetlands directly recharge downstream streams, river, and lakes via deeper ground water? *It is well established that water movement among wetlands is part of the shallow groundwater system* (van der Kamp and Hayashi 2009). Deeper tills, however, generally have low hydraulic conductivity allowing only very slow movement of water. But there are exceptions. In the more rugged parts of the PPR, where most functional wetlands remain, the till underlying or adjacent to wetlands includes materials varying in coarseness and permeability, ranging from cobble and gravel through sand to heavy clay. The sands and gravels occur as extensive sheets, long narrow buried-valley deposits, and many small deposits of local extent (van der Kamp and Hayashi 2009). The deposits can function as aquifers that distribute recharge water from "leaky" wetlands to deeper groundwater, and then possibly to down gradient surface waters. Because aquifers are encountered frequently when coring, it is likely that some wetlands do feed surface waters through deeper groundwater pathways. Research into the complex "black box" of groundwater movement in the glacial tills in the PPR has yet to prove and quantify the occurrence of such flow paths. However, known passage of salts from wetlands into deep groundwater storage has been determined (van der Kamp and Hayashi 2009).

4. Biodiversity inoculum. The EPA science review lays out a clear case that pothole wetlands contribute biodiversity inoculum to downstream waters. Some forms of the inoculum, such as seeds and whole plants, are transported directly by water that spills to downstream streams, rivers, and lakes. Other organisms, such as amphibians that live and reproduce in pothole wetlands, depend on spillage flow pathways and other surface water sources to disperse and recolonize new sites downslope. Still others, such as migratory waterfowl that breed in pothole wetlands, complete their breeding cycle in late summer by moving to more permanent downstream waters. A countless number of species from single celled organisms to vertebrates move from pothole wetlands to downstream waters in a myriad of ways in time and space to complete their life cycles and to colonize new sites as a means to maintain and expand their populations. Pothole wetlands play a major role in the ability of plants, animals, and microbial communities to remain functional and diverse in glaciated prairie landscapes.

C. **Because water quality is degraded during and after flooding, SWS supports the need to protect wetlands to reduce flood risk,** which will be increasingly important during future climates with more frequent, more extreme streamflow events. Here are relevant sections of recent scientific publications.

• Floods, like water quality, relate to the built environment. A study from Texas, which consistently has the nation's greatest impacts of flooding, concerned 423 flood events from 1997 to 2001 and identified impacts of several measures, including wetland alteration, impervious surfaces, and dams. Their results support the important role of naturally occurring wetlands in mitigating flood damage (Brody and Zahran 2008).

• It is conventional wisdom that losing wetlands increases flood risk. However, *it is novel to quantify cumulative impacts at a watershed scale*: Ahmed (2014) estimated a 4% increase in the 100-year flood as a

result losing non-*provincially significant wetlands* (6% of basin area; PSW are *provincially significant wetlands recognized by Ontario*)... Adding non-PSWs (combined total = 15% of basin area) and assuming similar hydrological functions regardless policy-related class, peak flood attenuation was estimated to improve 9-10%. Removal of non-PSWs will increase the value of the 1-day flow by up to 50%.

• "...federal permits issued to alter a naturally occurring wetland exacerbate flooding events in coastal watersheds along the Gulf of Mexico... importance of our findings for planners and policy makers interested in reducing the adverse impacts of coastal flooding is that flood events are regulated not solely by the effect of permit counts, but by the type of permit granted. First, as expected, IP [individual permits] significantly increase flooding because they signify development projects requiring large amounts of wetland (>0.5 acres) to be disrupted. These projects usually involve the addition of impervious surfaces... Decision makers should carefully monitor the number and location of IP granted within a watershed to ensure the hydrological system remains relatively intact... Second, while we expect large development projects and associated impervious surfaces to increase the rate of flooding, the even stronger positive effect of GP [general permits] is somewhat surprising. This result indicates that *relatively small-scale wetland alteration such as with the case of residential development have more serious "cumulative impacts" on flooding over time.* GP may be indicative of sprawling development patterns where each individual project may not cause a severe impact, but the total sum of all small disruptions to a watershed unit results in loss of hydrological function and resulting increased flood events. This '**death by a thousand cuts**' phenomenon should be a primary concern for environmental and hazard mitigation planners. *Officials need to **steer** their focus away from site-based review and incremental decision making toward the watershed level where cumulative impacts are more easily detected.* (Brody et al. 2007a)

Wetland loss is the primary driver of increased flood risk. "Although the total amount of impervious surface in an area is often cited as the culprit for increased flooding and associated property damage, these may result more from exactly where these surfaces are, and how they affect the natural environment... by separating the variable measuring wetland development from the variable measuring impervious surface, we eliminate from the latter from what may be its most important adverse hydrological impact: loss of wetlands. We noticed the same trends in related studies of floods at both the local jurisdiction scale and the watershed scale (Brody, Highfield, et al., 2007; Brody et al. 2008).

Literature cited (not including references mentioned within quotations)

Ahmed, F. 2014. Cumulative Hydrologic Impact of wetland loss: Numerical modeling study of the Rideau River Watershed, Canada. Journal of Hydrologic Engineering **19**:593-606.

Brinson, M. 1988. Strategies for assessing the cumulative impacts of wetland alteration on water quality. Environmental Management 12(5):655-662.

Brody, S. D., W. E. Highfield, H. C. Ryu, and L. Spanel-Weber. 2007a. Examining the relationship between wetland alteration and watershed flooding in Texas and Florida. Natural Hazards **40**:413-428.

Brody, S. D. and S. Zahran. 2008. Estimating flood damage in Texas Using GIS: Predictors, consequences, and policy implications. Pages 171-188 *in* D. S. Zui, editor. Geospatial Technologies and Homeland Security: Research Frontiers and Future Challenges.

Brody, S. D., S. Zahran, P. Maghelal, H. Grover, and W. E. Highfield. 2007b. The rising costs of floods - Examining the impact of planning and development decisions on property damage in Florida. Journal of the American Planning Association **73**:330-345.

DeCatanzaro, R., M. Cvetkovic, and P. Chow-Fraser. 2009. The relative importance of road density and physical watershed features in determining coastal marsh water quality in Georgian Bay. Environmental Management **44**:456-467.

Fergus, C. E., P. A. Soranno, K. S. Cheruvelil, and M. T. Bremigan. 2011. Multiscale landscape and wetland drivers of lake total phosphorus and water color. Limnology and Oceanography **56**:2127-2146.

Hemon, H. F., and J.Benoit. 1988. Cumulative impacts on water quality functionsof wetlands. Environmental Management 12(5):639-653.

Detenbeck, N.E., C.A. Johnston, and G.J. Niemi. 1993. Wetland effects on lake water quality in the Minneapolis/St. Paul metropolitan area. Landscape Ecology 8:39-61.

Johnson, W. C., S. E. Boettcher, K. A. Poiani, and G. Guntenspergen. 2004. Influence of weather extremes on the water levels of glaciated prairie wetlands. Wetlands 24:385-398.

Johnson, W. C. , B. Werner, G. R. Guntenspergen, R. A. Voldseth, B. Millett, D. E. Naugle, M. Tulbure, R. W. H. Carroll, J. Tracy, and C. Olawsky. 2010. Prairie wetland complexes as functional units in a changing climate. BioScience 60:128-140.

Johnston, C.A., N.E. Detenbeck, and G.J. Niemi. 1990. The cumulative effect of wetlands on stream water quality and quantity: a landscape approach. Biogeochemistry 10:105-141

Millett, B. , W. C. Johnson, and G. Guntenspergen. 2009. Climate trends of the North American prairie pothole region, 1906-2005. Climatic Change 93:243-267,

Moreno-Mateos, David, Ü Mander, FA Comín, C Pedrocchi, E Uuemaa. 2008. Relationships between landscape pattern, wetland characteristics, and water quality in agricultural catchments. Journal of environmental quality 37 (6), 2170-2180.

Newbold, S. C. 2005. A combined hydrologic simulation and landscape design model to prioritize sites for wetlands restoration. Environmental Modeling & Assessment **10**:251-263.

O'Brien, A. L. 1988. Evaluating the cumulative impacts of alteration on New England wetlands. Environmental Management 12(5):627-636.

Preston, E., and B. L. Bedford. 1988. Developing the scientific basis for assessing cumulative effects of wetland loss and degradation on landscape functions: Status, perspectives, and prospects. Environmental Management 12(5):751-771.

Siegel, D. L. 1988. Evaluating cumulative effects of disturbance on hydrologic function of bogs, fens, and mires. Environmental Management 12(5):621-626.

Winter, T. C. 1988. A conceptual framework for assessing cumulative impacts on the hydrology of nontidal wetlands. Environmental Management 12(5):605-620.

Winter, T. C. and D. O, Rosenberry. 1998. Hydrology of prairie pothole wetlands during drought and deluge: A 17-year study of the Cottonwood Lake wetland complex in North Dakota in the perspective of longer term measured and proxy hydrological records. Climatic Change 40:189-209.

van der Kamp, G. and M. Hayashi. 2009. Groundwater-wetland ecosystem interaction in the semiarid glaciated plains of North America. Hydrogeology Journal 17:203-214.

Zhang, T., P. A. Soranno, K. S. Cheruvelil, D. B. Kramer, M. T. Bremigan, and A. Ligmann-Zielinska. 2012. Evaluating the effects of upstream lakes and wetlands on lake phosphorus concentrations using a spatially-explicit model. Landscape Ecology 27:1015-1030.

The U.S. Shorebird Conservation Partnership

Building Collaborative Action for Shorebird Conservation

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14 November 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20310

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army, Civil Works
108 Army Pentagon
Washington, DC 20460

Attn: Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The Council of the U.S. Shorebird Conservation Plan Partnership represents a broad collective of individuals, agencies, and organizations interested in the long-term conservation of North American-breeding shorebirds. A central goal of the U.S. Shorebird Plan is to "stabilize populations of all shorebird species known or suspected of being in decline due to limiting factors occurring within the U.S., while ensuring that stable populations are secure". Because shorebirds depend on high-quality wetlands, particularly shallow wetlands, throughout their annual cycle, the primary purpose of the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters", has strong implications for the long-term conservation of migratory shorebirds, a Federal Trust Resource.

We understand the need for agencies to develop a clear and understandable rule that protects the Nation's waters, and is supported by science and consistent with the law. To that end, we believe Ducks Unlimited (DU) has provided you with a substantiated, scientific response to the proposed definition for "Waters of the United States". As well, DU's comments offer an analysis of the legal, biological, and societal implications of the final rule. The U.S. Shorebird Conservation Partnership urges you to carefully consider the recommendations they provided.

The understanding of connectivity of wetland systems throughout the U.S. is still emerging, and we support DU's recommendation for you to use a "weight of evidence approach" for evaluating the science of wetland connectivity. We found their presentation of Justice Kennedy's example of the Gulf of Mexico hypoxia zone as strong evidence for carefully considering implications of wetland connectivity and downstream water quality. DU provides numerous suggestions on how to provide greater clarity to definitions of "adjacent waters" and "floodplains", and we concur

with the idea, as supported by Justice Kennedy, of considering functional adjacency in defining the Nation's waters and not restricting the definition to physical proximity. We also support the recommendation of comprehensively mapping (a)(1) through (a)(3) waters to provide interpretive clarity. Mapping would also provide a basis for establishing a systematic approach to conducting significant nexus analyses for "other waters" on an ecoregional basis. More clarity should be provided in defining a significant nexus in the final rule, particularly when considering how cumulative impacts to "other waters", including geographically isolated wetlands, could affect downstream waters in the future.

The scientific literature clearly documents that many other wetlands and wetland subcategories falling within the proposed rule's "other waters" classification have similar types of significant nexuses with downstream navigable waters and should be designated as jurisdictional by rule. Abundant water resources not only support the economically important outdoor recreation industry, including hunters, anglers, and birders, but also alleviate economic burdens associated with the increasing frequency of damaging floods, harmful algal blooms, and environmental restorations. Additionally, surveys of the public from across the country demonstrate that a very large majority supports wetland conservation and clean water goals.

We realize a final rule must balance science and pragmatism such that the purposes of the Act are fulfilled and are consistent with the weight of the scientific evidence. The extent to which the final rule relies upon case-by-case analyses will be more impractical and costly for all entities, and perhaps open the door to increased litigation to dispute facts that are drawn and interpreted from various perspectives. In light of the extensive amount of science that demonstrates significant nexus for many classes of "other waters" within their regional contexts, designation as "jurisdictional by rule" will most often be more scientifically accurate than designation as "non-jurisdictional until determined to be so" via a case-specific significant nexus assessment that would suffer from the inherent shortcomings imposed by scientific and administrative realities.

We appreciate the opportunity to comment on the proposed definition of "Waters of the United States" and its impact on a Federal Trust Resource.

Sincerely,

Brad A. Andres, National Coordinator
U.S. Shorebird Conservation Partnership

Alaska Independent Fishermen's Marketing Association (AIFMA)
P.O. Box 60131
Seattle, WA 98160
Phone/Fax (206) 542-3930

November 14, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave. N.W.
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2011-0880.

Dear Sir or Madam:

The Alaska Independent Fishermen's Marketing Association (AIFMA) is the longest standing fishermen's cooperative, established in 1966, for purposes of representing commercial fishers in Bristol Bay of Alaska.

AIFMA supports EPA's proposed rule which clarifies, for industry and the public, the scope of the term "waters of the United States" for purposes of the Clean Water Act. Such clarification is necessary to properly implement two decisions by the U.S. Supreme Court in *Rapanos v. United States* and *Carabell v. United States.*

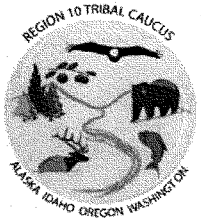
The commercial fishing industry, like most Americans, who depend on clean water for drinking and industrial and commercial purposes, knows the value of clean water. Our industry, like the agricultural industry and tourism and recreation industries, could not survive without clean water. I am confident that commercial fishers in AIFMA and similar organizations understand and support EPA's effort to clarify the scope of the protections afforded by the Clean Water Act.

Unfortunately, some in Congress and even in the agricultural industry misunderstand what EPA is doing. They accuse EPA of expanding the scope of the Act, or of grabbing new jurisdiction where it did not exist before. To an extent, EPA seems to have invited this misperception by referring to the proposed definition of "waters of the United States" as a new definition. The rule is new but the definition simply *interprets existing authority* as set out by the Supreme Court. EPA's proposed rule does not add to what has always been covered by the Act.

Instead, the proposed rule gives needed guidance to industry and the public so that implementation of the Act will be easier and clearer. For that reason, AIFMA urges you to finalize the rule. We will stand with you before Congress to support what is good for clean water, for our industry and for the common good.

Sincerely yours,

David Harsila
AIFMA President



EPA Region 10 RTOC
Regional Tribal Operations Committee
Curyung Tribal Council
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November 14, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Via www.regulations.gov and email to ow-docket@epa.gov

RE: Comments of Region 10 RTOC on (Proposed) Definition of Waters of the United States Under the Clean Water Act Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee ("RTOC"). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely on behalf of the tribal government representatives of the RTOC.

The Tribal Caucus appreciates the opportunity to comment on the Environmental Protection Agency ("EPA") and Department of Defense, Department of the Army, Corps of Engineers ("Corps") proposed Definition of "Waters of the United States" Under the Clean Water Act rulemaking, 79 Federal Register 22188 (April 21, 2014) (hereinafter "Proposed Definition" or "Proposed Rule").

Our Nation's waters provide irreplaceable benefits to tribal people across the U.S. Unfortunately, many of our waters and the fish and other resources that depend upon them are contaminated or at risk.

To safeguard these resources, Congress passed the Clean Water Act ("CWA") more than four decades ago. The CWA established a national goal that all waters of the U.S. should be fishable and swimmable. The goal was to be achieved by eliminating all pollutant discharges into waters of the U.S. by 1985 with an interim goal of making the waters safe for fish, shellfish, wildlife

and people by July 1, 1983. However, those goals have been far from achieved and the law is broken due to confusing court interpretation.

Legal uncertainty about what the law protects has denied pollution protections under the CWA to approximately 20 percent of the 110 million acres of wetlands in the continental United States putting at risk the drinking water supplies of 117 million Americans.

This rulemaking is extremely important because nearly all of the Clean Water Act's critical water quality protections and pollution prohibitions apply only to "waters of the United States." It is essential to the continued protection of our Nation's waters that the EPA and the Corps continue to assert jurisdiction over our Nation's waters to the fullest extent permitted by the law.

Tribal communities depend on the CWA to protect waterways and the people who depend on clean water for drinking water, recreation, fishing, economic growth, food production, and all of the other water uses that sustain our way of life, health and well being. The Tribal Caucus believes that the proposed rule will restore protections to many of our waterways. This proposed rule makes clear that many vulnerable waters will be covered by the CWA's pollution prevention and cleanup programs and protect those waters that the science shows have important effects on downstream waterways.

The proposed rule is especially important for communities impacted by mining, such as many tribal communities in EPA Region 10, because, according to EPA's Toxic Release Inventory, mining is the Nation's number one toxic polluter.

Mining in the western United States has contaminated stream reaches in the headwaters of more than 40 percent of the watersheds in the West. Some mines generate a perpetual source of pollution where mining exposes sulfide-bearing ore that, when mixed with water, generates sulfuric acid. The outflow of sulfuric acid water, also known as acid mine drainage ("AMD"), contaminates drinking water aquifers, lakes, streams, and prime fish and wildlife habitat. Once AMD beings, it cannot be stopped and requires treatment for many hundreds or thousands of years.

The Tribal Caucus supports the broad definition of Waters of the U.S. ("WOTUS") to include:

> ...all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: Which are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce.

In particular, the Tribal Caucus strongly supports the proposed rule for the clear protections it restores to headwaters, intermittent and ephemeral streams, and to wetlands and other waters located near or within the floodplain of these tributaries and the

The Tribal Caucus does believe the proposed rule should be clarified and expanded to address four areas: (1) closing the mining loophole; (2) including groundwater; (3) expanding the definition of adjacent waters; and (4) clarifying the definition of interstate waters.

First, the Tribal Caucus believe that many waters will still be threatened because of loopholes in the CWA that allow mining waste to be dumped directly into streams, rivers and lakes. The rule should be expanded to close the "fill" loophole to clarify that mining waste cannot be used to fill in waters of the United States, and the "waste treatment system" loophole that simply allows mining companies to rename water a "waste treatment system" to escape CWA responsibilities.

Second, EPA's proposed categorical exclusion of groundwater will leave ecologically important waters unprotected. The rule appears to be inconsistent with EPA's longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water.

The Tribal Caucus believes that the exclusion of groundwater, particularly the exclusion of "groundwater, including groundwater drained through subsurface drainage systems" from the definition of "Other Waters" should be revised to include, rather than exclude such waters. Groundwater is often hydrologically connected to navigable waters to the same extent, if not more, in some cases then waters that the rule has included in the definition.

EPA should include groundwater as a subcategory of "other waters," and leave its jurisdictional status to be determined on a case-by-case basis. Specifically, the Tribal Caucus recommends that the rule be revised to include groundwater as a WOTUS when it is hydrologically connected and retains a nexus to Waters of the U.S. Specifically, the rule should state: "On a case-specific basis, other waters, including wetlands **and groundwater**, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas."

Third, the Tribal Caucus supports the inclusion of "adjacent waters" into the definition of WOTUS. However, the definition of adjacent waters needs to be modified to include the outer extent of the floodplain and all riparian areas. As noted by EPA's Scientific Advisory Board member Dr. Sullivan, "[T]he scientific literature unequivocally supports the finding that floodplains and waters and wetlands in floodplain and riparian setting support the physical, chemical and biological integrity of downstream waters" and "[a]lthough distance can be one measure to help ascertain the degree of hydrological connectivity, biological and chemical connectivity should also be considered."

Fourth, the rule should include a definition of interstate waters that includes the cross of waters into or from a federally recognized tribe and not just crossing of state borders.

The Tribal Caucus appreciates the opportunity to comment on this rule. Your agencies' exercise of the trust responsibility is served by taking action to protect our rivers and streams. Tribal communities need to improve the health of our rivers and streams to a far greater degree than we

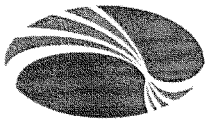
have currently achieved. We support adoption of this rule and encourage the Army Corps and EPA to adopt a rule that considers and protects tribal waters, resources, and people.

Sincerely,

William (Billy) J. Maines

William (Billy) J. Maines
Region 10 RTOC
Tribal Caucus Co-chair

Cc: RTOC



Alabama Rivers Alliance
Water Is Life

November 13, 2014

Via* www.regulations.gov *and email to ow-docket@epa.gov

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attention: Docket ID No. EPA—HQ—OW—2011—0880

Re: Comments On "Definition of 'Waters of the United States' Under the Clean Water Act, Proposed Rule," 79 Fed. Reg. 22188-22271.

Dear Administrator McCarthy and Assistant Secretary Darcy:

The Alabama Rivers Alliance ("ARA") is grateful for the opportunity to submit comments on the U.S. Environmental Protection Agency's ("EPA") and the U.S. Army Corps of Engineers' ("Corps") proposed rule on the definition of "waters of the United States" under the Clean Water Act ("proposed rule"). ARA is Alabama's statewide river advocacy alliance comprised of 34 watershed and environmental organizations and over 640 individual members. ARA works to protect & restore Alabama's rivers. To do this, we advocate smart water policy, organize at the grassroots level, and teach citizens how they can protect their water. Our goal is to achieve healthy rivers, healthy people, and a healthy system of government for the state of Alabama.

ARA is very supportive of the EPA's and Corps' effort to clarify the extent of geographical jurisdiction of the Clean Water Act ("CWA"). To this end, we recommend the work of the Southern Environmental Law Center ("SELC") on this issue and are a signatory to their comments

Alabama is the river state. According to the State's most recent 305(b) water quality report there are over 77,000 miles of rivers and streams in Alabama, of which over 30,000 miles are considered intermittent or ephemeral streams, and over 3,600,000 acres of freshwater wetlands.[1] However, a recent analysis of the NHDPlus dataset suggest that the actual number of

[1] Alabama Department of Environmental Management, *2014 Integrated Water Quality and Monitoring Report (305(b) Report)*, April 1, 2014.

stream miles may be over 145,000 with over 65,000 of these miles being small creeks and headwaters.[2]

Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 531 U.S. 159, 165, 31 ELR 20382 (2001) (*"SWANCC"*) and *Rapanos v. U.S.*, 126 S.Ct. 2208 (2006) (*"Rapanos"*) placed these waters in jeopardy and have significantly threatened the navigable waters of the US by confusing the understanding of what waters are protected under the CWA.

Alabama is the frontline in this debate. In *US v. Robison*, 505 F. 3d 1208 (11th Cir. 2007) (*"McWane"*), the court overturned a conviction of McWane, Inc., after a jury found that McWane had violated the CWA by dumping unpermitted pollution into Birmingham's Avondale Creek, a continuously flowing tributary of the Black Warrior River, a navigable-in-fact water of the United States. The court overturned McWane's conviction in the wake of *Rapanos*, when the 11th Circuit Court of Appeals determined that the EPA did not "present any evidence... about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River, and there was also no evidence presented of any actual harm suffered by the Black Warrior River"[3]. This is a scientifically preposterous standard which places an unrealistic burden on the agencies to physically demonstrate a "significant nexus" in every individual case - even those where science clearly suggests that such a nexus will exists. Although the polluter eventually entered into a consent decree with the EPA, *McWane* illustrates the very precarious situation that we find ourselves in today

With this in mind, we support EPA's inclusion in the definition of "waters of the US" all tributaries and adjacent wetlands as well as the proposed cumulative analysis of similarly situated waters. Watershed networks are inherently connected, and failure to protect small upstream tributaries could result in "alterations [to] downstream hydrology, water quality, biota and geomorphic processes."[4]

Environment North Carolina Research and Policy Center's timely report "Waterways Restored: The Clean Water Act's Impact on 15 American Rivers, Lakes and Bays" succinctly explains that, despite great progress in restoring our nations great waters, "[n]o places are more vulnerable or more important to the overall protection of waterways than headwaters and tributaries."[5] We strongly support SELC's recommended that "[t]he term "tributaries" should be redefined so that it is clear that for the purposes of this rule wetlands, lakes, and ponds that contribute flow to a tributary system are clearly included in the term and thus do not require

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[2] *Available at* http://water.epa.gov/scitech/datait/tools/waters/services/mapping_services.cfm. *(last accessed November 13, 2014)*

[3] US v. Robison, 505 F. 3d 1208, 1223 (11th Cir. 2007)

[4] Southern Environmental Law Center, *Comments On "Definition of 'Waters of the United States' Under the Clean Water Act, Proposed Rule," 79 Fed. Reg. 22188-22271,* November 13, 2014, p. 48 (*citing* Freeman, M.C., C.M. Pringle and R.J. Jackson. 2007. Hydrologic Connectivity and the Contribution of Stream Headwaters to Ecological Integrity at Regional Scales. Journal of the American Water Resources Association. 43(1): 6-14.)

[5] Environment North Carolina Research and Policy Center, *"Waterways Restored: The Clean Water Act's Impact on 15 American Rivers, Lakes, and Bays"*, October 2014, p. 33. *Available at: http://environmentnorthcarolinacenter.org/reports/ncc/waterways-restored (Last accessed November 14 2014*

case-by-case jurisdictional analysis."[6] For the purposes of the rule, the term "tributary" should mean:

> "1) a water (such as a stream, creek, or river) that has a bed and bank and ordinary high water mark and that contributes flow to other jurisdictional waters either directly or through another water or a discrete conveyance; or
> 2) a nonlinear water (such as a wetland, lake, or pond) even if it does not possess a bed or bank or ordinary high water mark as long as it contributes flow to other jurisdictional waters either directly or through another water or a discrete conveyance."[7]

We would add that CWA jurisdiction should extend as far as necessary to prevent bad actors from introducing pollutants into downstream waters. A polluter should not be allowed to pollute our rivers simple by moving the dumping point back from the river's edge. SELC points out, and we agree, that

> "Historically, ditches commonly have been protected under the CWA. Some so-called ditches have been regulated under the Clean Water Act because they are actually altered streams (i.e., streams that have been dredged out), and because ditches can transport pollutants downstream they are functionally no different than other tributaries. Ditches can also be regulated under the Clean Water Act if they flow into other bodies of water that are protected by the Clean Water Act even if the ditches themselves are artificial. There is no compelling legal or scientific reason to treat ditches differently from other tributaries.... [W]e urge EPA to remove the unnecessary and burdensome additional factors."[8]

We would also highlight the need for strong protections for our wetlands and groundwater connections. As SELC points out, "[t]he scientific literature is now clear that most non-proximate wetlands are connected either biologically, chemically, or hydrologically to jurisdictional waters"[9] Likewise, there is now a common understanding of the inseparable connection between our surface and near surface groundwater resources which often establishes the nexus between various non-adjacent surface waters. The proposed rule should reflect this reality.

Lastly, we echo the point made by so many during the debate over this issue that this clarification "would not restrict in any way the long-standing exemptions for agriculture, ranching, and forestry that are set forth in the CWA. Nor would what we are seeking broaden CWA jurisdiction beyond what is permissible under current federal law."[10]

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[6] SELC Comments *at* 4

[7] Id. *at* 13.

[8] Id. *at* 48-49 (*citing U.S. v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974), *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F. 3d 526 (9th Cir. 2001).)

[9] Id *at* 52.

[10] Id.

In conclusion, we appreciate the time and effort that the EPA and the Corps have devoted to clarifying the definitions of what waters are to be regulated under the CWA. We appreciate the agencies' efforts to allow all citizens to express their ideas and concerns. It is now time to bring this debate to a close and we look forward to the quick adoption and immediate implementation of this rule.

If there are any questions regarding these comments or if we can be of further service please contact us and the information provided.

Sincerely,

Mitch Reid
Program Director
Alabama Rivers Alliance
mreid@alabamarivers.org

CALIFORNIA ASSOCIATION of SANITATION AGENCIES

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November 5, 2014

Submitted via Federal eRulemaking Portal and via Email to ow-docket@epa.gov

Water Docket, Environmental Protection Agency, Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460
Attention: Docket ID No. EPA–HQ–OW–2011–0880.

Subject: Comments of the California Association of Sanitation Agencies on the Proposed Rule Defining "Waters of the United States"

Dear Administrator McCarthy,

The California Association of Sanitation Agencies (CASA) is pleased to provide comments on the proposed rule to define "waters of the United States" (hereafter "proposed rule") under the federal Clean Water Act (CWA). CASA represents more than 100 local public wastewater agencies engaged in collecting, treating and recycling wastewater to ensure protection of public health and the environment. Collectively, our agencies serve over 90 percent of the sewered population of California. CASA's member agencies operate wastewater treatment and water recycling facilities that discharge into waters of the United States as well as to waters of the state, and as such they may be impacted by the proposed rule's promulgation as well as its implementation.

CASA appreciates that the proposed rule explicitly specifies that the agencies propose no changes to the longstanding regulations that exclude waste treatment systems designed to meet the requirements of the CWA and prior converted cropland from the definition of "waters of the United States." (79 FR 22217) These regulations provide an essential component of the existing regulatory framework that ensures effective agency operations. The retention of the waste treatment exemption is one of the highest priorities for clean water agencies. We also endorse the proposed rule's clarification that the agencies do not intend alter the regulation of groundwater at the federal level and, in fact, the proposed rule codifies a number of the waters and features that the agencies have by longstanding practice generally considered not to be "waters of the United States." (*Id.* at 22218)

CASA holds several concerns about the expansion of federal jurisdiction under the proposed rule and potentially adverse ramifications for wastewater agencies across the state and the nation. Our primary concerns are: (1) the lack of clarity in the proposed rule as to what is included in the waste treatment exemption will create regulatory barriers to the effective implementation of recycled water projects without a commensurate benefit to the environment, thereby threatening recycled water projects that are vital to California water supply; and (2) expansion of jurisdictional waters under the proposed rule that could complicate and interfere with aspects of the wastewater treatment process. Specific issues and the manner in which the proposed rule could impact wastewater agencies are provided in more detail below.

The Waste Treatment Exemption Should Specifically Include Water Recycling Facilities and Effluent Storage Ponds

In order to address the historic drought conditions currently plaguing the western states, water and wastewater agencies must rely on a full suite of flexible options to provide potable and recycled water supplies for a variety of ongoing uses. Thus, CASA opposes any direct or indirect regulatory impacts on water recycling, water storage, and other mechanisms that play a part in recycled water infrastructure and processes as a result of the proposed rule.

As noted above, we appreciate the explicit acknowledgement and codification of the waste treatment exemption in the proposed rule. However, we believe it is important that the proposed rule **expressly** states that the waste treatment exemption extends to recycled water facilities. California water recycling projects often depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. If these features are considered waters of the U.S. and are excluded from the waste treatment exemption, they could theoretically no longer be used as an integral component of the waste treatment systems, forcing the closure of important recycled water projects critical to California's water supply. Moreover, a lack of clarity on this issue may stall or halt the development of recycled water projects at a time when recycling is needed the most to address climate resiliency priorities.

Because recycled water demand is variable with time of day and season, recycled water agencies maintain reservoirs or storage basins/ponds to store recycled water during periods of low usage in anticipation of peak demands. These features are an essential component of the recycled water process and integral to an agency's ability to continue reliably producing and supplying recycled water in many instances. The proposed rule should affirm that such reservoirs along with influent and treated effluent storage ponds are within the scope of the waste treatment exemption, consistent with the regulatory definition of "complete waste treatment system" found in existing federal regulations.[1] As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the U.S., and treatment systems should include any facilities, including storage ponds and basins, related not only to traditional treatment facilities and processes, but also to the production of recycled water.

In the alternative, recycled water facilities and features (including storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling) should be expressly exempted as part of the specifically identified features that are not considered waters of the U.S. within the proposed rule. In this case, recycled water facilities would be treated similar to artificial lakes, ponds, swimming pools, ornamental waters, and groundwater, which are specifically identified and expressly exempted. In either case, whether recycled water facilities are considered part of the waste treatment exemption or have their own

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[1] See 40 C.F.R. §35.2005(b)(12), defining "complete waste treatment system" as "all the treatment works necessary to meet the requirements of title III of the [CWA], involving . . . the ultimate disposal, *including recycling or reuse*, of the treated wastewater and residues which result from the treatment process." (Emphasis added); *see also* 40 C.F.R. §35.2005(b)(49) [definition of "treatment works" includes "storage of treated wastewater in land treatment systems before land application" among other things]

specifically identified exemption, it is essential that the proposed rule not interfere with recycled water production and treatment by making those features jurisdictional.

The failure to include an explicit statement in the final rule would leave open the question of whether these features are considered "waters of the U.S." Such a situation could lead to regulatory disincentives to produce recycled water in California and other western states, compounding a water scarcity situation that is already dire. Pending and adopted federal and state legislation to address the impacts of our historic drought contain a number of approaches to encourage recycled water projects. Transforming components of the recycled water process (including integral systems such as storage ponds) into jurisdictional waters would completely undercut efforts to address the drought and have resoundingly negative water supply ramifications across the state. We concur with the comments of Representative Grace Napolitano (D-CA) delivered to the House Committee on Transportation and Infrastructure Committee at the hearing held on June 11, 2014, as she questioned why in light of the severe drought in California, USEPA would not expressly include recycled water within the scope of the waste treatment exception. Given the drought and dire need to develop recycled water facilities in the arid west, clarification that excludes recycled water facilities from additional federal regulation is absolutely vital.

Spreading Grounds and Related Features of the Wastewater Treatment Process Should Be Expressly Exempted Under the Final Rule

As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the U.S., and CASA wants to ensure that as part of these proposed amendments spreading grounds/basins, treatment ponds/lagoons, and constructed treatment wetlands used as part of the wastewater process are subject to the same exemption. Since these facilities are clearly part of the treatment process, providing additional treatment, residence and settling prior to discharge, these facilities should be expressly recognized in the rule as falling under the Waste Treatment Exception.

In addition, many CASA member agencies utilize spreading grounds or basins in order to facilitate groundwater replenishment; a vital part of water management throughout California. Others utilize artificially created effluent storage ponds as part of their treatment process. Many agencies maintain reservoirs or storage basins/ponds to store recycled water. These artificially created features and spreading grounds have not previously been defined or regulated as "waters of the United States," and should remain separate. For this reason, the proposed rule should expressly include treatment ponds/lagoons, spreading grounds/basins, and constructed treatment wetlands within the scope of the Waste Treatment Exception, along with effluent storage reservoirs and recycled water storage facilities discussed previously.

The Proposed Amendments to What is Considered an "Adjacent Water" Must be Reexamined to Consider Wastewater Treatment Processes

Many wastewater treatment processes, including man-made spreading basins, are located near or even "adjacent" to rivers and tributaries that have been (or under the proposed rule, would be) designated as waters of the U.S. and may be located in the riparian or floodplain areas

of these rivers. Because the proposed rule defines "adjacency" and includes the incorporation of waters within the flood plain or riparian area of a designated water of the U.S. as also being a jurisdictional water (see section 328.3(c)(2)-(4), FR 22263), this could lead to an interpretation that such spreading basins and artificial storage ponds are jurisdictional.

Specifically, the proposed rule would revise the current category of an "adjacent wetland" to include all "adjacent waters." (FR 22206) As a result, numerous treatment ponds, recycled water reservoirs, and spreading grounds/basins across California could become jurisdictional, creating a significant problem and interference with existing wastewater treatment processes. For example, under the proposed rule, the Montebello Forebay spreading grounds in Southern California would appear to become jurisdictional. Under existing rules, regulations and case law, a waterbody is considered a water of the U.S. if it is a wetland adjacent to a water of the U.S. In contrast, under the proposed rule, all waterbodies (of many types) adjacent to a water of the U.S. could be considered themselves waters of the U.S., regardless of whether any sort of nexus or hydraulic connection has been shown and without any consideration of whether a berm or levee separates them. Under the proposed rule, a significant nexus appears to be assumed, as it states "...even in cases where a hydrologic connection may not exist, there are other important considerations...that result in a significant nexus between the adjacent wetlands or waters and the nearby "waters of the United States" and (a)(1) through (a)(3) waters." (79 FR 22244) As one seeming justification for this expanded interpretation, the proposed rule states that "many major species that prefer habitats at the interface of wetland and stream ecosystems remain able to utilize both habitats despite the presence of such a berm." (*Id.* at 22245) This use of species preference and behavior to justify incorporation of a water with no proven hydrologic connection as a water of the U.S. closely resembles the previously invalidated migratory bird rule. As such, terrestrial species preference is not an acceptable basis for the assertion of jurisdiction.

If these "adjacent" wastewater and recycled water facilities, including spreading grounds, are defined to be within the jurisdiction of the CWA, it would adversely impact CASA's member agencies' ability to augment groundwater supplies and to effectively provide wastewater treatment services. The plethora of additional and unnecessary requirements, regulations, and permitting associated with making these areas into jurisdictional waters, including but not limited to the procurement of an NPDES permit, assigning designated uses, exposure to penalties and potential third party liability for effluent violations, and impairment of the ability to operate and maintain these areas, would erect new mandates with no benefit to the surrounding ecosystems and waterbodies. Such a result represents an extreme disincentive to sustainable water supply development and a significant impairment of wastewater agencies' ability to protect public health and safety through innovative and effective wastewater treatment.

Within the proposed rule, there are two specific exemptions that could potentially address this issue. Pursuant to section 328.3(b)(5)(i) and 122.2(b)(5)(i)[2], a spreading ground could fall under the definition of "[a]rtificially irrigated areas that would revert to upland should application of irrigation water to that area cease" (79 FR 22263 and 22268) Spreading grounds

[2] All references are to Part 328 and Part 122, however the language suggestions contained herein similarly apply to other regulatory sections that have the potential to impact wastewater entities, including Part 230 (79 FR 22268-22269), Part 232 (79 FR 22269-22270), and Part 401 (79 FR 22273-22274).

utilized by wastewater treatment facilities are generally artificially created and might not otherwise exist aside from the application of wastewater effluent to the area. However, without being explicitly stated, it is not clear enough that this definition would apply to upland wastewater spreading grounds. Similarly, pursuant to section 328.3(b)(5)(ii) and 122.2(b(5)(ii), wastewater and recycled water ponds and spreading grounds could fall under an expanded definition of "[a]rtificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock water, irrigation, settling basins, or rice growing." (79 FR 22263 and 22268) The word "such" seems to indicate that these are merely examples, not an exhaustive list, and thus spreading grounds utilized in conjunction with and/or as part of the overall wastewater treatment process could fall under this exclusion. However, without specific references within these provisions to treatment ponds and spreading grounds, CASA and its members are very concerned that these facilities could become jurisdictional and create significant problems for agencies attempting to protect public health and the environment. This, we would request the explicit inclusion of the terms such as "spreading grounds" and "wastewater and recycled water storage," within this section.

"Tributary" is Defined Too Broadly and Will Likely be Construed to Include Certain Conveyances and Ditches

For the first time, the proposed rule seeks to define what constitutes a "tributary" under the Clean Water Act. The proposed rule drastically expands the number of waters potentially subject to federal jurisdiction. Specifically, the proposed rule defines "tributary" as a water "physically characterized by the presence of a bed and banks and ordinary high water mark...which contributes flow, either directly or through another water..." to a water of the U.S. (79 FR 22201-22202) Even wetlands, lakes, and ponds without an ordinary high water mark (OHWM) or bed and banks would be considered tributaries if they contribute flow, either directly or through another water to a water of the U.S. (*Id.* at 22201-22202) Perhaps most significantly, under the proposed rule, a tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not otherwise explicitly excluded. (*Id.* at 22202)

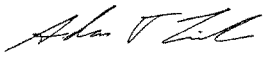
This overly broad definition of tributary could potentially increase the number of man-made conveyances, ditches and conveyance facilities, including those utilized by wastewater entities, under federal jurisdiction, and the lack of certainty surrounding the rule's definition of a tributary could lead to regulation of previously unregulated waters. This broad classification of "tributaries" would be considered jurisdictional regardless of perennial, intermittent or ephemeral flow. Even dry washes could be considered jurisdictional under the proposed rule. This is significant for a variety of reasons.

One example of the potential impacts of defining what constitutes a "tributary" too broadly is the potential discharge from sanitary sewer systems to dry creeks/sloughs/washes when no pollutants ever actually reach water. It is entirely unclear whether this constitutes a discharge of pollutants to a water of the U.S. Under the broad definition of tributary in the proposed rule, it is possible that spills to dry creeks, sloughs, or washes would be considered a "discharge" even if there is absolutely no real or potential impacts to surface waters of any kind. Similarly, there are circumstances where sewer spills occur in a street that drains to a roadside

ditch or local creek bed that has no flow and is unconnected to a water of the U.S. The responsible party may fully remediate the spill and address all real and potential water quality impacts before the spill ever reaches a water source. It is difficult to understand how can this kind of circumstance could be envisioned as a discharge to "waters of the United States" when there is no actual water in a dry creek or ditch nor an adverse impact to the environment.

CASA appreciates your consideration of our comments. If you have questions or wish to discuss our perspective further, please contact Adam D. Link, CASA's Director of Government Affairs at (916) 446-0388 or Eric Sapirstein, CASA's federal representative, at (202) 466-3755. Thank you for your consideration of our comments.

Sincerely,



Adam D. Link
CASA Director of Government Affairs

State Water Resources Control Board

November 14, 2014

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue NW (4101M)
Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army
108 Army Pentagon, Room 3E446
Washington, DC 22310-0108

WATERS OF THE UNITED STATES PROPOSED RULE
DOCKET ID NO. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

Thank you for the opportunity to comment on the U.S. Environmental Protection Agency and U.S. Department of the Army's (collectively the "Agencies") jointly Proposed Rule,[1] which defines the scope of "waters of the United States" protected under the federal Clean Water Act (CWA) in light of recent U.S. Supreme Court cases. The California State Water Resources Control Board (State Water Board), in conjunction with the nine California regional water quality control boards (collectively, "Water Boards"), is designated as California's water pollution control agency for the CWA. The Proposed Rule will affect all of the CWA programs that are administered by the Water Boards, including section 401 water quality certification, section 402 permitting, and section 303 water quality standards. Therefore, please accept the following general comments, as well as the attached specific comments, on the Proposed Rule on behalf of staff of the Water Boards.

We strongly support the Agencies' intent to adopt regulations to provide clarity to the definition of "waters of the United States" in order to improve efficiency, consistency, and predictability while protecting water quality, public health, and the environment. Protection of water resources is of utmost importance in California. The availability of clean water, now and in the future, is vital to maintaining the health of our communities, businesses, agriculture, and natural environment, especially in the face of climate change and increased demand from a growing population. A comprehensive rulemaking represents a major improvement over the status quo, which is distinguished primarily by case-by-case jurisdictional determinations resulting in a patchwork of fact-specific, sometimes conflicting, judicial decisions. Neither the economy nor the environment is well served by the current regulatory uncertainty.

We also strongly support the Agencies' science-based approach to the rulemaking, particularly with respect to further defining the types of water bodies that are considered to be "waters of the

[1] As published in 79 Fed. Reg. 22188-22274 (April 21, 2014)

United States" because they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

For example, the inclusion of all tributaries (including headwaters, ephemeral and intermittent streams, and tributary wetlands and ponds) as jurisdictional waters is an important step in protecting water quality in California. Both the Agencies' peer-reviewed scientific report and the Science Advisory Board's October 17, 2014 review of the Agencies' report correctly recognize the importance of all tributaries in maintaining the biological, physical, and chemical integrity of downstream waters. As shown in Attachment A of this letter, intermittent and ephemeral streams cover a significant portion of California's surface area. As recommended by the Science Advisory Board in its September 30, 2014 letter to the Agencies, however, the Agencies should consider whether the proposed definition of "tributary" actually includes all ephemeral streams as intended, but also clearly distinguishes such tributaries from excluded non-tributary ditches. In addition, natural discontinuous channels in dry land stream systems should also be considered to be tributaries, even when there are one or more natural breaks in the channel.

Similarly, we support the proposed definition of "adjacent" waters as applying to all types of waters, not just wetlands. We also support the proposed definition of "neighboring" waters to include waters within "riparian" areas and "floodplains," as well as waters with a hydrologic connection to jurisdictional waters, because the science clearly indicates that these types of waters have a significant nexus to the jurisdictional waters.

These proposed new definitions of types of "waters of the United States" offer increased clarity and consistency, which will result in more efficient and effective protection of headwaters, streams, their associated wetlands, and adjacent waters. This is important in states such as California that are characterized by a broad diversity of landscapes, climate, and hydrology. To the extent that the science justifies defining additional types of waters as "waters of the United States," either now or in the future, we would support doing so for the same reasons. For example, as suggested by the Science Advisory Board in its September 30, 2014 letter to the Agencies, the Agencies should consider whether geographically-based subcategories of similarly situated "other waters" have a significant nexus to jurisdictional waters. To the extent that is necessary to continue to rely instead on case-by-case significant nexus determinations, however, we generally support the framework of the Proposed Rule for similarly situated "other waters."

As recommended by the Scientific Advisory Board in its September 30, 2014 letter to the Agencies, the Agencies should also consider whether non-wetland swales and other features that provide hydrologic connectivity to and between wetland complexes, such as vernal pools, should be excluded if they directly contribute flows, and function as part of the tributary system to jurisdictional waters, even though they lack an ordinary high water mark and bed and bank. Additionally, while we generally support the exclusion of ditches, gullies, and rills from "waters of the United States," we recommend that these features be defined to avoid confusion. To the extent that any excluded features can contribute flow to waters of the United States, the Agencies should clarify that they may be considered point sources, as long as they are not statutorily exempt from regulation under the CWA.

Some states, including California, have state laws that supplement the CWA's authority to protect certain types of water bodies. Even so, we appreciate the necessity of relying on the authority provided by CWA section 401 to regulate discharges to waters of the United States, especially for discharges associated with projects licensed by the Federal Energy Regulatory

Commission. A narrow definition of "waters of the United States" would mean that state authority over more of these types of projects would be preempted by the Federal Power Act.

In a similar vein, we rely heavily on the Agencies' activities under the section 404 dredge and fill program to leverage our limited staff resources in the section 401 water quality certification program. A narrow definition of "waters of the United States" would require additional state resources to achieve the same level of protection as is afforded under the section 404 program today. By contrast, the proposed definition of "waters of the United States" will not increase the type and number of water bodies that are protected only under state law, and will also reduce the number of case-by-case determinations. This will facilitate the processing of CWA section 401 certification applications, and decrease Water Boards staffs' time spent on ensuring that impacts to waters are addressed and appropriately mitigated and monitored. Improved alignment of federal and state jurisdictional waters will also likely decrease permit processing time to the benefit of applicants.

In addition to these general comments, please find our specific comments on the language of the Proposed Rule in Attachment B to this letter. We appreciate the Agencies' outreach to state agencies in discussing this rulemaking effort and encourage the Agencies to continue to consult with the states as the Agencies consider the public comments and the rulemaking moves forward. Once the rulemaking is final, we encourage continued early outreach and coordination, particularly when making jurisdictional determinations pursuant to the newly-adopted "waters of the United States" rule.

Thank you for considering these comments. If you have any questions regarding this submittal, please do not hesitate to call Bill Orme, Chief of the State Water Resources Control Board's Water Quality Certification Unit, at (916) 341-5464. You may also email him at: Bill.Orme@waterboards.ca.gov.

Sincerely,

Thomas Howard
Executive Director
California State Water Resources Control Board

cc: (via Electronic Mail)

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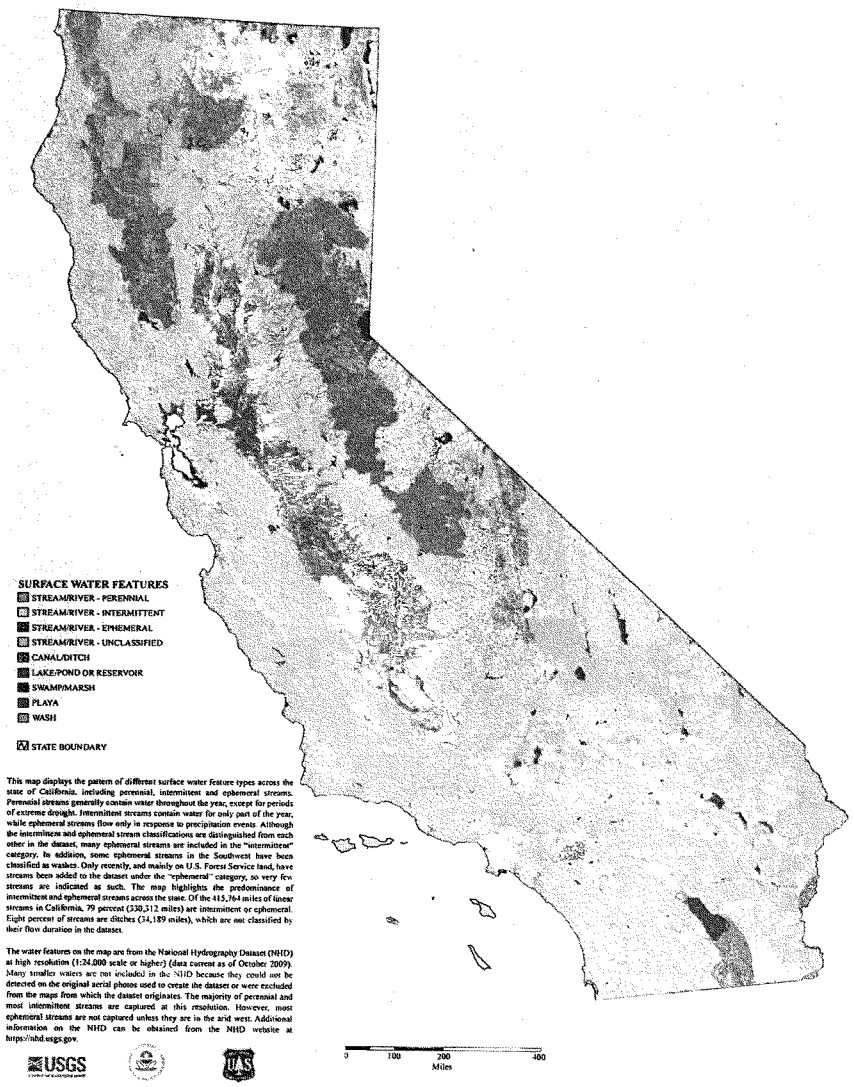
EPA-HQ-OW-2011-0880

STREAMS AND WATERBODIES IN CALIFORNIA

Attachment A

The National Hydrography Dataset



This map displays the pattern of different surface water feature types across the state of California, including perennial, intermittent and ephemeral streams. Perennial streams generally contain water throughout the year, except for periods of extreme drought. Intermittent streams contain water for only part of the year, while ephemeral streams flow only in response to precipitation events. Although the intermittent and ephemeral stream classifications are distinguished from each other in the dataset, many ephemeral streams are included in the "intermittent" category. In addition, some ephemeral streams in the Southwest have been classified as washes. Only recently, and mainly on U.S. Forest Service land, have streams been added to the dataset under the "ephemeral" category, so very few streams are indicated as such. The map highlights the predominance of intermittent and ephemeral streams across the state. Of the 415,764 miles of linear streams in California, 79 percent (330,312 miles) are intermittent or ephemeral. Eight percent of streams are ditches (34,189 miles), which are not classified by their flow duration in the dataset.

The water features on the map are from the National Hydrography Dataset (NHD) at high resolution (1:24,000 scale or higher) (data current as of October 2009). Many smaller waters are not included in the NHD because they could not be detected on the original aerial photos used to create the dataset or were excluded from the maps from which the dataset originates. The majority of perennial and most intermittent streams are captured at this resolution. However, most ephemeral streams are not captured unless they are in the arid west. Additional information on the NHD can be obtained from the NHD website at https://nhd.usgs.gov.

USGS

Prepared by INDUS Corporation under contract with
U.S. Environmental Protection Agency
Office of Water – Washington, DC
October 2013

The following specific comments are provided by the California State Water Resources Control Board and the nine California regional water quality control boards (collectively, the "Water Boards") staff regarding the proposed "Definition of 'Waters of the United States' Under the Clean Water Act" (Proposed Rule) for 40 CFR 230.3. Specific recommended changes to the proposed regulations are shown in ~~strikeout~~/underline format. Additional comments are presented as endnotes.

Proposed "Definition of 'Waters of the United States' Under the Clean Water Act"
40 CFR 230.3

(s) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (t) of this section, the term "waters of the United States" means:

(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 (s)(1) through (3) and (5) of this section;

(5) All tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (s)(1) through (5) of this section; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (s)(1) through (3) of this section.

(t) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) of this section—

(1) Waste treatment systems, including treatment ponds, ~~or~~ lagoons, and storm water detention basins,[1] designed and used[2] to meet the requirements of the Clean Water Act and not constructed in a waters of the United States.[3]

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than ~~perennial~~ intermittent[4] flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used

exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity that are not part of an interconnected network of waters of the United States;[5]

(vi) Groundwater, including groundwater drained through subsurface drainage systems; and

(vii) Gullies and rills and non-wetland swales.[6]

(u) Definitions—

(1) *Adjacent.* The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(2) *Neighboring.* The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (s)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection[7] or confined surface hydrologic connection to such a jurisdictional water.

(3) *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.[8]

(4) *Floodplain.* The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary.* The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section. In addition, wetlands[9] lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (s)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, natural discontinuous channels in dryland stream systems,[10] debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (t)(3) or (4) of this section.

(6) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in

saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(7) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (s)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section.[11]

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[1] Stormwater detention basins and other constructed water-dependent stormwater treatment systems should also qualify for this exclusion.

[2] If a waste treatment system is abandoned or otherwise ceases to serve the treatment function it was designed for, it should not continue to qualify for the exclusion.

[3] Generally, waste treatment systems that are constructed within a water of the United States should not qualify for this exclusion. There may be some existing waste treatment systems that were constructed within a water of the United States that the Agencies affirmatively determined ceased to be a water of the United States; those determinations should remain in effect.

[4] The distinction between ditches excluded under proposed (t)(3) and ditches that meet the proposed definition of "tributary" is not clear, because "tributary" includes man-made ditches. If the ditch is not connected to a water of the United States and is not abandoned, then the flow regime may not be relevant. For ditches that are connected to waters of the United States, if the intent of the proposed (t)(3) exclusion is to be consistent with the significant nexus test, then an intermittent flow regime would be more appropriate than a permanent flow regime, particularly for arid and semi-arid areas. Alternatively, the simplest approach may be to treat all ditches that are excavated wholly in uplands and drain only uplands as potential point sources, rather than waters of the United States, without regard to flow regime. This approach could be limited to ditches that are not abandoned, and would include the upland portions of municipal separate storm sewer systems.

[5] There are cases where after a number of years of inactivity, water filled depressions created incidental to construction activity become habitat for plants and animals and support other designated uses. These water-filled depressions may be considered to be waters of the United States if they are interconnected with other waters of the United States.

[6] Non-wetland swales that contribute flow to waters of the United States may be considered waters of the United States. See endnote 9.

[7] We support the proposed definition of "neighboring." However, guidance should be provided on how to determine whether there is a "shallow subsurface hydrologic connection" for the purpose of this exclusion.

[8] We support the definition of "riparian," because it is consistent with scientific evidence that riparian areas are areas through which surface and subsurface hydrology interconnect aquatic

areas and connect them with their adjacent uplands (Brinson et al., 2002). They are distinguished by gradients in biophysical conditions, ecological processes, and biota. They can include wetlands, aquatic support areas, and portions of uplands that significantly influence the conditions or processes of aquatic areas.

[9] We support the proposed language including wetlands as tributary. However, the Agencies should consider whether interconnecting non-wetland swales that provide critical hydrologic connectivity to wetland complexes should be excluded. In California, this is commonly found in vernal pool complexes. Although vernal pools may be considered jurisdictional, swales that provide chemical, physical, and biological connectivity would be excluded. For clarity, we suggest that the Agencies consider whether to add "interconnecting swales" to clarify that interconnecting swales in wetland complexes should be considered jurisdictional because they directly contribute flows and function as part of the tributary system to waters of the United States.

We agree that gullies and rills, and non-wetland swales in upland areas that are purely erosional features and do not contribute flow, either directly or through another water, to waters of the United States correctly should not be considered jurisdictional by rule. However, as suggested by the Scientific Advisory Board, the Agencies should consider whether non-wetland swales in arid and semi-arid environments and low gradient landscapes should be included as tributaries if they contribute flow to waters of the United States (particularly headwaters in zero order basins), regardless of the presence of an ordinary high water mark. There are many ephemeral and intermittent tributaries in the arid West, such as those ephemeral channels that are tributary to the Mojave River and Amargosa River in California. As shown on the National Hydrography Dataset (NHD) high resolution map (Attachment A), the majority of streams in California (79 percent) are intermittent or ephemeral (INDUS Corporation, 2013).

Headwaters undergo geomorphic processes, such as erosion and incision, which may take the initial form of non-wetland swales. Therefore, these headwater features can significantly affect the chemical, physical, and biological integrity of waters of the United States. The importance of headwater stream systems is noted throughout the preamble to the Proposed Rule on page 22201: "The great majority of tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream environments. Tributaries serve to store water, thereby reducing flooding, provide biogeochemical functions that help maintain water quality, trap and transport sediments, transport, store and modify pollutants, provide habitat for plants and animals, and sustain the biological productivity of downstream rivers, lakes and estuaries." Additionally, the preamble to the Proposed Rule clearly recognizes on page 22206 the benefits of headwater and ephemeral streams: "[t]ributaries that are small, flow infrequently, or are a substantial distance from the nearest (a)(1) through (a)(3) water (e.g., headwater perennial, intermittent, and ephemeral tributaries) are essential components of the tributary network and have important effects on the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters, contributing many of the same functions downstream as larger streams. When their functional contributions to the chemical, physical, and biological conditions of downstream waters are considered at a watershed scale, the scientific evidence supports a legal determination that they meet the "significant nexus" standard articulated by Justice Kennedy in *Rapanos*."

[10] We note that there are ephemeral and intermittent streams in arid and semi-arid regions that are commonly referred to as "drylands" (Levick et al., 2008; CDFG, 2010). Natural

discontinuous channels in dryland stream ephemeral channels are characterized by alternating erosional and depositional reaches that may vary in length (USACE, 2008). These channels are constantly in flux and are characterized by temporal and spatial changes in channel morphology for any given location. These systems are subject to prolonged wet and dry cycles and typically have many years of discontinuous flows. Since jurisdiction should be based on physical structure rather than the vagaries of climate, these features when contributing flow either directly or through another water to a water of the United States, should be considered jurisdictional.

[11] We support the proposed "significant nexus" definition, including specifically, "a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (s)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section." Making the determination of "similarly situated" waters should be done at the watershed level (for these purposes, the term watershed should mean all areas resulting from the first subdivision of a subbasin). Certainty that waters are "similarly situated" and thus similarly affecting the chemical, physical, or biological integrity of jurisdictional waters increases when the area of analysis is confined to a watershed where, by definition, all waters flow to a common point. Although waters within an ecoregion could similarly affect chemical, physical, or biological integrity of a jurisdictional water, the large scale of ecoregions would greatly complicate the analysis and provide more opportunities for challenges to the jurisdictional determinations.

In addition, we recommend that the Agencies make it clear that the existence of a significant nexus may be reassessed in cases where new permanent changes in hydrology occur, through natural or man caused events (e.g., climate change), altering hydrologic flows. In such cases, a water previously determined not to be jurisdictional under the rule, may be found to be jurisdictional in its new altered condition.

Literature Cited

Brinson, M. M. et al. (2002). *Riparian Areas: Functions and Strategies for Management.* Washington, D.C: National Academy Press.

California Department of Fish and Game (CDFG). (2010). *A review of Stream Processes and Forms in Dryland Watersheds.* Prepared by K. Vyverberg, Senior Engineering Geologist, Conservation Engineering. December 2010.

INDUS Corporation. (2013). *Streams and Waterbodies in California The NHD Dataset: Committee on Science, Space, and Technology.* Retrieved August 29, 2014 from the Committee on Science, Space, and Technology Web site: http://science.edgeboss.net/sst2014/documents/epa/california2013.pdf

Levick, L. J. et al. (2008). *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest.* U.S. Environmental Protection Agency and U.S. Department of Agriculture/ARS Southwest Watershed Research Center.

U.S. Army Corps of Engineers (USACE). (2008). *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States.* R. W. Lichvar, and S. M. McColley. ERDC/CRREL TR-08-12. August 2008.

November 14, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy,

The undersigned fishing and seafood organizations write in strong support of the Environmental Protection Agency's (EPA) proposed clean water protection rule. We represent businesses that supply fish and seafood to America's tables every day. We know the importance of sustainability firsthand: our livelihoods are inextricably linked to the health of the marine environment. When water pollution or drainage of wetlands and tributary streams harms aquatic life and harvest rates, our businesses ultimately pay the price. EPA's Clean Water Protection Rule helps to avoid these risks by restoring longstanding water quality protections that have been under-enforced for nearly a decade due to legal uncertainty.

Our businesses rely on healthy marine life, and marine life requires clean water. When pollution degrades our aquatic resources, we see the effects in our bottom line. Algal blooms, fueled by pollution in some areas, have tainted seafood with toxins that are unsafe to eat. Moreover, these events can cause consumers to avoid seafood even after it is once again safe to eat.

The Clean Water Act was intended to help prevent pollution from entering many waterways where we fish and harvest. Yet recently, the Act's scope of protection has been cast into doubt by a set of ambiguous court decisions. This has resulted in significant backsliding in water quality as legal uncertainty has prevented the effective enforcement of legal protections. In many cases, direct discharges or destruction of nutrient-filtering wetlands has taken place even in waters that should rightfully be protected by the law.

EPA's proposed rule is designed to address this problem. By clearly signaling which waters are protected and which waters are not, the rule will once again allow EPA and the Army Corps of Engineers to administer the law with clarity, certainty and efficiency. Better enforcement of Clean Water Act protections is essential if we are to reverse our nation's persistent coastal and inland water pollution.

Our organizations ask EPA to produce a strong rule that will protect the waters we rely on. By protecting clean water, this rule protects our businesses and the safe and healthy seafood that Americans love. We therefore urge you to produce a strong, science-based rule that will protect water quality for our industries and the nation.

Sincerely,

Golden Gate Salmon Association

Pacific Coast Federation of Fishermen's Associations

November 14, 2014

Via Email Correspondence: ow-docket@epa.gov
The Honorable Gina McCarthy, Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW.
Washington, DC 20460

Re: Docket ID No# EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

As local and state decision makers representing communities across Colorado, we support the proposed *Definition of Waters of the United States Under the Clean Water Act* issued by the US Environmental Protection Agency and the US Army Corps of Engineers that clarifies which streams, lakes, wetlands, and other waterways are covered by the Clean Water Act. Please consider these our formal comments in support of the clarification.

Colorado's river basins, lakes, and wetlands are essential resources that provide drinking water as well as the economic backbone for millions of Americans across the Western United States and Colorado. We support this proposed rule because it:

- Restores protections of our waterways that previously existed for decades,
- Protects the communities who economies rely upon those waterways, and
- Provides protection to our rivers and wetlands from the impacts of our rapidly growing population.

Passed in 1972, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the Clean Water Act safeguarded nearly all of our nation's waters, as intended by Congress. Despite the law's dramatic progress towards protecting our water resources, two Supreme Court decisions on the jurisdictional scope of the Act left our seasonally flowing river basins, lakes, streams, and wetlands vulnerable to pollution and destruction. The federal policy changes over the last decade have further confused and called into question the Clean Water Act's protections for most of Colorado's rivers, streams, lakes, and wetlands. This confusion has put at risk the drinking water for more than 3.8 million Coloradans not to mention the economic impacts that could result if we do not properly protect our waterways. We support the proposed updates to the definition as it provides clarity as to what water bodies are covered.

Perhaps most importantly, the proposed rule will help to protect Colorado's robust outdoor recreation economy and those communities that rely upon it. Rivers in Colorado support a multibillion dollar outdoor recreation economy that includes white-water rafting, boating, kayaking, fly fishing, birding, and hunting. In fact, this river-based recreation economy is the backbone of many of our rural and mountain communities. Rivers in Colorado generate over $9 billion in economic activity every year, which includes supporting nearly 80,000 jobs. Additionally, according to the *2011 National Fishing, Hunting, and Wildlife-Associated Recreation Survey* by the U.S. Fish and Wildlife Services, freshwater fishing expenditures totaled over $648 million dollars in Colorado alone.

As a headwater state, it's critical that we ensure our rivers are protected. Colorado is home to four of our country's major river basin systems, which are party to nine interstate river compacts, one interstate agreement, and two equitable apportionment decrees for rivers. The Colorado River Basin is a primary source of water for drinking, recreational activity, agriculture, and industrial uses for seven states – providing the drinking water for over 30 million Americans. Most of Colorado's nearly 100,000 miles of streams are tributary to one of these rivers. Even minor impacts to these tributary systems can significantly affect water across the West. In order for the Act to truly protect our rivers and waterways, it must protect our headwaters. Protect water at its most vital point – the source.

We urge the agencies to finalize a strong rule that provides essential guidance to the Clean Water Act; and thereby, protects our communities and economies. We support this rule and the finalization of the *Definition of "Waters of the United States Under the Clean Water Act* so that we can continue to make progress toward the goals set by Congress in 1972.

Sincerely,

Senator John Kefalas (SD-14)
Senator Matt Jones (SD-17)
Senator Andy Kerr (SD-22)
Senator Jessie Ulibarri (SD-21)
Representative KC Becker (HD-13)
Representative Randy Fischer (HD-53)
Representative Mike Foote (HD-12)
Representative Jonathan Singer (HD-11)
Representative Max Tyler (HD-23)
Representative Angela Williams (HD-7)
Representative-Elect Faith Winter, (HD-35) currently City Councilor and Mayor Pro Tem, City of Westminster

Commissioner Elise Jones, Boulder County
Commissioner Cindy Domenico, Boulder County
Commissioner Deb Gardner, Boulder County
Commissioner Eva Henry, Adams County
Commissioner Chaz Tedesco, Adams County
Commissioner Tim Mauck, Clear Creek County
Commissioner Karn Stiegelmeir, Summit County
Mayor Sue Horn, Town of Bennett
Councilor Chris Nevitt, City of Denver
Councilor Robin Kneich, City of Denver
Councilor Susan Shepherd, City of Denver
Councilor Albus Brooks, City of Denver
Councilor Paul Lopez, City of Denver
Councilor Ross Cunniff, City of Ft. Collins
Councilor Phil Farley, City of Loveland
Councilor Ralph Trenary, City of Loveland
Councilor Marcie Miller, City of Golden
Councilor Eric Montoya, City of Thornton

Mayor Marjorie Sloan, City of Golden
Councilor Suzanne Jones, City of Boulder
Councilor Tim Plass, City of Boulder
Councilor Lisa Morzel, City of Boulder
Councilor Christine Berg, City of Lafayette
Councilor Sarah Levinson, City of Longmont
Councilor Jill Gaebler, City of Colorado Springs
Councilor Steve Douglas, City of Commerce City
Councilor Bennet Boeschenstein, City of Grand Junction
Councilor Ted May, City of Federal Heights
Councilor Tanya Ishikawa, City of Federal Heights
Councilor Kyle Mullica, City of Northglenn
Councilor Emma Pinter, City of Westminster
Councilor Alberto Garcia, City of Westminster

CC:

U.S. Senator Michael Bennet
U.S. Senator Mark Udall
Colorado Governor John Hickenlooper

74 Pennsylvania Organizations Supporting Proposed *Definition of "Waters of the United States" Under the Clean Water Act*

350.0rg Philadelphia •Action United • Allegheny County Clean Air Now • Allegheny Defense Project • Allegheny Group, Sierra Club • Alliance of Nurses for Healthy Environments • Aquashicola/Pohopoco Watershed Conservancy • Audubon Pennsylvania • Audubon Society of Western PA • Bartram's Gardens • Berks Gas Truth • Brandywine Conservancy & Museum of Art • Bucks County Audubon Society at Honey Hollow • Center for Coalfield Justice • Central PA Conservancy • Chestnut Hill United Church • Citizens Climate Lobby, Harrisburg • Citizens Climate Lobby, Lancaster • Citizens for Pennsylvania's Future • Clean Air Council • Clean Water Action • Clear Water Conservancy • Climate Reality Project • Eastern PA Coalition for Abandoned Mine Reclamation • Energy Justice Network • Farm to City, LLC • Food & Water Watch • Friends of Poquessing • Friends of the Delaware Canal • Friends of the Wissahickon • Green Party of PA • Green Philly Blog • Green Treks Network • Green Valleys Watershed Association • Group Against Smog & Pollution • Juniata Valley Audubon Society • Keystone Progress • Keystone Trails Association • Lackawanna River Corridor Association • League of Women Voters of PA • Lehigh Valley Gas Truth • Lower Penns Creek Watershed Association • Mountain Watershed Association • Nine Mile Run Watershed Association • • Peach Bottom Concerned Citizens Group • PennEnvironment • PA Council of Churches • PA Forest Coalition • PA Interfaith Impact Network • Physicians for Social Responsibility • Pidcock Creek Watershed Association • Pine Creek Valley Watershed Association • Protecting Our Waters • Raymond Proffitt Foundation • Responsible Drilling Alliance • Schuylkill River Greenway Association • Schuylkill River Park Alliance • Sierra Club, PA Chapter • South Philadelphia Rainbow Committee • Temple Sinai • The Tinicum Conservancy • Three Rivers Waterkeeper • Tikkun Olam Center for Jewish Social Justice • Tobyhanna Creek/Tunkhannock Creek Watershed Association • Tookany/Tacony Watershed Partnership • United Food & Commerical Workers Union, Local 23 • Upper Burrell Citizens Against Marcellus Pollution • Valley Forge Trout Unlimited • Valley Forge Watershed Association • Wildlands Conservancy • Wissahickon Valley Watershed Association • Women for a Healthy Environment • Women of Temple Sinai • Youghiogheny Riverkeeper

November 13, 2014

The Honorable Gina McCarthy
Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue
Washington, DC 20460

Email to: ow-docket@epa.gov

Re: Clean Water Rule Docket ID # EPA-HQ-OW-20011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The above signed **74** conservation, environmental, faith based, and unions, representing over 611,000 members in Pennsylvania appreciate the opportunity to comment on the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed *Definition of "Waters of the United States" Under the Clean Water Act* to clarify which streams, wetlands and other waters are protected under the Clean Water Act. This rule is long overdue. Many of our organizations have spent more than a

decade advocating to restore Clean Water Act protections to all wetlands and tributary streams, as Congress originally intended when it passed the landmark Act in 1972.

For its first thirty years, the Clean Water Act safeguarded nearly all of our rivers, streams, lakes and wetlands, in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Despite the law's dramatic progress at combating water pollution nationally, federal policy changes in the last decade have left many small streams and "isolated" wetlands vulnerable to pollution or destruction. These federal policy changes have called into question Clean Water Act protections for nearly 60% of our nation's stream miles and at least 20 million acres of wetlands in the continental United States.

We support the proposed rule for the clear protections it restores to headwaters, intermittent and ephemeral streams, and to wetlands and other waters located near or within the floodplain of these tributaries. We urge the Agencies to strengthen the final rule by further clarifying that important wetlands and other waters located beyond floodplains are also categorically protected under the Clean Water Act. Millions of small streams and wetlands provide most of the flow to our most treasured rivers, including the Allegheny, Delaware, Monongahela, Ohio, Schuylkill and Susquehanna. If we do not protect these streams and wetlands, we cannot protect and restore the lakes, rivers and bays on which communities and local economies depend. Leaving critical water resources vulnerable jeopardizes jobs and revenue for businesses that depend on clean water, including outdoor activities like angling and water-based recreation.

We support the Agencies' proposal to define all tributaries as "waters of the United States," including headwaters and small streams that may only flow seasonally. Headwater streams provide most of the flow to downstream streams and rivers, and make up 59% of Pennsylvania's stream miles. Intermittent and ephemeral streams may only flow during parts of the year, but they support water quality in downstream waters by filtering pollutants and capturing nutrients and make up 25% of Pennsylvania's stream miles. These streams are also critical habitat for fish and other aquatic species.

Headwater and seasonal streams also feed the drinking water sources of 117 million Americans, including 8 million residents in Pennsylvania. Clarifying that all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act will restore protections to 10,720 miles of streams in Pennsylvania that 63% of our residents depend on for drinking water.

In addition, we support the Agencies' definition of tributary and strongly agree that ditches should be defined as "waters of the U.S." where they function as tributaries. There is sufficient scientific evidence that some ditches function as tributaries moving water and pollutants downstream. In those cases protection is important.

We support the Agencies' determination that all adjacent wetlands are "Waters of the U.S." Wetlands perform critical functions that support aquatic life, clean drinking water and safeguard communities from floods. Wetlands protect the water quality of entire watersheds by filtering pollutants. They also store floodwaters, reducing flood flows that can threaten property and infrastructure. Wetlands also

provide essential fish and wildlife habitat that support robust outdoor recreation and tourism. When wetlands are polluted, dredged or filled, these benefits are lost.

In order to protect wetlands and other resources, we also urge the agency to:

> **Categorically define certain non-adjacent "other waters" as "Waters of the United States" and identify additional subcategories of waters that are jurisdictional, rather than requiring case-by-case determinations.** Wetlands and other waters, even so-called isolated ones that are not adjacent to tributaries, provide many of the same natural benefits as adjacent waters located within floodplains. In fact, it is because of their placement outside of floodplains that they function as "sinks" to capture and filter pollutants and store floodwaters, protecting the physical, biological and chemical integrity of downstream waters. Examples of "other waters" where the science supports our recommendation that they should be categorically protected by rule include: prairie potholes, Carolina and Delmarva Bays, Texas coastal prairie wetlands and vernal pools.
>
> **Provide for new science by not categorically excluding any of the "other waters," and establishing a process by which evolving science can inform jurisdictional decisions in the future.** "Other waters" that cannot be defined as jurisdictional in the final rule should still be assessed on a case-by-case basis and provisions made for categorically including them as "Waters of the United States" if and when evolving science indicates that this is appropriate.

The Agencies' commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade, eliminate permit confusion and delay, and better protect the critical water resources on which our communities depend.

We urge the Agencies to swiftly finalize a rule to clarify that all waters with a "significant nexus" to downstream waters are clearly protected under the Clean Water Act. We thank the Agencies for their efforts to protect these waters and look forward to working with them to finalize and implement a strong *"Definition of Waters of the United States" under the Clean Water Act.*

Sincerely (74 Organizations and their Representative(s) appear on the following pages),

74 Pennsylvania Organizations Supporting Proposed *Definition of "Waters of the United States" Under the Clean Water Act*

350.org
Local Steering Committee
Philadelphia, PA

Action United
Bill Bartlett, Executive Director
Pittsburgh, PA

Allegheny County Clean Air Now
Ted Popovich, Member
Pittsburgh, PA

Allegheny Defense Project
William Belitskus, Board President, ADP
Kane, Pennsylvania

Allegheny Group, Sierra Club
Peter Wray, Chair, Conservation Committee
Pittsburgh, PA

Alliance of Nurses for Healthy Environments
Katie Huffling, Director of Programs, MS, RN, CNM
Mount Rainier. MD

Aquashicola/Pohopoco Watershed Conservancy
Jim Vogt, President
Monroe & Carbon Counties, PA

Audubon Pennsylvania
Philip S. Wallis, Vice-President & Executive Director
Audubon, PA

Audubon Society of Western PA
Jim Bonner, Executive Director
Pittsburgh, PA

Bartram's Gardens
Maitreyi Roy, Executive Director
Philadelphia, PA

Berks Gas Truth
Karen Feridun, Founder
Kutztown, PA

Brandywine Conservancy and Museum of Art
Seung Ah Byun, PhD, PE, Senior Planner for Water Resources
Chadds Ford. PA

Bucks County Audubon Society at Honey Hollow
Diane Smith, Director of Education
New Hope, PA

Center for Coalfield Justice
Patrick Grenter, Executive Director
Washington, PA

Central PA Conservancy
Anna Yelk, Executive Director
Carlisle, PA

Chestnut Hill United Church
Linda Noonan, Senior Pastor
Philadelphia, PA

Citizens Climate Lobby, Harrisburg Chapter
Rachel Mark, Group Leader
Harrisburg, PA

Citizens Climate Lobby, Lancaster Chapter
Jerry Lee Miller, Group Leader
Lancaster, PA

Clean Air Council
Joseph Otis Minott, Executive Director
Philadelphia, PA

Clean Water Action
Myron Arnowitt, PA State Director
Pittsburgh, PA

Clear Water Conservancy
Jennifer Shuey, Executive Director
State College, PA

Climate Reality Project
Richard Whiteford, Leader
Downingtown, PA

Eastern PA Coalition for Abandoned Mine Reclaimation
Robert E. Hughes, Executive Director
Ashley, PA

Energy Justice Network
Mike Ewall, Founder & Director
Philadelphia, PA

Farm to City, LLC
Bob Pierson, Director
Philadelphia, PA

Food & Water Watch
Wenonah Hauter, Executive Director
Washington, DC

Friends of Poquessing
Donna Smith-Remick, President
Philadelphia, PA

74 Pennsylvania Organizations Supporting Proposed *Definition of "Waters of the United States" Under the Clean Water Act*

Friends of the Delaware Canal
Susan Taylor, Executive Director
New Hope, PA

Friends of the Wissahickon
Maura McCarthy, Executive Director
Philadelphia, PA

Green Party of Pennsylvania
Jay Sweeney, Chair
Harrisburg, PA

Green Philly Blog
Julie Hancher, Founder
Philadelphia, PA

Green Treks Network
Barry Lewis, Executive Director
Philadelphia, PA

Green Valleys Watershed Association
Victoria Laubach, Executive Director
Pottstown, PA

Group Against Smog and Pollution
Rachel Filippini, ED
Pittsburgh, PA

Juniata Valley Audubon Society
Laura Jackson, President
Tyrone, PA

Keystone Progress
Michael Morrill, Executive Director
Harrisburg, PA

Keystone Trails Association
Curt Ashenfelter, Executive Director
Harrisburg, PA

Lackawanna River Corridor Association
Bernard McGurl, Executive Director
Scranton, PA

League of Women Voters of PA
Susan Carty, President
Harrisburg, PA

Lehigh Valley Gas Truth
Julie Ann Edgar, Organizer
Bethlehem, PA

Lower Penns Creek Watershed Association
Robert Miller, President
New Berlin, PA

Mountain Watershed Association
Beverly Braverman, Executive Director
Melcroft, PA

Nine Mile Run Watershed Association
Brenda Smith, Executive Director
Pittsburgh, PA

Peach Bottom Concerned Citizens Group
Maria Payan, Executive Director
Delta, PA

Penn Environment
David Masur, Executive Director
Philadelphia, PA

Citizens for Pennsylvania's Future
Cynthia Dunn, President
Harrisburg, PA

Pennsylvania Council of Churches
Rev. Sandra L. Strauss, Director of Public Advocacy
Harrisburg, PA

Pennsylvania Forest Coalition
Richard A. Martin, Coordinator
Harrisburg, PA

Pennsylvania Interfaith Impact Network
Sue Thorn, Lead Organizer
Pittsburgh, PA

Physicians for Social Responsibility
Dr. Catherine Thomasson, Executive Director
Washington, DC

Pidcock Creek Watershed Association
Jan Ubel, Chair
Solebury Twp., Buckingham Twp., Upper Makefield Twp., and Wrightstown, PA

Pine Creek Valley Watershed Assn.
Ingrid Morning, President & General Counsel
Oley, PA

Protecting Our Waters
Iris Marie Bloom, Executive Director
Philadelphia, PA

Raymond Proffitt Foundation
John Hoekstra, Executive Director
Philadelphia, PA

74 Pennsylvania Organizations Supporting Proposed *Definition of "Waters of the United States" Under the Clean Water Act*

Responsible Drilling Alliance
James Slotterback, President
Williamsport, PA

Schuylkill River Greenway Association
Kurt Zwikl, Executive Director
Pottstown, PA

Schuylkill River Park Alliance
John Randolph, Executive Director
Philadelphia, PA

Sierra Club, PA Chapter
Thomas Y. Au & Barbara Benson, Co-Chairs, Water Issues Committee
Harrisburg, PA

South Philadelphia Rainbow Committee
Robert Wilbowe, Coordinator/Founder
Philadelphia, PA

Temple Sinai
Rabbi Symons, Rabbi
Pittsburgh, PA

The Tinicum Conservancy
Boyce Budd, Pres., Board of Trustees
Upper Black Eddy, PA

Three Rivers Waterkeeper
Rob Walters, Executive Director
Pittsburgh, PA

Tikkun Olam Center for Jewish Social Justice
Susan Cohen, Member
Pittsburgh, PA

Tobyhanna Creek/Tunkhannock Creek Watershed Association
Larry Gould, President
Pocono Lake, PA

Tookany/Tacony-Frankford Watershed Partnership
Julie Slavet, Executive Director
Philadelphia, PA

United Food & Commercial Workers Union Local 23
Tony Helfer, President
Canonsburg, PA

Upper Burrell Citizens Against Marcellus Pollution
Ron Slabe & Debby Borowiec, Co-Leaders
Upper Burrell, PA

Valley Forge Trout Unlimited
Robin Freisem, President
West Chester, PA

Valley Forge Watershed Association
Curt Huston, President/Founder
Valley Forge, PA

Wildlands Conservancy
Abigail Pattishall, Vice President of Conservation
Emmaus, PA

Wissahickon Valley Watershed Association
Dennis O. Miranda, Executive Director
Ambler, PA

Women for a Healthy Environment
Michelle Naccarati Chapkis, Executive Director
Pittsburgh, PA

Women of Temple Sinai
Susan Cohen, Chair
Pittsburgh, PA

Youghiogheny Riverkeeper
Krissy Kasserman, Youghiogeny Riverkeeper
Melcroft, PA

338

City of Philadelphia

Council of the City of Philadelphia
Office of the Chief Clerk
Room 402, City Hall
Philadelphia

(Resolution No. 140541)

RESOLUTION

Supporting the Environmental Protection Agencies' and the Army Corps of Engineers' proposed definition of "Waters of the United States" under the Clean Water Act to help enhance the protection of our nation's public health and aquatic resources, and increase the Clean Water Act's program predictability and consistency by increasing clarity as to the scope of "Waters of the United States" protected under the Act.

WHEREAS, The Waters of the United States provide an extraordinary value for the protection of public health, recreational resources, economic livelihood related to clean water, and are a treasured resource; and

WHEREAS, The Clean Water Act is the fundamental federal law protecting the Waters of the United States from pollution, degradation and destruction; and

WHEREAS, Critical streams and wetlands which supply drinking water protect against floods and filter pollution previously were protected under the Clean Water Act but federal policy changes over the last decade have left these streams and wetlands vulnerable to degradation or destruction; and

WHEREAS, These vulnerable waters of the United States impact sources of drinking water for over 117 million Americans; and

WHEREAS, Strong federal standards are needed because water does not respect political boundaries and flows from one state to another; and

WHEREAS, More than 1,000 peer reviewed scientific studies have confirmed that headwater intermittent and ephemeral streams and wetlands affect the quantity and quality of water in larger bodies of water downstream; and

WHEREAS, The U.S. Environmental Protection Agency and Army Corps of Engineers have proposed a clarifying rulemaking to restore protection for streams and wetlands

City of Philadelphia

RESOLUTION NO. 140541 continued

previously protected under the Clean Water Act, safeguarding water quality in the nation's waters, protecting jobs in businesses that depend on clean water and safeguarding drinking water for one in three Americans; and

WHEREAS, The proposal leaves in place all agricultural exemptions and creates new exemptions for agricultural practices related to conservation; now, therefore, be it

RESOLVED, BY THE COUNCIL OF THE CITY OF PHILADELPHIA, That Council does hereby support the proposed definition of "Waters of the United States" under the Clean Water Act and urges the Environmental Protection Agency and Army Corps of Engineers to finalize these important protections for our nation's water resources.

FURTHER RESOLVED, That an Engrossed copy of this resolution be presented to Michael Roles of the Clean Water Action as evidence of the sincere sentiments of this legislative body.

City of Philadelphia

RESOLUTION NO. 140541 continued

City of Philadelphia

RESOLUTION NO. 140541 continued

CERTIFICATION: This is a true and correct copy of the original Resolution, Adopted by the Council of the City of Philadelphia on the twelfth day of June, 2014.

Darrell L. Clarke
PRESIDENT OF THE COUNCIL

Michael A. Decker
CHIEF CLERK OF THE COUNCIL

Introduced by: Councilmembers Reynolds Brown and Kenney

Sponsored by: Councilmembers Reynolds Brown and Kenney

LEAGUE OF WOMEN VOTERS®
OF PENNSYLVANIA
226 Forster Street, Harrisburg, PA 17102-3220
717.234.1576 www.palwv.org
Making Democracy Work®
Grassroots leadership since 1920

November 13, 2014

The Honorable Gina McCarthy, Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy, Assistant Secretary of the Army
Department of the Army, Civil Works
Water Docket
Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, DC 20460

Re: Clean Water Rule Docket ID # EPA-HQ-OW-20011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The League of Women Voters has a strong commitment to protecting our environment based on research, getting input from different perspectives and reaching consensus positions. These positions lead to advocacy, an important part of League work on the national, state and local level. The League believes that natural resources should be conserved and protected to assure their future availability. Pollution of these resources should be controlled in order to preserve the physical, chemical and biological integrity of ecosystems and to protect public health.[1]

Because of this longstanding commitment to protect the environment, the League of Women Voters of Pennsylvania would like to express strong support for the EPA's proposed rulemaking in order to improve protection of our nation's streams and wetlands, as per the Clean Water Act. The League was proud to be one of dozens of environmental and civic organizations and faith groups that co-signed a letter drafted by Clean Water Action, PA in support of EPA's proposed Rule. We also want to add our own comments.

1. http://www.lwv.org/content/natural-resources

The Commonwealth of Pennsylvania especially needs the proposed protection of our wetlands and streams, as set forth in the joint letter, including clarification that "all waters within a 'significant nexus' to downstream waters are designated 'Waters of the United States'" and clearly deserve the protection of the Clean Water Act.

Less than one month ago, the Pa legislature in both houses passed House Bill 1565 which weakened requirements for forested riparian buffers and riparian buffers in headwaters and other "Special Protection Watersheds." In spite of strong opposition by the following and dozens of other groups, this bill has now become law. The partial list of organizations was compiled by the Chesapeake Bay Foundation (CBF) and it was part of a letter the Foundation sent, urging Governor Corbett to veto this bill:

> The Chesapeake Bay Foundation – PA, PA environmental Council, Western PA Conservancy, the PA Chapter of the Nature Conservancy, the Fish and Boat Commission, PA Chapter National Association of Water Companies, Clean Water Action, PA Council of Trout Unlimited, PA Federation of Sportsmen's Clubs, League of Women Voters of PA, PA Land Trust Association, PA Landscape and Nursery Association, and former PA DEP Secretary, David E. Hess.

To quote from that letter, "Given the innumerable societal and ecological benefits provided by forested riparian and riparian buffers CBF maintains that House Bill 1565 (P.N. 4258) is fundamentally flawed and could result in undesired consequences for Pennsylvania." The letter explains that the Clean Water Act (CWA) requires the "restoration and maintenance of the chemical, physical and biological integrity of the Nation's waters" and that the CWA "requires states to adopt water quality standards consistent with the requirements of the CWA." It also suggests that EPA could consider this Act "a revision of PA's water quality standards in violation of PA's EPA approved antidegradation regulations and policy," in spite of amendments that were made in the Senate before HB1565 was approved.

The League thanks the EPA and the Army Department of Civil Works for proposing this Rule and we strongly urge you to adopt it as per the Clean Water Action PA letter and our own comments here. Thank you for the opportunity to provide input.

Sincerely,

Susan Carty

Susan Carty
President
League of Women Voters of Pennsylvania

Published on *American Sustainable Business Council* (http://asbcouncil.org)

Small Business Owner Speaks Out for Strong Clean Water Rules in Advance of Joint Congressional Hearing

For Immediate Release:
February 3, 2015

Contact Info

Bob Keener
ASBC
bkeener@asbcouncil.org [1]
671-610-6766

WASHINGTON, DC (February 3, 2015)—A small business owner, representing the views of hundreds of thousands more across the country, called for strong clean water rules from the EPA on a media teleconference today. **Eric Henry, President of T.S. Designs, a printed clothing manufacturer based in Burlington, North Carolina,** spoke in advance of a joint U.S. Senate and House committee hearing scheduled for tomorrow.

"I have been in the textile business in the same community for over 30 years and so I understand the value of clean water. That's why I support the EPA's clean water rules and why I want further clarification of those regulations," said Henry. "Protecting clean water isn't some abstract concern for us – it ensures that businesses like ours, which rely on agriculture, will have consistent supplies of the materials we need, and that the communities that we and our customers live in won't be hurt by the loss of a crucial natural resource," he said.

Tomorrow's hearing between the Senate Environment and Public Works and the House Transportation and Infrastructure committees is expected to focus on a pending rule to clarify Clean Water Act protections of 60 percent of streams and millions of acres of wetlands across the country.

Eric Henry is a member of the American Sustainable Business Council (ASBC), which represents member organizations that span more than 200,000 businesses nationwide.

The ASBC Action Fund is collecting business signatures on a letter supporting EPA Clean Water Rules [2].

Last year ASBC commissioned a national scientific poll [3] of small business owners, which found that large majorities—including majorities of self-described Republicans—favor federal protection of clean water. For example, the poll found that 80% of small business owners support federal protection of upstream headwaters and wetlands as proposed in the new "Waters of the U.S." clean water rule of the Environmental Protection Agency (EPA).

The American Sustainable Business Council *and the* ***ASBC Action Fund*** *represent member organizations that span more than 200,000 businesses nationwide, and more than 325,000 entrepreneurs, executives, managers and investors. The Council* www.asbcouncil.org [4] *informs policy makers and the public about the need and opportunities for building a vibrant and sustainable economy. The Action Fund* www.asbcaction.org [5] *advocates for legislative change.*

- About ASBC
  - Overview
  - How We Work
  - Working Groups & Task Forces
  - Our Team
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  - Good Workplace
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  - Regulations
  - Safer Chemicals

DEPARTMENT OF THE ARMY
NASHVILLE DISTRICT, CORPS OF ENGINEERS
REGULATORY BRANCH
3701 BELL ROAD
NASHVILLE, TENNESSEE 37214

August 14, 2014

SUBJECT: File No: LRN-2014-00350; Proposed Construction of a Distribution Center, Cookeville, Putnam County, Tennessee

Mr. Max K. Carter
4601 Bob Gentry Road
Cookeville, Tennessee 38506

Dear Mr. Carter:

Enclosed are two copies of a Department of the Army draft permit for work specified in accordance with the enclosed plans, drawings, and specifications. If the permit is acceptable as drafted, you are requested to sign both copies and return them to me for final action. The original will be signed by me and returned to you with a placard to be posted at all times that construction is performed at the site. Your attention is directed to all conditions under which this permit will be issued. Failure to comply with any condition of the approved permit may result in its suspension, cancellation, or revocation.

A fee of $100.00 is required before final action can be taken on your permit request. Please make your check payable to the "**CORPS OF ENGINEERS, NASHVILLE DISTRICT.**" To ensure proper credit, please write "**File No. LRN-2014-00350, DA Permit Fee**" on the front of your check, and mail along with the signed draft permits to the attention of the Regulatory Branch. This permit is not valid until it is properly signed by both the applicant and me; therefore, work must not commence on the project until a fully-executed copy has been returned to you. Please contact me at (615) 369-7500, if you have any questions. For additional information about our Regulatory Program, please visit our web site at www.lrn.usace.army.mil.

Sincerely,

Eric G. Reusch
Chief, Eastern Regulatory Section
Operations Division

Enclosures

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL		
Applicant: Max K. Carter	File Number: LRN-2014-00350	Date: 8-14-14
Attached is:		See Section below
X	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A
	PROFFERED PERMIT (Standard Permit or Letter of permission)	B
	PERMIT DENIAL	C
	APPROVED JURISDICTIONAL DETERMINATION	D
	PRELIMINARY JURISDICTIONAL DETERMINATION	E

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/CECW/Pages/reg_materials.aspx or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- OBJECT: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT		
REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)		
ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.		
POINT OF CONTACT FOR QUESTIONS OR INFORMATION:		
If you have questions regarding this decision and/or the appeal process you may contact: Casey Ehorn Nashville District, U.S. Army Corps of Engineers Regulatory Branch 3701 Bell Road Nashville, Tennessee 37214 (615) 369-7506; Casey.H.Ehorn@usace.army.mil	If you only have questions regarding the appeal process you may also contact: Appeals Officer U.S. Army Corps of Engineers Great Lakes and Ohio River Division 550 Main Street, Room 10032 Cincinnati, OH 45202-3222 TEL (513) 684-6212; FAX (513) 684-2460	
RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.		
_____ Signature of appellant or agent.	Date:	Telephone number:

DEPARTMENT OF THE ARMY PERMIT

Permittee: Max K. Carter

Permit No: LRN-2014-00350

Issuing Office: Nashville District

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below.

Project Description: Discharge of fill material into 4.58 acres of wetlands, 571 linear feet of ephemeral streams, and 5,855 linear feet of intermittent streams in association with the construction of a 1.6 million square foot distribution center, which will include associated structures, access roads, parking lots, and stormwater management facilities.

Project Location: In wetlands and streams in Cookeville, Putnam County, Tennessee. USGS Quadrangle: Cookeville West, TN. Latitude: 36.131363°, Longitude: - 85.591695

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on July 1, 2019. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least 6 months before the above date is reached.

2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and State coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions: (SEE CONTINUATION SHEET 1, SPECIAL CONDITIONS)

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

( )Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).
(X)Section 404 of the Clean Water Act (33 U.S.C. 1344).
( )Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, State, or local authorizations required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data. The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General Condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

Mr. Max K. Carter **(DATE)**

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

John L. Hudson, P.E.
LIEUTENANT COLONEL
DISTRICT COMMANDER

BY:
Eric G. Reusch
Chief, Eastern Regulatory Section
Operations Division

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

(TRANSFEREE) (DATE)

CONTINUATION SHEET 1
SPECIAL CONDITIONS

1. Permit Drawings: The work must be completed in accordance with the plans and information submitted in support of the proposed work, as attached (sheets 1 through 3).

2. Fill Material: The Permittee shall use only clean fill material for this project. The fill material shall be free from items such as trash, debris, asphalt, construction materials, concrete block with exposed reinforcement bars, and soils contaminated with any toxic substance, in toxic amounts in accordance with Section 307 of the Clean Water Act.

3. Erosion Control: Prior to the initiation of any work authorized by this permit, the Permittee shall install erosion control measures along the perimeter of all work areas to prevent the displacement of fill material outside the work area. Immediately after completion of the final grading of the land surface, all slopes, land surfaces, and filled areas shall be stabilized using sod, degradable mats, barriers, or a combination of similar stabilizing materials to prevent erosion. The erosion control measures shall remain in place and be maintained until all authorized work has been completed and the site has been stabilized.

4. Compensatory Mitigation: The permittee shall obtain 9.5 wetland credits from Tennessee Mitigation Fund. The permittee shall submit to the U.S. Army Corps of Engineers, Nashville District, Regulatory Branch documentation on the completed mitigation bank transaction prior to performing work authorized by this permit. All submittals must prominently display the reference number LRN-2014-00350.

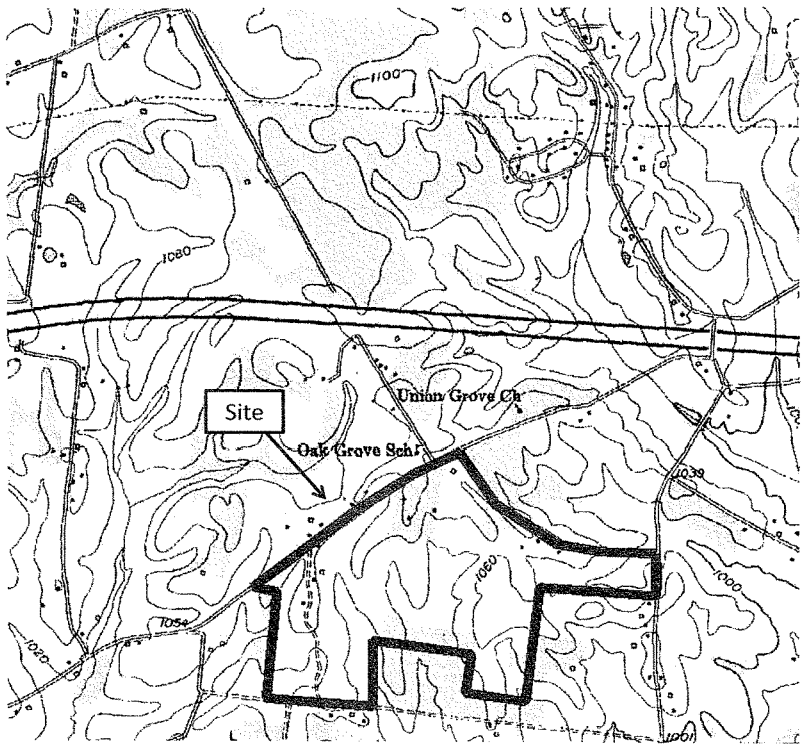
5. Compensatory Mitigation: The permittee shall obtain 4,124 stream credits from the Tennessee Stream Mitigation Program. The permittee shall submit to the U.S. Army Corps of Engineers, Nashville District, Regulatory Branch documentation on the in-lieu fee transaction prior to performing work authorized by this permit. All submittals must prominently display the reference number LRN-2014-00350.

6. Endangered Species Act Compliance: This U.S. Army Corps of Engineers (Corps) permit does not authorize you to take a threatened or endangered species, in particular *Myotis sodalis*. In order to legally take a listed species, you must have a separate authorization under the Endangered Species Act (ESA) (e.g., an ESA Section 10 permits, or ESA Section 7 consultation Biological Opinion with non-discretionary "incidental take" provisions with which you must comply). The enclosed Memorandum of Agreement (MOA) prepared by the U.S. Fish and Wildlife Service (USFWS), dated 06 March 2014, contains mandatory terms and conditions to implement the reasonable and prudent measures that are associated with the specified "incidental take" in the USFWS's intra-service Biological Opinion, which covers the development of the MOA. Your authorization under this Corps permit is conditional upon your compliance with all of the mandatory terms and conditions associated with incidental take of the attached MOA. These terms and conditions are incorporated by reference in this permit. Failure to comply with

the commitments made in this document constitutes non-compliance with the ESA and your Corps permit. The USFWS is the appropriate authority to determine compliance with ESA.

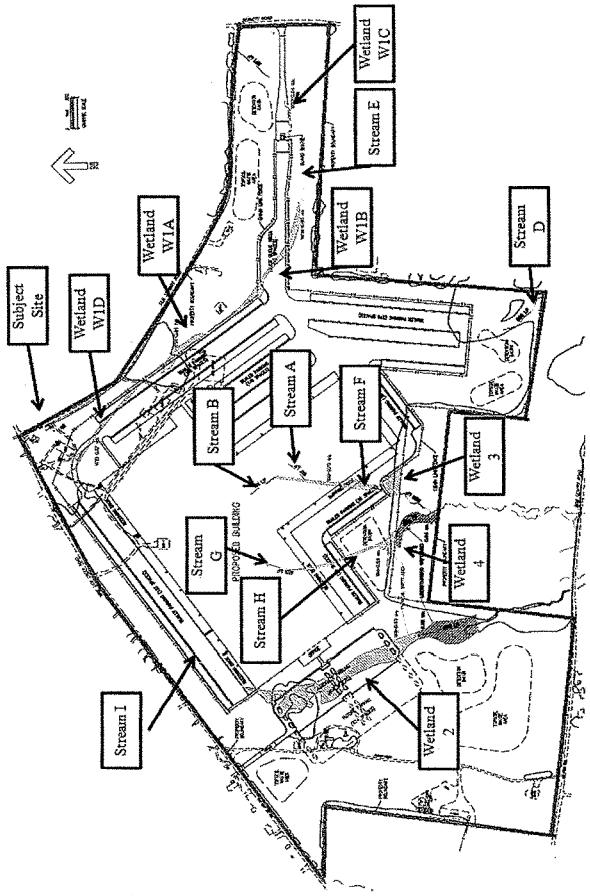
7. Regulatory Agency Changes: Should any other regulatory agency require changes to the work authorized or obligated by this permit, the Permittee is advised that a modification to this permit instrument is required prior to initiation of those changes. It is the Permittee's responsibility to request a modification of this permit from the Nashville District Regulatory Office.

8. **Wetland and Stream Avoidance/Minimization Areas:** The Permittee shall avoid the remaining 1.41 acres of onsite wetlands and 1,708 linear feet of stream (as detailed on the "Impact Map" Drawing). These natural wetland/stream areas were avoided as part of the permit application review process and therefore will not be disturbed by any dredging, filling, mechanized land clearing, agricultural activities, or other construction work whatsoever. The Corps reserves the right to deny review of any requests for future impacts to these natural wetland/stream areas.



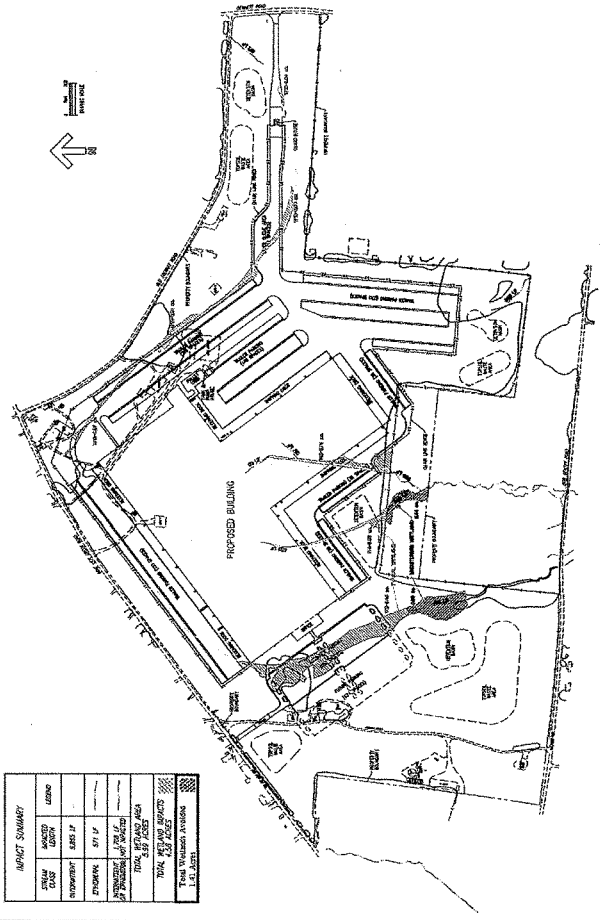
U.S. ARMY CORPS
OF ENGINEERS
Nashville District

Max K. Carter – "Project Victor"
Location Map
14 August 2014
LRN-2014-00350
1 of 3



U.S. ARMY CORPS
OF ENGINEERS
Nashville District

Max K. Carter – "Project Victor"
Map of Aquatic Resources
14 August 2014
LRN-2014-00350
2 of 3



U.S. ARMY CORPS
OF ENGINEERS
Nashville District

Max K. Carter – "Project Victor"
Impact Map
14 August 2014
LRN-2014-00350
3 of 3

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER RESOURCES
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 11th Floor
Nashville, Tennessee 37243-1102

July 3, 2014

Steven Summers
Executive Vice President
Gray Construction
10 Quality Street
Lexington, KY 40507

Subject: §401 Water Quality Certification: Commercial- unnamed tributary to Cane Creek and associated wetlands, Cookeville, Putnam County. NRS 14.052

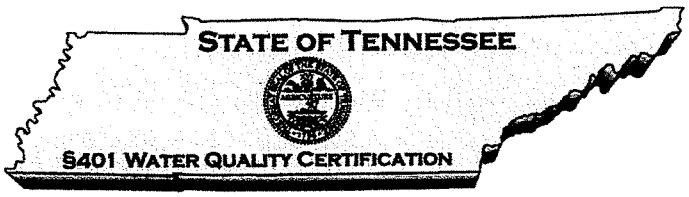
Dear Mr. Summers:

We have reviewed your application for alterations to 4.58 acres of wetland and 1,502 linear feet of an unnamed tributary to Cane Creek. Pursuant to §401 of the Federal Clean Water Act (33 U.S.C.1341) and the *Tennessee Water Quality Control Act of 1977,* the division has determined the subject activities will not violate applicable water quality standards and has issued the attached permit (**enclosed**). Failure to comply with the terms of this permit or other violations of the *Tennessee Water Control Act of 1977* is subject to penalty in accordance with T.C.A. §69-115.

It is the responsibility of the permittee to ensure that all contractors involved with this project have read and understood the permit conditions before the project begins. If you need additional information, please contact me at mike.lee@tn.gov or by phone at 615-532-0712.

Sincerely,
Mike Lee
Natural Resources Unit

Cc: DWR, Nashville Environmental Field Office
U.S. Army Corps of Engineers, Nashville Regulatory District
Elizabeth McGuire, U.S. Environmental Protection Agency, Atlanta, GA
Mary Jennings, U.S. Fish and Wildlife Service, Cookeville, TN
Rob Todd, Tennessee Wildlife Resources Agency, Nashville, TN
Tracy Meggs, City of Cookeville
Terry Shaw, Lancaster, KY
File copy



NRS 14.052

Pursuant to §401 of *The Federal Clean Water Act* (33 U.S.C. 1341), the State of Tennessee is required to certify whether the activity described below will violate applicable water quality standards. Accordingly, the Division of Water Resources requires reasonable assurance that the activity will not violate provisions of *The Tennessee Water Quality Control Act of 1977* (T.C.A. §69-3-101 et seq.) or provisions of §§301, 302, 303, 306 or 307 of *The Clean Water Act*.

Subject to conformance with accepted plans, specifications and other information submitted in support of the application, pursuant to 33 U.S.C. 1341 the State of Tennessee hereby certifies the activity described below. This shall serve as authorization under T.C.A. §69-3-101 et seq.

PERMITTEE: Steven Summers
Gray Construction
10 Quality Street
Lexington, KY 40507

AUTHORIZED WORK: The purpose of the proposed project involves the construction of a 1.6 million square foot commercial/industrial building with associated accessory structures, access roads, parking facilities, utilities and permanent storm water management facilities. . Construction shall require alterations to 1,502 linear feet of the headwaters of an unnamed tributary to Cane Creek and 4.58 acres of wetland. Compensatory wetland mitigation shall occur with the payment into the Tennessee Mitigation Fund. Compensatory stream mitigation shall be with the purchase of 1502 feet of credits from the Tennessee Stream Mitigation Program.

LOCATION: approximately 205 acres located southwest of Old Stewart Road, west of Bennett Road, north of Bog Gentry and southwest of Mine Lick Creek Road; Cookeville, Putnam County. 36.13100; -85.590775

EFFECTIVE DATE: July 3, 2014

EXPIRATION DATE: July 2, 2019

Sandra Dudley, PhD., P.E.
Director, Division of Water Resources

Table of Contents

PART I

Special Conditions:

a. Any proposed in stream equipment shall be free of noticeable leaks of fluids and oils; e.g., hydraulic, transmission, crankcase, and engine coolant, fluids, and oils.

b. Best Management Practices (BMPs) shall be stringently implemented throughout the construction period to prevent sediments, oils, or other project-related pollutants from being discharged into waters of the state.

c. Streambeds shall not be used as transportation routes for construction equipment. Temporary stream crossings shall be limited to one point in the construction area and EPSC measures shall be utilized where stream banks are disturbed.

d. Appropriate steps shall be taken to ensure that petroleum products or other chemical pollutants are prevented from entering waters of the state. All spills must be reported to the appropriate emergency management agency, and measures shall be taken immediately to prevent the pollution of waters of the state, including groundwater, should a spill occur.

General Conditions:

a. It is the responsibility of the applicant to convey all terms and conditions of this permit to all contractors. A copy of this permit, approved plans and any other documentation pertinent to the activities authorized by this permit shall be maintained on site at all times during periods of construction activity.

b. Work shall not commence until the applicant has received the federal §404 permit from the U. S. Army Corps of Engineers, a §26a permit from the Tennessee Valley Authority or authorization under a Tennessee NPDES Storm Water Construction Permit where necessary. The applicant is responsible for obtaining these permits.

c. The work shall be accomplished in conformance with the accepted plans, specifications, data and other information submitted in support of application NRS 14.052 and the limitations, requirements and conditions set forth herein.

d. All work shall be carried out in such a manner as will prevent violations of water quality criteria as stated in Rule 0400-40-03-.03 of the Rules of the Tennessee Department of Environment and Conservation. This includes, but is not limited to, the prevention of any discharge that causes a condition in which visible solids, bottom deposits, or turbidity impairs the usefulness of waters of the state for any of the uses designated by Rule 0400-40-04. These uses include fish and aquatic life (including trout streams and naturally reproducing trout streams), livestock watering and wildlife, recreation, irrigation, industrial water supply, domestic water supply, and navigation.

e. Impacts to waters of the state other than those specifically addressed in the plans and this permit are prohibited. All streams, springs and wetlands shall be fully protected prior, during and after construction until the area is stabilized.

f. Any questions, problems or concerns that arise regarding any stream, spring or wetland either before or during construction, shall be addressed to the Division of Water Resources Cookeville Environmental Field Office, or the permit coordinator in the division's Natural Resources Unit (615) 532-0712.

g. Adverse impact to formally listed state or federal threatened or endangered species or their critical habitat is prohibited.

h. This permit does not authorize adverse impacts to cultural, historical or archeological features or sites.

PART II

Mitigation Requirements and Monitoring Procedures

Required Mitigation Activities

a. Compensatory wetland mitigation shall occur with the payment to the Tennessee Wildlife Federation (TWF) In-Lieu Fee Program for Tennessee Wetlands for 9.5 credits. The TWF will prioritize compensatory mitigation in the 12 digit HUC. The enhancement of 17.5 acres at the Highlands Business Park and East Davis Road and the creation of 0.46 acres on East Davis Road shall be a priority.

b. The payment must be made to the TWF within sixty (60) days of receipt of invoice. Please be advised that this conditional permit is not valid until this compensatory mitigation requirement has been fulfilled. **A copy of the purchase agreement shall be submitted to this office.**

c. To mitigate for stream resource value losses resulting from the authorized project not otherwise addressed, the applicant shall purchase 1502 stream mitigation in-lieu fee credits in the Upper Cumberland Area from the Tennessee Stream Mitigation Program. Please be advised that the stream impacts associated with this mitigation are not authorized to proceed until the specified mitigation credits have been purchased. **A copy of the purchase agreement shall be submitted to this office.** With the purchase of the stream mitigation credits, legal responsibility for completion of this stream mitigation is legally transferred to the Tennessee Stream Mitigation Program

PART III

Duty to Reapply

Permittee is not authorized to discharge after the expiration date of this permit. In order to receive authorization to discharge beyond the expiration date, the permittee shall submit such information and forms as are required to the Director of Water Resources. Such applications must be properly signed and certified.

Property Rights

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State, or local laws or regulations.

Other Information

If the permittee becomes aware that he/she failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, then he/she shall promptly submit such facts or information.

Changes Affecting the Permit

Transfer/Change of Ownership

a. This permit may be transferred to another party, provided there are no activity or project modifications, no pending enforcement actions, or any other changes which might affect the permit conditions contained in the permit, by the permittee if:

b. The permittee notifies the Director of the proposed transfer at least 30 days in advance of the proposed transfer date;

c. The notice includes a written agreement between the existing and new permittee containing a specified date for transfer of permit responsibility, coverage, and contractual liability between them; and

d. The Director does not notify the current permittee and the new permittee, within 30 days, of his intent to modify, revoke, reissue, or terminate the permit, or require that a new application be filed rather than agreeing to the transfer of the permit.

e. The permittee must provide the following information to the division in their formal notice of intent to transfer ownership:

    1. the permit number of the subject permit;
    2. the effective date of the proposed transfer;
    3. the name and address of the transferor;
    4. the name and address of the transferee;

5. the names of the responsible parties for both the transferor and transferee;
6. a statement that the transferee assumes responsibility for the subject permit;
7. a statement that the transferor relinquishes responsibility for the subject permit;
8. The signatures of the responsible parties for both the transferor and transferee, and;
9. a statement regarding any proposed modifications to the permitted activities or project, its operations, or any other changes which might affect the permit conditions contained in the permit.

Change of Mailing Address

The permittee shall promptly provide to the Director written notice of any change of mailing address. In the absence of such notice the original address of the permittee will be assumed to be correct.

Noncompliance

Effect of Noncompliance

All discharges shall be consistent with the terms and conditions of this permit. Any permit noncompliance constitutes a violation of applicable State and Federal laws and is grounds for enforcement action, permit termination, permit modification, or denial of permit reissuance.

Reporting of Noncompliance

24-Hour Reporting

a. In the case of any noncompliance which could cause a threat to public drinking supplies, or any other discharge which could constitute a threat to human health or the environment, the required notice of non-compliance shall be provided to the Division of Water Resources in the appropriate Environmental Field Office within 24-hours from the time the permittee becomes aware of the circumstances. (The Environmental Field Office should be contacted for names and phone numbers of environmental response personnel).

b. A written submission must be provided within five (5) days of the time the permittee becomes aware of the circumstances unless this requirement is waived by the Director on a case-by-case basis. The permittee shall provide the Director with the following information:

    1. A description of the discharge and cause of noncompliance;

2. The period of noncompliance, including exact dates and times or, if not corrected, the anticipated time the noncompliance is expected to continue; and
3. The steps being taken to reduce, eliminate, and prevent recurrence of the non-complying discharge.

Scheduled Reporting

For instances of noncompliance which are not reported under subparagraph a. above, the permittee shall report the noncompliance by contacting the permit coordinator, and provide all information concerning the steps taken or planned to reduce, eliminate, and prevent recurrence of the violation and the anticipated time the violation is expected to continue.

Adverse Impact

The permittee shall take all reasonable steps to minimize any adverse impact to the waters of Tennessee resulting from noncompliance with this permit, including but not limited to, accelerated or additional monitoring as necessary to determine the nature and impact of the noncompliance. It shall not be a defense for the permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

Liabilities

Civil and Criminal Liability

Nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance. Notwithstanding this permit, the permittee shall remain liable for any damages sustained by the State of Tennessee, including but not limited to fish kills and losses of aquatic life and/or wildlife, as a result of the discharge of pollutants to any surface or subsurface waters. Additionally, notwithstanding this Permit, it shall be the responsibility of the permittee to conduct its discharge activities in a manner such that public or private nuisances or health hazards will not be created.

Liability under State Law

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or the Federal Water Pollution Control Act, as amended.

This permit does not preclude requirements of other federal, state or local laws. This permit also serves as a State of Tennessee Aquatic Resource Alteration Permit (ARAP) pursuant to the Tennessee Water Quality Control Act of 1977 (T.C.A. §69-3-101 et seq.).

Page 8.

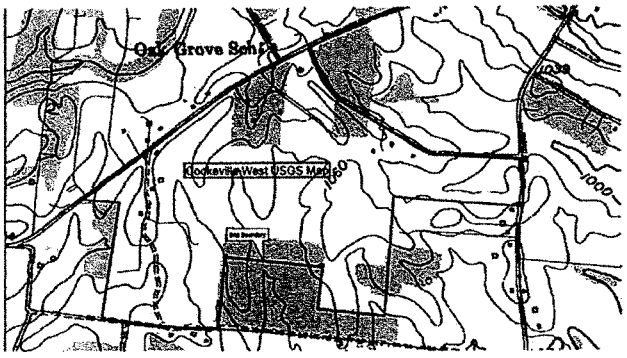
The State of Tennessee may modify, suspend or revoke this permit or seek modification or revocation should the state determine that the activity results in more than an insignificant violation of applicable water quality standards or violation of the act. Failure to comply with permit terms may result in penalty in accordance with T.C.A. §69-3-115.

An appeal of this action may be made as provided in T.C.A. §69-3-105(i) and Rule 0400-40-03-.12 by submitting a petition for appeal. This petition must be filed within thirty (30) days after public notice of the issuance of the permit. The petition must specify what provisions are being appealed and the basis for the appeal. It should be addressed to the technical secretary of the Tennessee Board of Water Quality, Oil and Gas at the following address: Dr. Sandra Dudley, Director, Division of Water Resources, 12th Floor William R. Snodgrass Tennessee Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee 37243. Any hearing would be in accordance with T.C.A. §§69-3-110 and 4-5-301 et seq.

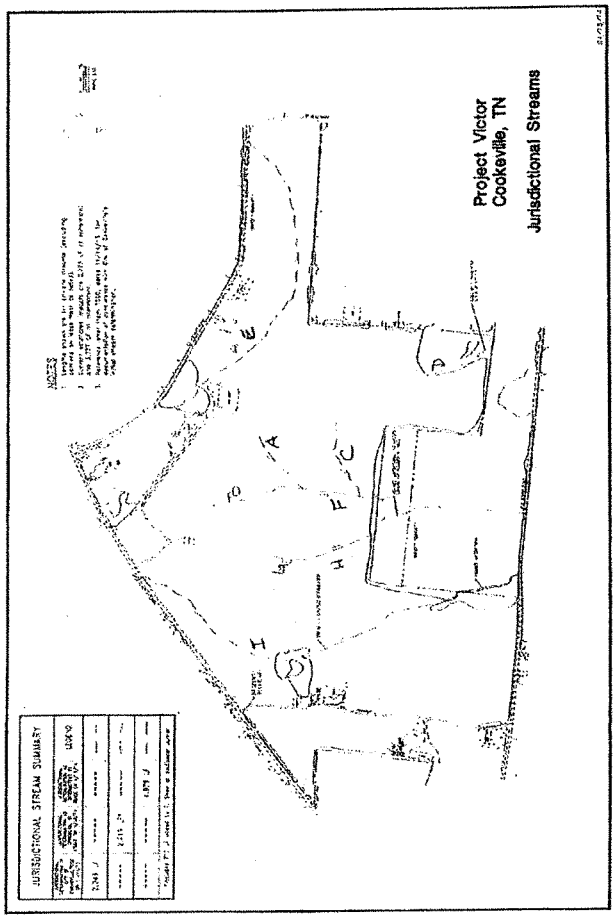
Page 9.

APPENDIX

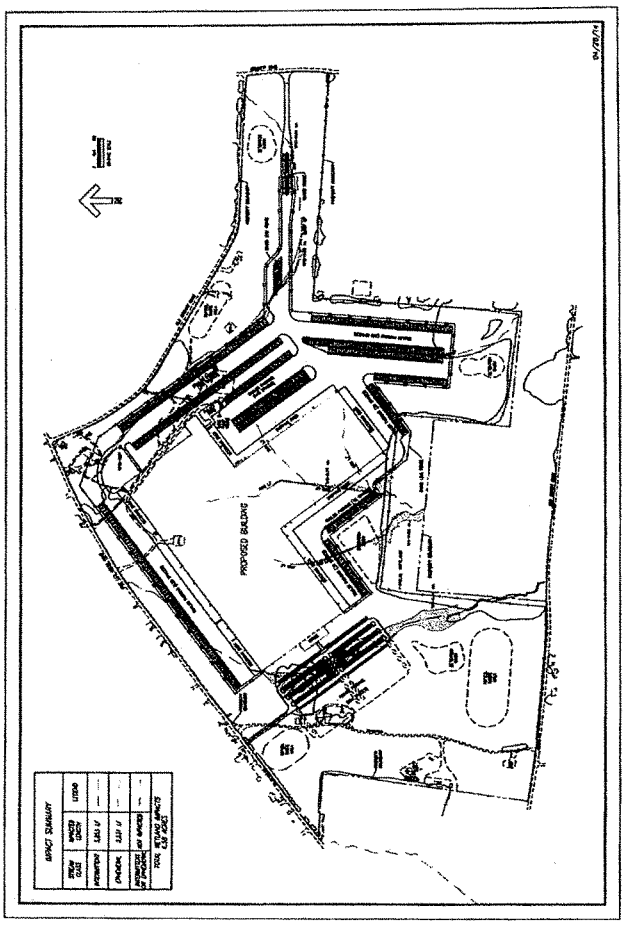
6.2 USGS TOPO MAP - COOKEVILLE WEST



Page 10.

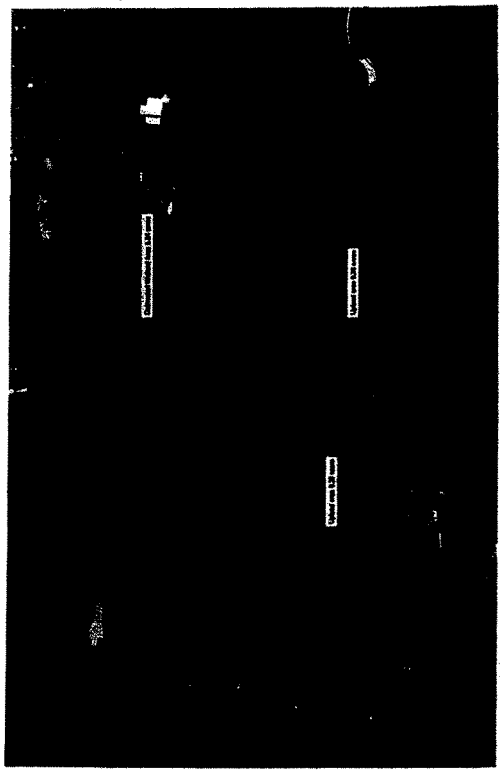

Project Victor
Cookeville, TN
Jurisdictional Streams
JURISDICTIONAL STREAM SUMMARY

Page 11.



Page 12.

PROPOSED MITIGATION SITE WETLAND B
55 EAST DAVIS ROAD, COOKEVILLE



49

Eleanor H Norton

GOVERNMENT OF THE DISTRICT OF COLUMBIA

District Department of the Environment

Office of the Director

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave, NW
Washington, DC 20460

November 3, 2014

ATTN: Docket ID No. EPA-HQ-OW-2011-0880

To whom it may concern:

On behalf of the Government of the District of Columbia, the District Department of the Environment (DDOE) is submitting comments on EPA's proposed rule on the definition of "waters of the United States" under the Clean Water Act. The proposed rule seeks to resolve a number of contentious issues and will ultimately benefit water quality throughout the nation, including the Anacostia and Potomac Rivers and Rock Creek in the District. The District is supportive of EPA's overall effort and intent to clarify what qualifies as waters of the United States.

However, the District requests clarification of the proposed rule's definition of the term "tributary" to ensure that the proposed rule does not have unintended consequences for urban jurisdictions. Specifically, was EPA's intent to include piped sections of streams in its definition of "tributary," and therefore consider those sections "waters of the United States"? The District suggests amending the proposed rule to clarify that while a tributary may have piped or buried sections incorporated into a storm sewer system, the designation of "waters of the United States" should extend only to the day-lit sections of the tributary.

In many urban areas, small creeks and storm sewer systems are sometimes interconnected, some to the point where it is difficult to distinguish one from the other. This is often the result of many years of development, addressing flood control issues and piping and paving over streams to facilitate development. Those small piped streams are, subsequently, used for storm conveyance as well as stream flow. DDOE's stormwater documentation and mapping information indicates that this is the situation within the District. Many parts of the District's Municipal Separate Storm Sewer System (MS4) enclose what were once running streams. Two common examples are:

- Perennial streams that flow into a pipe and are conveyed through MS4 conveyance system and eventually discharged to larger waters, such as the Anacostia river (examples: Fort Chaplin Run, Fort Davis Tributary); and
- Perennial streams, whose headwaters have been piped and incorporated into the storm sewer system (to address flood control issues and facilitate development) that eventually become day-lighted streams and flow into other surface water streams (example: Piney Branch, for which approximately ¾ of its mainstem has been piped prior to its confluence with Rock Creek).

The proposed rule's definition of the term "tributary" could have implications for streams that fit these categories. Depending on interpretation, this definition could result in a number of consequences for urban jurisdictions, including for how and where jurisdictions monitor and assess MS4 discharges, and stream health, and for subjecting storm sewer maintenance to CWA permitting requirements.
In one section of the preamble to the proposed rule (79 FR 22199; 3rd column), tributaries are described to include:

> The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3). A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4).

At present, DDOE's ambient monitoring program (which assesses the health of District waters and supports development of the District's 305(b) report) collects samples from above-ground sections of waterbodies. Sections of streams that flow through pipes are not considered "surface waters" and therefore are not included in the reported length of the water body. A separate MS4 monitoring program has historically monitored outfalls that often have "dry weather discharge" present with the intent to characterize MS4 discharges and pollutant concentrations.

In both of the stream examples above, it is clear that observed discharges from outfall examples during "dry" periods (without recent (72-96 hours) precipitation) are not stormwater flows. However, it is not clear whether these waters would be considered

"groundwater infiltration to the MS4" or whether these qualify as "man-altered tributaries" and therefore waters of the US.

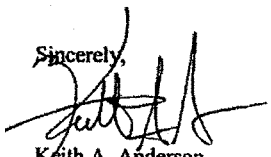
Section 1.2 of the District's permit identifies that "diverted stream flows" and "uncontaminated ground water infiltration" are authorized non-stormwater discharges to the MS4. Given the proposed rule's "tributary" definition, it may be necessary for the District to assess all of its urban waterways to verify which portions should be considered part of the storm sewer system and which are creeks or streams (or were historically creeks and streams and defined as "tributaries" under the proposed rule).

The results of this assessment could necessitate changes to both the District's ambient monitoring and MS4 permit-related monitoring efforts and associated reporting if pipes once considered part of the MS4 system are now tributaries that are "waters of the US" that aren't appropriate for outfall discharge monitoring, but may require other water quality assessments. At this time, DDOE is in the process of developing a "Revised Monitoring Framework," as required by the District's MS4 Permit. Timely resolution of these issues is critical to the development of a quality monitoring framework document.

Finally, if pipes once considered part of the MS4 are now considered "waters of the US," it is possible that projects to repair, maintain, or improve that MS4 system would be subject permitting requirements under Section 404 of the Clean Water Act. Such an outcome would add considerable cost, complexity, and delay to urban jurisdictions' efforts to maintain and improve their storm sewer systems. Furthermore, in the case of the District, this would add considerable administrative burden to review and certify such projects for consistency with District water quality standards.

The District is grateful for the opportunity to provide these comments, and for EPA's consideration in finalizing this proposed rule. We look forward to EPA's response and final rule on this important topic.

Sincerely,



Keith A. Anderson
Director, District Department of the Environment

TROUT UNLIMITED

January 29, 2015

Dear Rhode Island and Massachusetts Congressional Delegations,

I am writing behalf of the Massachusetts and Rhode Island Council of Trout Unlimited (TU) and our more than 4,300 members to support the Army Corps of Engineers and Environmental Protection Agency effort to restore the protections of the Clean Water Act to headwater streams and tributaries. The regions's anglers urge Congress to allow this essential rule to be finalized quickly. The proposed Waters of the United States rule will protect our state's highest quality streams that are important not only for spawning and juvenile fish, but also for the quality of all the waters downstream.

TU's mission is to protect, reconnect, and restore America's coldwater fisheries. Even as we work to restore degraded stretches of rivers through thousands of hours of volunteer work, we know that the Clean Water Act provides critical baseline protections for the high water quality required by trout. After a series of Supreme Court cases weakened protections for headwater streams and tributaries, we strongly support the ongoing rulemaking effort to protect these critical habitats.

TU often works with our country's private landowners including farmers, foresters and ranchers. We know they are good stewards of the land, and we want to make sure that the agencies do everything possible to ensure that the rule will work well for them. However, we agree with the agencies in affirming that this rule is not an expansion of authority, but a return to the way things were for 30 years of the Clean Water Act's history.

We're not alone in our support of the rule. In fact, more than 200 hunting and angling organizations submitted a letter in favor of finalizing the rule during the comment period that closed on November 14, 2014. We were joined by more than 700,000 positive comments praising the Corps and EPA for the rule.

As a representative of the state council of Trout Unlimited, I ask Massachusetts and Rhode Islands's Congressional delegations to support this important rule and not delay or derail it in the future.

Signed,

John Troiano
Council Chair
Massachusetts and Rhode Island Council of Trout Unlimited

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

September 16, 2014

Administrator Gina McCarthy
Environmental Protection Agency
Mail Code 28227
1200 Pennsylvania Avenue NW
Washington, DC 20460

Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: "Waters of the United States" Rulemaking
Docket No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

We are the attorneys general of seven states and the District of Columbia, and we write to voice our support of the rule proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) defining the scope of the "waters of the United States" protected under the Clean Water Act. See 79 Fed. Reg. 22188 (April 21, 2014).

The proposed rule is an important action to advance the statute's objective "to restore and maintain the chemical, physical and biological integrity of the Nation's Waters." 33 U.S.C. § 1251(a). The rule would establish clear categories of waters within the protection of the law by defining "waters of the United States" to include tributaries and adjacent waters (such as wetlands), along with traditional navigable waters, interstate waters, and the territorial seas. The rule is based on sound science, and takes into account the practical and ecological realties of our Nation's interconnected waters. It promotes the consistent and efficient implementation of

State water pollution programs across the country in accordance with the principles of "cooperative federalism" on which this landmark statute is based. We support the proposed rule for three reasons.

First, the proposed rule is grounded in peer-reviewed scientific studies that confirm fundamental hydrologic principles. Water flows downhill, and connected waters, singly and in the aggregate, transport physical, chemical and biological pollution that affects the function and condition of downstream waters, as demonstrated by the many studies on which EPA and the Corps rely. The health and integrity of watersheds, with their networks of tributaries and wetlands that feed downstream waters, depend upon protecting the quality of upstream headwaters and adjacent wetlands. Comprehensive coverage under the CWA of these ecologically connected waters is essential to achieve the water quality protection purpose of the act.

Second, the proposed rule advances the statute's protection of state waters downstream of other states by securing a strong federal "floor" for water pollution control, thereby maintaining the consistency and effectiveness of the downstream states' water pollution programs. The federal statute preempts many common-law remedies traditionally used to address interstate water pollution, leaving the act and its regulatory provisions as the primary mechanism for protecting downstream states from the effects of upstream pollution. Of note is the fact that all of the lower forty-eight states have waters that are downstream of the waters of other states. By protecting interstate waters, the proposed rule allows states to avoid imposing disproportionate limits on in-state sources to offset upstream discharges which might otherwise go unregulated.

Third, by clarifying the scope of "waters of the United States," the proposed rule would promote predictability and consistency in the application of the law, and in turn help clear up a confusing body of case law that has emerged. Since the Supreme Court's plurality decision in Rapanos v. United States, 547 U.S. 715 (2006), a complex and confusing split has developed among the federal courts regarding which waters are "waters of the United States" and therefore within the Act's jurisdiction. The federal circuits have embraced at least three distinct approaches in instances of uncertain CWA jurisdiction, with some courts adopting Justice Kennedy's significant nexus test, some adopting the plurality's test, and some tending to defer to the agencies' fact-based determinations. Many courts have actively avoided ruling on the controlling law, highlighting the need for Agency clarification. The confusion and disagreement in the courts have produced inconsistent outcomes and contribute to the ongoing uncertainty regarding the Act's

application. The proposed rule's clear categories of waters subject to the Act would alleviate much of the jurisdictional uncertainty and allow for more efficient administration of the Act. The rule's clarity would be of benefit to the states because it would ease some of the administrative burden of having to make many fact-based determinations employing uncertain tests. In this regard, in the rulemaking the agencies have requested comments as to how a final rule could ease that burden further.

For these reasons we express our support for EPA's and the Corps' proposed rules defining the scope of waters protected under the CWA, and urge its promulgation by the agencies.[1]

Eric T. Schneiderman
New York Attorney General

Lisa Madigan
Illinois Attorney General

George Jepsen
Connecticut Attorney General

Douglas F. Gansler
Maryland Attorney General

Joseph R. Biden III
Delaware Attorney General

Peter F. Kilmartin
Rhode Island Attorney General

Irvin B. Nathan
District of Columbia Attorney General

Bob Ferguson
Washington State Attorney General

[1] While the undersigned attorneys general support the proposed rule, they may object to other aspects of the proposal or the agencies' rationale for it and, accordingly, reserve their rights concerning such objections.

cc: Ken Kopocis, EPA Assistant Administrator for Water
Avi S. Garbow, Esq., EPA General Counsel
Chief Counsel, Army Corps of Engineers
Water Docket

November 14, 2014

The Honorable Gina McCarthy, Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works

Re: Docket ID # EPA-HQ-OW-20011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy,

We support the US Environmental Protection Agency and US Army Corps of Engineers proposed *Definition of "Waters of the United States Under the Clean Water Act"* to clarify which streams, wetlands and other waters are covered by Clean Water Act protections. Wetlands and small streams, including those that flow only seasonally, have a direct impact on the health and quality of larger streams and rivers downstream. These resources are critical drinking water sources, and they protect communities from flooding and filter pollutants.

For its first thirty years, the Clean Water Act safeguarded nearly all of our nation's waters. These protections are necessary to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as intended by Congress when it passed the Clean Water Act in 1972. Despite the law's dramatic progress at combating water pollution nationally, federal policy changes in the last decade have left many small streams and "isolated" wetlands vulnerable to pollution or destruction.

These federal policy changes have called into question Clean Water Act protections for nearly 60% of our nation's streams miles and at least 20 percent of the 110 million acres of wetlands in the continental United States. This confusion has put the drinking water for 117 million Americans at risk, including 11.5 million Texans. Millions of small streams and wetlands provide most of the flow to our most treasured waterways, including the Brazos, Colorado, Trinity, and Rio Grande rivers, and Caddo Lake and Galveston Bay. If we do not protect these networks of small streams, we cannot protect and restore the lakes, rivers, and bays that our economy and way of life depend on. We will also be jeopardizing jobs and revenue in businesses that depend on clean water, including outdoor activities like angling and water-based recreation.

As state and local decision makers, we believe broad federal protections are critical to protecting our local waters. Water flows downhill, and each of the lower 48 states have water bodies that are downstream of one or more other states. Maintaining consistency among water pollution programs throughout these states is essential. Since the passage of the Clean Water Act, states have come to rely on the Act's core provisions and have structured their own water pollution programs accordingly.

We support the draft rule's proposal to restore Clean Water Act protection to all tributaries of navigable waterways. Failure to do so would jeopardize water quality in our larger riversheds and estuaries. It would also put at risk the millions of dollars and thousands of jobs generated by water related tourism activities and other businesses that are dependent on clean water supplies.

This commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade and better protection for critical water resources on which our communities depend. We strongly support finalization of *Definition of "Waters of the United States Under the Clean Water Act."*

Sincerely,

Roberto Alonzo
Texas State Representative, District 104
312 W. 12th Street, Suite A
Dallas, TX 75208

Rafael Anchia
Texas State Representative, District 103
1111 West Mockingbird Lane, Suite 1010
Dallas, TX 75247

Lon Burnam
Texas State Representative, District 90
1067 W. Magnolia Avenue
Fort Worth, TX 76104

Yvonne Davis
Texas State Representative, District 111
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Dallas, TX 75232

Dawnna Dukes
Texas State Representative, District 46
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Austin, TX 78768

Jessica Farrar
Texas State Representative, District 148
P.O. Box 30099
Houston, TX 77249

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Texas State Senator, District 6
5425 Polk Street, Suite 125
Houston, Texas 77023

Roland Gutierrez
Texas State Representative, District 119
3319 Sidney Brooks
San Antonio, TX 78235

Donna Howard
Texas State Representative, District 48
P.O. Box 2910
Austin, TX 78768

Celia Israel
Texas State Representative, District 50
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Austin, TX 78768

Marisa Marquez
Texas State Representative, District 77
310 N. Mesa Street, Ste. 906
El Paso, TX 79901

Tom Colkin
Gallatin City Council Member
770 Pine Grove Road
Rusk, TX 75785

Roberta Colkin
Gallatin City Council Member & President,
East Texas Sub-Regional Planning Commission
770 Pine Grove Road
Rusk, TX 75785

Hoyte Davis, Board Member and Past President
Craft-Turney Water Supply
3784 FM 7475
Jacksonville, TX 75766

Dr. Elba Garcia
Dallas County Commissioner, Precinct 4
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Dallas, Texas 75201

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Austin City Council Member Elect, District 2
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Austin, TX 78745

Sandy Greyson
Dallas City Council Member, District 12
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Dallas, TX 75201

Scott Griggs
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Dallas, TX 75201

Philip Kingston
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Dallas, TX 75201

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Texas State Representative, District 49
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Austin, TX 78768

Eddie Rodriguez
Texas State Representative, District 51
P.O. Box 2910
Austin, TX 78768

José Rodriguez
Texas Senator, District 29
100 N. Ochoa, Suite A
El Paso, Texas 79901

CC: US Senators and Representatives

Ana Reyes
Farmers Branch City Council, District 1
13000 William Dobson Pkwy
Farmers Branch, TX 75234

November 14, 2014

The Honorable Gina McCarthy
Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue
Washington, DC 20460

Email to: ow-docket@epa.gov

Re: Clean Water Rule Docket ID # EPA-HQ-OW-20011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The undersigned twenty-five organizations in Texas appreciate the opportunity to comment on the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed *Definition of "Waters of the United States Under the Clean Water Act"* to clarify which streams, wetlands, and other waters are protected under the Clean Water Act. This rule is long overdue. Many of our organizations have spent more than a decade advocating to restore Clean Water Act protections to all wetlands and tributary streams, as Congress originally intended when it passed the landmark Act in 1972.

For its first thirty years, the Clean Water Act safeguarded nearly all of our rivers, streams, lakes and wetlands, in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Despite the law's dramatic progress at combating water pollution nationally, federal policy changes in the last decade have left many small streams and "isolated" wetlands vulnerable to pollution or destruction. These federal policy changes have called into question Clean Water Act protections for nearly 60% of our nation's stream miles and at least 20 million acres of wetlands in the continental United States.

Our organizations support the proposed rule for the clear protections it restores to headwaters, intermittent and ephemeral streams, and to wetlands and other waters located near or within the floodplain of these tributaries. We urge the Agencies to strengthen the final rule by further clarifying that important wetlands and other waters located beyond floodplains are also categorically protected under the Clean Water Act. Millions of small streams and wetlands provide most of the flow to our most treasured rivers, including the Trinity, Colorado, Cypress, Neches, Sulphur, and Brazos rivers. If we do not protect these streams and wetlands, we cannot protect and restore the lakes, rivers and bays on which communities and local economies depend. Leaving critical water resources vulnerable jeopardizes jobs and revenue for businesses that depend on clean water, including outdoor activities like angling and water-based recreation.

Our organizations support the Agencies' proposal to define all tributaries as "waters of the United States," including headwaters and small streams that may only flow seasonally. Headwater streams provide most of the flow to downstream streams and rivers, and make up 53% of Texas' stream miles. Intermittent and ephemeral streams may only flow during parts of the year, but they support water quality in downstream waters by filtering pollutants and capturing nutrients

and make up 75% of Texas' stream miles. These streams are also critical habitat for fish and other aquatic species.

Headwater and seasonal streams also feed the drinking water sources of 117 million Americans, including 11.5 million residents in Texas. Clarifying that all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act will restore protections to 12,570 miles of streams in Texas that 46% of our residents depend on for drinking water.

In addition, we support the Agencies' definition of tributary and strongly agree that ditches should be defined as "waters of the U.S." where they function as tributaries. There is sufficient scientific evidence that some ditches function as tributaries moving water and pollutants downstream. In those cases protection is important.

Our organizations support the Agencies' determination that all adjacent wetlands are "Waters of the U.S." Wetlands perform critical functions that support aquatic life, clean drinking water and safeguard communities from floods. Wetlands protect the water quality of entire watersheds by filtering pollutants. They also store floodwaters, reducing flood flows that can threaten property and infrastructure. Wetlands also provide essential fish and wildlife habitat that support robust outdoor recreation and tourism. When wetlands are polluted, dredged or filled, these benefits are lost.

In order to protect wetlands and other resources, we also urge the agency to:

> **Categorically define certain non-adjacent "other waters" as "Waters of the United States" and identify additional subcategories of waters that are jurisdictional, rather than requiring case-by-case determinations.** Wetlands and other waters, even so-called isolated ones that are not adjacent to tributaries, provide many of the same natural benefits as adjacent waters located within floodplains. In fact, it is because of their placement outside of floodplains that they function as "sinks" to capture and filter pollutants and store floodwaters, protecting the physical, biological and chemical integrity of downstream waters. Examples of "other waters" where the science supports our recommendation that they should be categorically protected by rule include: prairie potholes, Carolina and Delmarva Bays, Texas coastal prairie wetlands and vernal pools.
>
> **Provide for new science by not categorically excluding any of the "other waters," and establishing a process by which evolving science can inform jurisdictional decisions in the future.** "Other waters" that cannot be defined as jurisdictional in the final rule should still be assessed on a case-by-case basis and provisions made for categorically including them as "Waters of the United States" if and when evolving science indicates that this is appropriate.

The Agencies' commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade, eliminate permit confusion and delay, and better protect the critical water resources on which our communities depend.

Our organizations urge the Agencies to swiftly finalize a rule to clarify that all waters with a "significant nexus" to downstream waters are clearly protected under the Clean Water Act.

We thank the Agencies for their efforts to protect these waters and look forward to working with them to finalize and implement a strong *"Definition of Waters of the United States under the Clean Water Act."*

Sincerely,

Dan Kocurek, President
Arlington Conservation Council
P.O. Box 216
Arlington, TX 76004-0216

David Foster, State Director
Clean Water Action
600 West 28th Street, Suite 202
Austin, TX 78705

Steve Box, Executive Director
Environmental Stewardship
P.O. Box 1423
Bastrop, TX 78602

Marc McCord, President
FracDallas
616 S. Colorado St.
Cellina, TX 75009

Bob Stokes, President
Galveston Bay Foundation
17330 Highway 3
Webster, TX 77598

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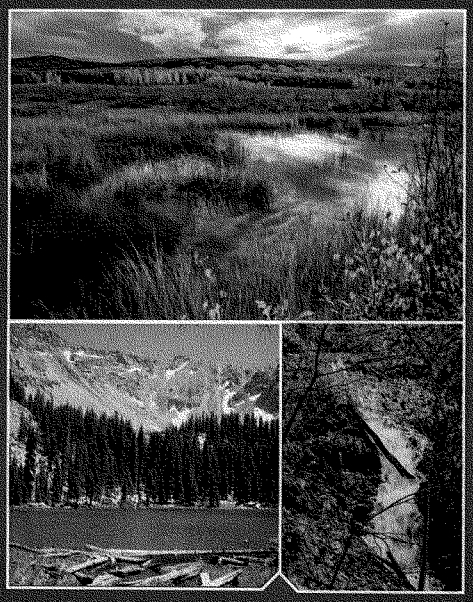
Connectivity of Streams & Wetlands to Downstream Waters:
A Review & Synthesis of the Scientific Evidence



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CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE

Office of Research and Development
U.S. Environmental Protection Agency
Washington, DC

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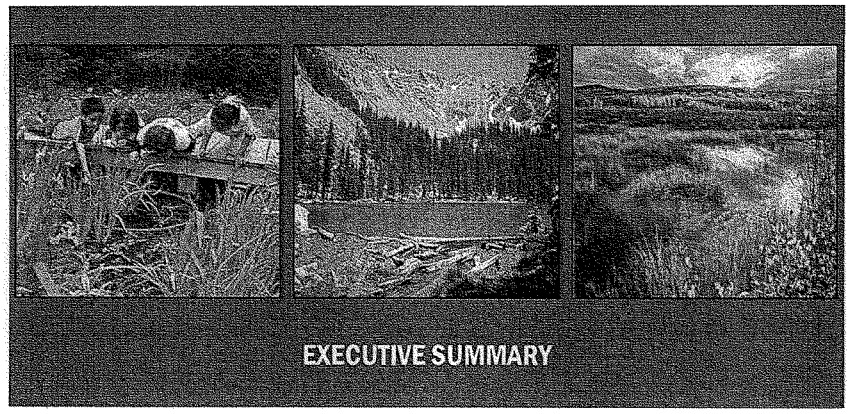


EXECUTIVE SUMMARY

BACKGROUND

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The U.S. Environmental Protection Agency's (U.S. EPA's) Office of Research and Development developed this report to inform rulemaking by the U.S. EPA and U.S. Army Corps of Engineers (U.S. ACE) on the definition of "waters of the United States" under the Clean Water Act (CWA). Its purpose is to summarize current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in aggregate, affect the physical, chemical, and biological integrity of downstream waters. The focus of the review is on surface and shallow subsurface connections of small or temporary streams, nontidal wetlands, and certain open waters. Because this report is a technical review of peer-reviewed scientific literature, it neither considers nor sets forth legal standards for CWA jurisdiction, nor does it establish EPA policy.

The report is organized into six chapters. Chapter 1 outlines the purpose, scientific context, and approach of the report. Chapter 2 describes the components of a river system and watershed; the types of physical, chemical, and biological connections that link those components; the factors that influence connectivity at various temporal and spatial scales; and methods for quantifying connectivity. Chapter 3 reviews literature on connectivity in stream networks in terms of physical, chemical, and biological connections and their resulting effects on downstream waters. Chapter 4 reviews literature on the connectivity and effects of nontidal wetlands and certain open waters on downstream waters. Chapter 5 applies concepts and evidence from previous chapters to six case studies from published literature on Carolina and Delmarva bays, oxbow lakes, prairie potholes, prairie streams, southwestern streams, and vernal pools. Chapter 6 summarizes key findings and conclusions, identifies data gaps, and briefly discusses research approaches that could fill those gaps. A glossary of scientific terms used in the report

and detailed case studies of selected systems (summarized in Chapter 5) are included in Appendix A and Appendix B, respectively.

SUMMARY OF MAJOR CONCLUSIONS

Based on the review and synthesis of more than 1,200 publications from the peer reviewed scientific literature, the evidence supports five major conclusions. Citations have been omitted from the text to improve readability; please refer to individual chapters for supporting publications and additional information.

Conclusion 1: Streams

The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. Streams are the dominant source of water in most rivers, and the majority of tributaries are perennial, intermittent, or ephemeral headwater streams. Headwater streams also convey water into local storage compartments such as ponds, shallow aquifers, or stream banks, and into regional and alluvial aquifers; these local storage compartments are important sources of water for maintaining baseflow in rivers. In addition to water, streams transport sediment, wood, organic matter, nutrients, chemical contaminants, and many of the organisms found in rivers. The literature provides robust evidence that streams are biologically connected to downstream waters by the dispersal and migration of aquatic and semiaquatic organisms, including fish, amphibians, plants, microorganisms, and invertebrates, that use both upstream and downstream habitats during one or more stages of their life cycles, or provide food resources to downstream communities. In addition to material transport and biological connectivity, ephemeral, intermittent, and perennial flows influence fundamental biogeochemical processes by connecting channels and shallow ground water with other landscape elements. Physical, chemical, and biological connections between streams and downstream waters interact via integrative processes such as nutrient spiraling, in which stream communities assimilate and chemically transform large quantities of nitrogen and other nutrients that otherwise would be transported directly downstream, increasing nutrient loads and associated impairments due to excess nutrients in downstream waters.

Conclusion 2: Riparian/Floodplain Wetlands and Open Waters

The literature clearly shows that wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in

rivers, and transformation and transport of stored organic matter. Riparian/floodplain wetlands and open waters improve water quality through the assimilation, transformation, or sequestration of pollutants, including excess nutrients and chemical contaminants such as pesticides and metals, that can degrade downstream water integrity. In addition to providing effective buffers to protect downstream waters from point source and nonpoint source pollution, these systems form integral components of river food webs, providing nursery habitat for breeding fish and amphibians, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Lateral expansion and contraction of the river in its floodplain result in an exchange of organic matter and organisms, including fish populations that are adapted to use floodplain habitats for feeding and spawning during high water, that are critical to river ecosystem function. Riparian/floodplain wetlands and open waters also affect the integrity of downstream waters by subsequently releasing (desynchronizing) floodwaters and retaining large volumes of stormwater, sediment, and contaminants in runoff that could otherwise negatively affect the condition or function of downstream waters.

Conclusion 3: Non-floodplain Wetlands and Open Waters

Wetlands and open waters in non-floodplain landscape settings (hereafter called "non-floodplain wetlands") provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species. This diverse group of wetlands (e.g., many prairie potholes, vernal pools, playa lakes) can be connected to downstream waters through surface-water, shallow subsurface-water, and ground-water flows and through biological and chemical connections.

In general, connectivity of non-floodplain wetlands occurs along a gradient (Conclusion 4), and can be described in terms of the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters. These descriptors are influenced by climate, geology, and terrain, which interact with factors such as the magnitudes of the various functions within wetlands (e.g., amount of water storage or carbon export) and their proximity to downstream waters to determine where wetlands occur along the connectivity gradient. At one end of this gradient, the functions of non-floodplain wetlands clearly affect the condition of downstream waters if a visible (e.g., channelized) surface-water or a regular shallow subsurface-water connection to the river network is present. For non-floodplain wetlands lacking a channelized surface or regular shallow subsurface connection (i.e., those at intermediate points along the gradient of connectivity), generalizations about their specific effects on downstream waters from the available literature are difficult because information on both function and connectivity is needed. Although there is ample evidence that non-floodplain wetlands provide hydrologic, chemical, and biological functions that affect material fluxes, to date, few scientific studies explicitly addressing connections between non-floodplain wetlands and river networks have been published in the peer-reviewed literature. Even fewer publications specifically focus

on the frequency, duration, magnitude, timing, or rate of change of these connections. In addition, although areas that are closer to rivers and streams have a higher probability of being connected than areas farther away when conditions governing the type and quantity of flows—including soil infiltration rate, wetland storage capacity, hydraulic gradient, etc.—are similar, information to determine if this similarity holds is generally not provided in the studies we reviewed. Thus, current science does not support evaluations of the degree of connectivity for specific groups or classes of wetlands (e.g., prairie potholes or vernal pools). Evaluations of individual wetlands or groups of wetlands, however, could be possible through case-by-case analysis.

Some effects of non-floodplain wetlands on downstream waters are due to their isolation, rather than their connectivity. Wetland "sink" functions that trap materials and prevent their export to downstream waters (e.g., sediment and entrained pollutant removal, water storage) result because of the wetland's ability to isolate material fluxes. To establish that such functions influence downstream waters, we also need to know that the wetland intercepts materials that otherwise would reach the downstream water. The literature we reviewed does provide limited examples of direct effects of wetland isolation on downstream waters, but not for classes of wetlands (e.g., vernal pools). Nevertheless, the literature we reviewed enables us to conclude that sink functions of non-floodplain wetlands, which result in part from their relative isolation, will affect a downstream water when these wetlands are situated between the downstream water and known point or nonpoint sources of pollution, and thus intersect flowpaths between the pollutant source and downstream waters.

Conclusion 4: Degrees and Determinants of Connectivity

Watersheds are integrated at multiple spatial and temporal scales by flows of surface water and ground water, transport and transformation of physical and chemical materials, and movements of organisms. Although all parts of a watershed are connected to some degree—by the hydrologic cycle or dispersal of organisms, for example—the degree and downstream effects of those connections vary spatially and temporally, and are determined by characteristics of the physical, chemical, and biological environments and by human activities.

Stream and wetland connections have particularly important consequences for downstream water integrity. Most of the materials—broadly defined as any physical, chemical, or biological entity—in rivers, for example, originate from aquatic ecosystems located upstream or elsewhere in the watershed. Longitudinal flows through ephemeral, intermittent, and perennial stream channels are much more efficient for transport of water, materials, and organisms than diffuse overland flows, and areas that concentrate water provide mechanisms for the storage and transformation, as well as transport, of materials.

Connectivity of streams and wetlands to downstream waters occurs along a continuum that can be described in terms of the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters. These terms, which we refer to collectively as

connectivity descriptors, characterize the range over which streams and wetlands vary and shift along the connectivity gradient in response to changes in natural and anthropogenic factors and, when considered in a watershed context, can be used to predict probable effects of different degrees of connectivity over time. The evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The connectivity and effects of non-floodplain wetlands and open waters are more variable and thus more difficult to address solely from evidence available in peer-reviewed studies.

Variations in the degree of connectivity influence the range of functions provided by streams and wetlands, and are critical to the integrity and sustainability of downstream waters. Connections with low values of one or more descriptors (e.g., low-frequency, low-duration streamflows caused by flash floods) can have important downstream effects when considered in the context of other descriptors (e.g., large magnitude of water transfer). At the other end of the frequency range, high-frequency, low-magnitude vertical (surface-subsurface) and lateral flows contribute to aquatic biogeochemical processes, including nutrient and contaminant transformation and organic matter accumulation. The timing of an event can alter both connectivity and the magnitude of its downstream effect. For example, when soils become saturated by previous rainfall events, even low or moderate rainfall can cause streams or wetlands to overflow, transporting water and materials to downstream waters. Fish that use nonperennial or perennial headwater stream habitats to spawn or rear young, and invertebrates that move into seasonally inundated floodplain wetlands prior to emergence, have life cycles that are synchronized with the timing of flows, temperature thresholds, and food resource availability in those habitats.

Conclusion 5: Cumulative Effects

The incremental effects of individual streams and wetlands are cumulative across entire watersheds and therefore must be evaluated in context with other streams and wetlands. Downstream waters are the time-integrated result of all waters contributing to them. For example, the amount of water or biomass contributed by a specific ephemeral stream in a given year might be small, but the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters. Similarly, the downstream effect of a single event, such as pollutant discharge into a single stream or wetland, might be negligible but the cumulative effect of multiple discharges could degrade the integrity of downstream waters.

In addition, when considering the effect of an individual stream or wetland, all contributions and functions of that stream or wetland should be evaluated cumulatively. For example, the same stream transports water, removes excess nutrients, mitigates flooding, and provides refuge for

fish when conditions downstream are unfavorable; if any of these functions is ignored, the overall effect of that stream would be underestimated.

SUPPORT FOR MAJOR CONCLUSIONS

This report synthesizes a large body of scientific literature on the connectivity and mechanisms by which streams, wetlands, and open waters, singly or in aggregate, affect the physical, chemical, and biological integrity of downstream waters. The major conclusions reflect the strength of evidence currently available in the peer-reviewed scientific literature for assessing the connectivity and downstream effects of water bodies identified in Chapter 1 of this report.

The conclusions of this report were corroborated by two independent peer reviews by scientists identified in the front matter of this report.

The term connectivity is defined in this report as the degree to which components of a watershed are joined and interact by transport mechanisms that function across multiple spatial and temporal scales. Connectivity is determined by the characteristics of both the physical landscape and the biota of the specific system. Our review found strong evidence supporting the central roles of the physical, chemical, and biological connectivity of streams, wetlands, and open waters—encompassing varying degrees of both connection and isolation—in maintaining the structure and function of downstream waters, including rivers, lakes, estuaries, and oceans. Our review also found strong evidence demonstrating the various mechanisms by which material and biological linkages from streams, wetlands, and open waters affect downstream waters, classified here into five functional categories (source, sink, refuge, lag, and transformation; discussed below), and modify the timing of transport and the quantity and quality of resources available to downstream ecosystems and communities. Thus, the currently available literature provided a large body of evidence for assessing the types of connections and functions by which streams and wetlands produce the range of observed effects on the integrity of downstream waters.

We identified five categories of functions by which streams, wetlands, and open waters influence the timing, quantity, and quality of resources available to downstream waters:

- Source: the net export of materials, such as water and food resources;
- Sink: the net removal or storage of materials, such as sediment and contaminants;
- Refuge: the protection of materials, especially organisms;
- Transformation: the transformation of materials, especially nutrients and chemical contaminants, into different physical or chemical forms; and
- Lag: the delayed or regulated release of materials, such as stormwater.

These functions are not mutually exclusive; for example, the same stream or wetland can be both a source of organic matter and a sink for nitrogen. The presence or absence of these functions, which

depend on the biota, hydrology, and environmental conditions in a watershed, can change over time; for example, the same wetland can attenuate runoff during storm events and provide ground-water recharge following storms. Further, some functions work in conjunction with others; a lag function can include transformation of materials prior to their delayed release. Finally, effects on downstream waters should consider both actual function and potential function. A potential function represents the capacity of an ecosystem to perform that function under suitable conditions. For example, a wetland with high capacity for denitrification is a potential sink for nitrogen, a nutrient that becomes a contaminant when present in excessive concentrations. In the absence of nitrogen, this capacity represents the wetland's potential function. If nitrogen enters the wetland (e.g., from fertilizer in runoff), it is removed from the water; this removal represents the wetland's actual function. Both potential and actual functions play critical roles in protecting and restoring downstream waters as environmental conditions change.

The evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The body of literature documenting connectivity and downstream effects was most abundant for perennial and intermittent streams, and for riparian/floodplain wetlands. Although less abundant, the evidence for connectivity and downstream effects of ephemeral streams was strong and compelling, particularly in context with the large body of evidence supporting the physical connectivity and cumulative effects of channelized flows that form and maintain stream networks.

As stated in Conclusion 3, the connectivity and effects of wetlands and open waters that lack visible surface connections to other water bodies are more difficult to address solely from evidence available in the peer-reviewed literature. The limited evidence currently available shows that these systems have important hydrologic, water-quality, and habitat functions that can affect downstream waters where connections to them exist; the literature also provides limited examples of direct effects of non-floodplain wetland isolation on downstream water integrity. Currently available peer-reviewed literature, however, does not identify which types or classes of non-floodplain wetlands have or lack the types of connections needed to convey the effects on downstream waters of functions, materials, or biota provided by those wetlands.

KEY FINDINGS FOR MAJOR CONCLUSIONS

This section summarizes key findings for each of the five major conclusions, above and in Chapter 6 of the report. Citations have been omitted from the text to improve readability; please refer to individual chapters for supporting publications and additional information.

Conclusion 1, Streams: Key Findings

- Streams are hydrologically connected to downstream waters via channels that convey surface and subsurface water either year-round (i.e., perennial flow), weekly to seasonally (i.e., intermittent flow), or only in direct response to precipitation (i.e., ephemeral flow). Streams are

the dominant source of water in most rivers, and the majority of tributaries are perennial, intermittent, or ephemeral headwater streams. For example, headwater streams, which are the smallest channels where streamflows begin, are the cumulative source of approximately 60% of the total mean annual flow to all northeastern U.S. streams and rivers.

- In addition to downstream transport, headwaters convey water into local storage compartments such as ponds, shallow aquifers, or stream banks, and into regional and alluvial aquifers. These local storage compartments are important sources of water for maintaining baseflow in rivers. Streamflow typically depends on the delayed (i.e., lagged) release of shallow ground water from local storage, especially during dry periods and in areas with shallow ground-water tables and pervious subsurfaces. For example, in the southwestern United States, short-term shallow ground-water storage in alluvial floodplain aquifers, with gradual release into stream channels, is a major source of annual flow in rivers.
- Infrequent, high-magnitude events are especially important for transmitting materials from headwater streams in most river networks. For example, headwater streams, including ephemeral and intermittent streams, shape river channels by accumulating and gradually or episodically releasing stored materials such as sediment and large woody debris. These materials help structure stream and river channels by slowing the flow of water through channels and providing substrate and habitat for aquatic organisms.
- There is strong evidence that headwater streams function as nitrogen sources (via export) and sinks (via uptake and transformation) for river networks. For example, one study estimated that rapid nutrient cycling in small streams with no agricultural or urban impacts removed 20–40% of the nitrogen that otherwise would be delivered to downstream waters. Nutrients are necessary to support aquatic life, but excess nutrients lead to eutrophication and hypoxia, in which over-enrichment causes dissolved oxygen concentrations to fall below the level necessary to sustain most aquatic animal life in the stream and streambed. Thus, the influence of streams on nutrient loads can have significant repercussions for hypoxia in downstream waters.
- Headwaters provide habitat that is critical for completion of one or more life-cycle stages of many aquatic and semiaquatic species capable of moving throughout river networks. Evidence is strong that headwaters provide habitat for complex life-cycle completion; refuge from predators, competitors, parasites, or adverse physical conditions in rivers (e.g., temperature or flow extremes, low dissolved oxygen, high sediment); and reservoirs of genetic- and species-level diversity. Use of headwater streams as habitat is especially critical for the many species that migrate between small streams and marine environments during their life cycles (e.g., Pacific and Atlantic salmon, American eels, certain lamprey species). The presence of these species within river networks provides robust evidence of biological connections between headwaters and larger rivers; because these organisms also transport nutrients and other materials as they migrate, their presence also provides evidence of biologically mediated chemical connections. In prairie streams, many fishes swim upstream into tributaries to release eggs, which develop as they are transported downstream.

- Human alterations affect the frequency, duration, magnitude, timing, and rate of change of connections between headwater streams, including ephemeral and intermittent streams, and downstream waters. Human activities and built structures (e.g., channelization, dams, groundwater withdrawals) can either enhance or fragment longitudinal connections between headwater streams and downstream waters, while also constraining lateral and vertical exchanges and tightly controlling the temporal dimension of connectivity. In many cases, research on human alterations has enhanced our understanding of the headwater stream-downstream water connections and their consequences. Recognition of these connections and effects has encouraged the development of more sustainable practices and infrastructure to reestablish and manage connections, and ultimately to protect and restore the integrity of downstream waters.

Conclusion 2, Riparian/Floodplain Wetlands and Open Waters: Key Findings

- Riparian areas and floodplains connect upland and aquatic environments through both surface and subsurface hydrologic flowpaths. These areas are therefore uniquely situated in watersheds to receive and process waters that pass over densely vegetated areas and through subsurface zones before the waters reach streams and rivers. When pollutants reach a riparian or floodplain wetland, they can be sequestered in sediments, assimilated into wetland plants and animals, transformed into less harmful or mobile forms or compounds, or lost to the atmosphere. Wetland potential for biogeochemical transformations (e.g., denitrification) that can improve downstream water quality is influenced by local factors, including anoxic conditions and slow organic matter decomposition, shallow water tables, wetland plant communities, permeable soils, and complex topography.
- Riparian/floodplain wetlands can reduce flood peaks by storing and desynchronizing floodwaters. They can also maintain river baseflows by recharging alluvial aquifers. Many studies have documented the ability of riparian/floodplain wetlands to reduce flood pulses by storing excess water from streams and rivers. One review of wetland studies reported that riparian wetlands reduced or delayed floods in 23 of 28 studies. For example, peak discharges between upstream and downstream gaging stations on the Cache River in Arkansas were reduced 10–20% primarily due to floodplain water storage.
- Riparian areas and floodplains store large amounts of sediment and organic matter from upstream and from upland areas. For example, riparian areas have been shown to remove 80–90% of sediments leaving agricultural fields in North Carolina.
- Ecosystem function within a river system is driven in part by biological connectivity that links diverse biological communities with the river system. Movements of organisms that connect aquatic habitats and their populations, even across different watersheds, are important for the survival of individuals, populations, and species, and for the functioning of the river ecosystem. For example, lateral expansion and contraction of the river in its floodplain result in an exchange of matter and organisms, including fish populations that are adapted to use floodplain habitats

for feeding and spawning during high water. Wetland and aquatic plants in floodplains can become important seed sources for the river network, especially if catastrophic flooding scours vegetation and seed banks in other parts of the channel. Many invertebrates exploit temporary hydrologic connections between rivers and floodplain wetland habitats, moving into these wetlands to feed, reproduce, or avoid harsh environmental conditions and then returning to the river network. Amphibians and aquatic reptiles commonly use both streams and riparian/floodplain wetlands to hunt, forage, overwinter, rest, or hide from predators. Birds can spatially integrate the watershed landscape through biological connectivity.

Conclusion 3, Non-floodplain Wetlands and Open Waters: Key Findings

- Water storage by wetlands well outside of riparian or floodplain areas can affect streamflow. Hydrologic models of prairie potholes in the Starkweather Coulee subbasin (North Dakota) that drains to Devils Lake indicate that increasing the volume of pothole storage across the subbasin by approximately 60% caused simulated total annual streamflow to decrease 50% during a series of dry years and 20% during wet years. Similar simulation studies of watersheds that feed the Red River of the North in North Dakota and Minnesota demonstrated qualitatively comparable results, suggesting that the ability of potholes to modulate streamflow could be widespread across eastern portions of the prairie pothole region. This work also indicates that reducing water storage capacity of wetlands by connecting formerly isolated potholes through ditching or drainage to the Devils Lake and Red River basins could increase stormflow and contribute to downstream flooding. In many agricultural areas already crisscrossed by extensive drainage systems, total streamflow and baseflow are increased by directly connecting potholes to stream networks. The impacts of changing streamflow are numerous, including altered flow regime, stream geomorphology, habitat, and ecology. The presence or absence of an effect of prairie pothole water storage on streamflow depends on many factors, including patterns of precipitation, topography, and degree of human alteration. For example, in parts of the prairie pothole region with low precipitation, low stream density, and little human alteration, hydrologic connectivity between prairie potholes and streams or rivers is likely to be low.
- Non-floodplain wetlands act as sinks and transformers for various pollutants, especially nutrients, which at excess levels can adversely impact human and ecosystem health and pose a serious pollution problem in the United States. In one study, sewage wastewaters were applied to forested wetlands in Florida for 4.5 years; more than 95% of the phosphorus, nitrate, ammonium, and total nitrogen were removed by the wetlands during the study period, and 66–86% of the nitrate removed was attributed to the process of denitrification. In another study, sizeable phosphorus retention (0.3 to 8.0 mg soluble reactive P m^{-2} d^{-1}) occurred in marshes that comprised only 7% of the lower Lake Okeechobee basin area in Florida. A non-floodplain bog in Massachusetts was reported to sequester nearly 80% of nitrogen inputs from various sources, including atmospheric deposition, and prairie pothole wetlands in the upper Midwest were found to remove >80% of the nitrate load via denitrification. A large prairie marsh was found to remove 86% of nitrate, 78% of ammonium, and 20% of phosphate through

assimilation and sedimentation, sorption, and other mechanisms. Together, these and other studies indicate that onsite nutrient removal by non-floodplain wetlands is substantial and geographically widespread. The effects of this removal on rivers are generally not reported in the literature.

- Non-floodplain wetlands provide unique and important habitats for many species, both common and rare. Some of these species require multiple types of waters to complete their full life cycles, including downstream waters. Abundant or highly mobile species play important roles in transferring energy and materials between non-floodplain wetlands and downstream waters.
- Biological connections are likely to occur between most non-floodplain wetlands and downstream waters through either direct or stepping stone movement of amphibians, invertebrates, reptiles, mammals, and seeds of aquatic plants, including colonization by invasive species. Many species in those groups that use both stream and wetland habitats are capable of dispersal distances equal to or greater than distances between many wetlands and river networks. Migratory birds can be an important vector of long-distance dispersal of plants and invertebrates between non-floodplain wetlands and the river network, although their influence has not been quantified. Whether those connections are of sufficient magnitude to impact downstream waters will either require estimation of the magnitude of material fluxes or evidence that these movements of organisms are required for the survival and persistence of biota that contribute to the integrity of downstream waters.
- Spatial 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. However, proximity alone is not sufficient to determine connectivity, due to local variation in factors such as slope and permeability.
- The cumulative influence of many individual wetlands within watersheds can strongly affect the spatial scale, magnitude, frequency, and duration of hydrologic, biological and chemical fluxes or transfers of water and materials to downstream waters. Because of their aggregated influence, any evaluation of changes to individual wetlands should be considered in the context of past and predicted changes (e.g., from climate change) to other wetlands within the same watershed.
- Non-floodplain wetlands can be hydrologically connected directly to river networks through natural or constructed channels, nonchannelized surface flows, or subsurface flows, the latter of which can travel long distances to affect downstream waters. A wetland surrounded by uplands is defined as "geographically isolated." Our review found that, in some cases, wetland types such as vernal pools and coastal depressional wetlands are collectively—and incorrectly—referred to as geographically isolated. Technically, the term "geographically isolated" should be applied only to the particular wetlands within a type or class that are completely surrounded by uplands. Furthermore, "geographic isolation" should not be confused with functional isolation, because

geographically isolated wetlands can still have hydrologic, chemical, and biological connections to downstream waters.

- Non-floodplain wetlands occur along a gradient of hydrologic connectivity-isolation with respect to river networks, lakes, or marine/estuarine water bodies. This gradient includes, for example, wetlands that serve as origins for stream channels that have permanent surface-water connections to the river network; wetlands with outlets to stream channels that discharge to deep ground-water aquifers; geographically isolated wetlands that have local ground-water or occasional surface-water connections to downstream waters; and geographically isolated wetlands that have minimal hydrologic connection to other water bodies (but which could include surface and subsurface connections to other wetlands). This gradient can exist among wetlands of the same type or in the same geographic region.
- Caution should be used in interpreting connectivity for wetlands that have been designated as "geographically isolated" because (1) the term can be applied broadly to a heterogeneous group of wetlands, which can include wetlands that are not actually geographically isolated; (2) wetlands with permanent channels could be miscategorized as geographically isolated if the designation is based on maps or imagery with inadequate spatial resolution, obscured views, etc.; and (3) wetland complexes could have connections to downstream waters through stream channels even if individual wetlands within the complex are geographically isolated. For example, a recent study examined hydrologic connectivity in a complex of wetlands on the Texas Coastal Plain. The wetlands in this complex have been considered to be a type of geographically isolated wetland; however, collectively they are connected both geographically and hydrologically to downstream waters in the area: During an almost 4-year study period, nearly 20% of the precipitation that fell on the wetland complex flowed out through an intermittent stream into downstream waters. Thus, wetland complexes could have connections to downstream waters through stream channels even when the individual wetland components are geographically isolated.

Conclusion 4, Degrees and Determinants of Connectivity: Key Findings

- The surface-water and ground-water flowpaths (hereafter, hydrologic flowpaths), along which water and materials are transported and transformed, determine variations in the degree of physical and chemical connectivity. These flowpaths are controlled primarily by variations in climate, geology, and terrain within and among watersheds and over time. Climate, geology, and terrain are reflected locally in factors such as rainfall and snowfall intensity, soil infiltration rates, and the direction of ground-water flows. These local factors interact with the landscape positions of streams and wetlands relative to downstream waters, and with functions (such as the removal or transformation of pollutants) performed by those streams and wetlands to determine connectivity gradients.
- Gradients of biological connectivity (i.e., the active or passive movements of organisms through water or air and over land that connect populations) are determined primarily by species

assemblages, and by features of the landscape (e.g., climate, geology, terrain) that facilitate or impede the movement of organisms. The temporal and spatial scales at which biological pathways connect aquatic habitats depend on characteristics of both the landscape and species, and overland transport or movement can occur across watershed boundaries. Dispersal is essential for population persistence, maintenance of genetic diversity, and evolution of aquatic species. Consequently, dispersal strategies reflect aquatic species' responses and adaptations to biotic and abiotic environments, including spatial and temporal variation in resource availability and quality. Species' traits and behaviors encompass species-environment relationships over time, and provide an ecological and evolutionary context for evaluating biological connectivity in a particular watershed or group of watersheds.

- Pathways for chemical transport and transformation largely follow hydrologic flowpaths, but sometimes follow biological pathways (e.g., nutrient transport from wetlands to coastal waters by migrating waterfowl, upstream transport of marine-derived nutrients by spawning of anadromous fish, uptake and removal of nutrients by emerging stream insects).
- Human activities alter naturally occurring gradients of physical, chemical, and biological connectivity by modifying the frequency, duration, magnitude, timing, and rate of change of fluxes, exchanges, and transformations. For example, connectivity can be reduced by dams, levees, culverts, water withdrawals, and habitat destruction, and can be increased by effluent discharges, channelization, drainage ditches and tiles, and impervious surfaces.

Conclusion 5, Cumulative Effects: Key Findings

- Structurally and functionally, stream-channel networks and the watersheds they drain are fundamentally cumulative in how they are formed and maintained. Excess water from precipitation that is not evaporated, taken up by organisms, or stored in soils and geologic layers moves downgradient by gravity as overland flow or through channels carrying sediment, chemical constituents, and organisms. These channels concentrate surface-water flows and are more efficient than overland (i.e., diffuse) flows in transporting water and materials, and are reinforced over time by recurrent flows.
- Connectivity between streams and rivers provides opportunities for materials, including nutrients and chemical contaminants, to be transformed chemically as they are transported downstream. Although highly efficient at the transport of water and other physical materials, streams are dynamic ecosystems with permeable beds and banks that interact with other ecosystems above and below the surface. The exchange of materials between surface and subsurface areas involves a series of complex physical, chemical, and biological alterations that occur as materials move through different parts of the river system. The amount and quality of such materials that eventually reach a river are determined by the aggregate effect of these sequential alterations that begin at the source waters, which can be at some distance from the river. The opportunity for transformation of material (e.g., biological uptake, assimilation, or beneficial transformation) in intervening stream reaches increases with distance to the river.

Nutrient spiraling, the process by which nutrients entering headwater streams are transformed by various aquatic organisms and chemical reactions as they are transported downstream, is one example of an instream alteration that exhibits significant beneficial effects on downstream waters. Nutrients (in their inorganic form) that enter a headwater stream (e.g., via overland flow) are first removed from the water column by streambed algal and microbial populations. Fish or insects feeding on algae and microbes take up some of those nutrients, which are subsequently released back into the stream via excretion and decomposition (i.e., in their organic form), and the cycle is repeated. In each phase of the cycling process—from dissolved inorganic nutrients in the water column, through microbial uptake, subsequent transformations through the food web, and back to dissolved nutrients in the water column—nutrients are subject to downstream transport. Stream and wetland capacities for nutrient cycling have important implications for the form and concentration of nutrients exported to downstream waters.

- Cumulative effects across a watershed must be considered when quantifying the frequency, duration, and magnitude of connectivity, to evaluate the downstream effects of streams and wetlands. For example, although the probability of a large-magnitude transfer of organisms from any given headwater stream in a given year might be low (i.e., a low-frequency connection when each stream is considered individually), headwater streams are the most abundant type of stream in most watersheds. Thus, the overall probability of a large-magnitude transfer of organisms is higher when considered for all headwater streams in a watershed—that is, a high-frequency connection is present when headwaters are considered cumulatively at the watershed scale, compared with probabilities of transport for streams individually. Similarly, a single pollutant discharge might be negligible but the cumulative effect of multiple discharges could degrade the integrity of downstream waters. Riparian open waters (e.g., oxbow lakes), wetlands, and vegetated areas cumulatively can retain up to 90% of eroded clays, silts, and sands that otherwise would enter stream channels. The larger amounts of snowmelt and precipitation cumulatively held by many wetlands can reduce the potential for flooding at downstream locations. For example, wetlands in the prairie pothole region cumulatively stored about 11–20% of the precipitation in one watershed.
- The combination of diverse habitat types and abundant food resources cumulatively makes floodplains important foraging, hunting, and breeding sites for fish, aquatic life stages of amphibians, and aquatic invertebrates. The scale of these cumulative effects can be extensive; for example, coastal ibises travel up to 40 km to obtain food from freshwater floodplain wetlands for nesting chicks, which cannot tolerate salt levels in local food resources until they fledge.

CLOSING COMMENTS

The structure and function of downstream waters highly depend on materials—broadly defined as any physical, chemical, or biological entity—that originate outside of the downstream waters. Most of the constituent materials in rivers, for example, originate from aquatic ecosystems located upstream in the drainage network or elsewhere in the drainage basin, and are transported to the river through flowpaths illustrated in the introduction to this report. Thus, the effects of streams, wetlands, and open waters on rivers are determined by the presence of (1) physical, chemical, or biological pathways that enable (or inhibit) the transport of materials and organisms to downstream waters; and (2) functions within the streams, wetlands, and open waters that alter the quantity and quality of materials and organisms transported along those pathways to downstream waters.

The strong hydrologic connectivity of river networks is apparent in the existence of stream channels that form the physical structure of the network itself. Given the evidence reviewed in this report, it is clear that streams and rivers are much more than a system of physical channels for efficiently conveying water and other materials downstream. The presence of physical channels, however, is a compelling line of evidence for surface-water connections from tributaries, or water bodies of other types, to downstream waters. Physical channels are defined by continuous bed-and-bank structures, which can include apparent disruptions (such as by bedrock outcrops, braided channels, flow-through wetlands) associated with changes in the material and gradient over and through which water flows. The continuation of bed and banks downgradient from such disruptions is evidence of the surface connection with the channel that is upgradient of the perceived disruption.

Although currently available peer-reviewed literature does not identify which types of non-floodplain wetlands have or lack the types of connections needed to convey functional effects to downstream waters, additional information (e.g., field assessments, analysis of existing or new data, reports from local resource agencies) could be used in case-by-case analysis of non-floodplain wetlands. Importantly, information from emerging research into the connectivity of non-floodplain wetlands, including studies of the types identified in Section 4.5.2 of this report, could close some of the current data gaps in the near future. Recent scientific advances in the fields of mapping, assessment, modeling, and landscape classification indicate that increasing availability of high-resolution data sets, promising new technologies for watershed-scale analyses, and methods for classifying landscape units by hydrologic behavior can facilitate and improve the accuracy of connectivity assessments. Emerging research that expands our ability to detect and monitor ecologically relevant connections at appropriate scales, metrics to accurately measure effects on downstream integrity, and management practices that apply what we already know about ecosystem function will contribute to our ability to identify waters of national importance and maintain the long-term sustainability and resiliency of valued water resources.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

OFFICE OF THE ADMINISTRATOR
SCIENCE ADVISORY BOARD

October 17, 2014

EPA-SAB-15-001

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Subject: SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*

Dear Administrator McCarthy:

The EPA's Office of Research and Development (ORD) requested that the Science Advisory Board (SAB) review the draft report titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013 External Review Draft)* ("Report"). The Report is a review and synthesis of the peer-reviewed literature on the connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries,a nd oceans. The Report was developed by ORD to summarize the current scientific understanding of connectivity to inform EPA and U.S. Army Corps of Engineers rulemaking related to the jurisdiction of the Clean Water Act.

In response to the EPA's request, the SAB convened an expert panel to review the Report. The SAB was asked to comment on the clarity and technical accuracy of the Report; whether it includes the most relevant peer-reviewed literature; whether the literature has been correctly summarized; and whether the findings and conclusions are supported by the available science. The enclosed report provides the SAB's consensus advice and recommendations.

The EPA Report is a thorough and technically accurate review of the literature on the connectivity of streams and wetlands to downstream waters. The SAB agrees with two of the three major conclusions in the Report. The SAB finds that the review of the scientific literature strongly supports the conclusions that streams and "bidirectional" floodplain wetlands are physically, chemically, and/or biologically connected to downstream navigable waters; however, these connections should be considered in terms of a connectivity gradient. The SAB recommends revisions to improve the clarity of the Report, better reflect the scientific evidence, expand the discussion of approaches to quantifying connectivity,a nd make the document more useful to decision-makers. The SAB disagrees with the conclusion that there is insufficient information available to generalize about the connectivity of wetlands in "unidirectional," non-floodplain settings. In that case, the SAB finds that the scientific literature supports a more definitive statement that reflects how numerous functions of non-floodplain wetlands sustain the

physical, chemical,a nd/or biological integrity of downstream waters, although the degree of connectivity can vary widely.Th e SAB's major comments and recommendations are provided below.

- The Report often refers to connectivity as though it is a binary property (connected versus not connected) rather than as a gradient. In order to make the Report more technically accurate, the SAB recommends that the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and consequences of those connections. The SAB notes that relatively low levels of connectivity can be meaningful in terms of impacts on the chemical, physical, and biological integrity of downstream waters.

- The SAB recommends that the EPA consider expanding the brief overview of approaches to measuring connectivity. This expansion would be most useful if it provided examples of the dimensions of connectivity that could most appropriately be quantified, ways to construct connectivity metrics, and the methodological and technical advances that are most needed.

- The Report presents a conceptual framework that describes the hydrologic elements of a watershed and the types of connections that link them. The literature review supporting the framework is technically accurate and clearly presented.Ho wever, to strengthen and improve its usefulness, the SAB recommends that the framework be expressed as spatially continuous physical, hydrological (surface and subsurface), chemical, and biological flowpaths that connect watersheds. Layers of complexity should be included in the conceptual framework to represent important aspects of connectivity such as spatial and temporal scale. The water body classification system used in the Report (i.e., classification of waters according to landscape settings) should be integrated into the flowpath framework to show that continuous phenomena interact across landscape settings.I n addition, the SAB recommends that each section of the Report be clearly linked to the conceptual framework.

- The SAB recommends that the Report more explicitly address the scientific literature on cumulative and aggregate effects of streams, groundwater systems, and wetlands on downstream waters. In particular, the Report should contain a discussion of the spatial and temporal scales at which streams,groundwat er systems, and wetlands are functionally aggregated. The SAB also recommends that, throughout the Report, the EPA further discuss several important issues including the role of biological connectivity, biogeochemical transformation processes,a nd the effects of human alteration of connectivity.

- In the Report, the EPA has classified waters and wetlands as having the potential for either "bidirectional" or "unidirectional" hydrologic flows with rivers and lakes. The SAB finds that these terms do not adequately describe the four-dimensional (longitudinal, lateral, vertical, and temporal) nature of connectivity, and the SAB recommends that the Report use more commonly understood terms that are grounded in the peer-reviewed literature.

- The SAB commends the EPA for the comprehensive literature review in the Report, although additional citations have been suggested to strengthen it. To make the review process more transparent, the EPA should more clearly describe the approach used to screen, compile, and synthesize the information. The Report should also clearly indicate that the definitions used for rivers, streams, and wetlands are scientific, rather than legal or regulatory definitions, and may differ from those used in the Clean Water Act and associated regulations.

- The SAB finds that the review and synthesis of the literature describing connectivity of streams to downstream waters reflects the pertinent literature and is well grounded in current science. The literature review provides strong scientific support for the conclusion that ephemeral, intermittent, and perennial streams exert a strong influence on the character and functioning of downstream waters and that tributary streams are connected to downstream waters. However, the EPA should recognize that there is a gradient of connectivity.Th e SAB also recommends that the literature review more thoroughly address hydrologic exchange flows between main channels and off-channel areas, the influence of stream connectivity on downstream water temperature, and the movement of organisms throughout stream systems to use critical habitats.

- The SAB finds that the review and synthesis of the literature on the connectivity of waters and wetlands in floodplain settings is somewhat limited in scope (i.e., focused largely on headwater riparian wetlands) and should be expanded. However, the literature review does substantiate the conclusion that floodplains and waters and wetlands in floodplain settings support the physical, chemical, and biological integrity of downstream waters. The SAB recommends that the Report be reorganized to clarify the functional role of floodplain systems in maintaining the ecological integrity of streams and rivers and that the Report more fully reflect the literature on lateral exchange between floodplains and rivers.

- The SAB finds that, in general, the review and synthesis of the literature on the connectivity of non-floodplain ("unidirectional") waters and wetlands is technically accurate.H owever, additional information on biological connections should be included. The SAB has provided numerous additional literature citations addressing the roles of multiple biological taxa in this regard, such as transporting propagules and nutrients and providing critical habitat.

- The SAB disagrees with the EPA's conclusion that the literature reviewed did not provide sufficient information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in "unidirectional" non-floodplain landscape settings. The SAB finds that the scientific literature supports a more definitive statement about the functions of "unidirectional" non-floodplain wetlands that sustain the physical, chemical and/or biological integrity of downstream waters.I n this regard, the SAB recommends that the EPA revise the conclusion to better articulate: (1) what is supported by the scientific literature and (2) the issues that still need to be resolved.

The SAB appreciates the opportunity to provide the EPA with advice on this important subject. We look forward to receiving the agency's response.

Sincerely,

/s/

Dr. David T. Allen, Chair
Science Advisory Board

/s/

Dr. Amanda D. Rodewald, Chair
SAB Panel for the Review of the EPA
Water Body Connectivity Report

Enclosure

EPA Connect
The Official Blog of EPA's Leadership

EPA

Setting the Record Straight on Waters of the US

2014 June 30

Nancy Stoner
June 30, 2014
4:56 pm EDT

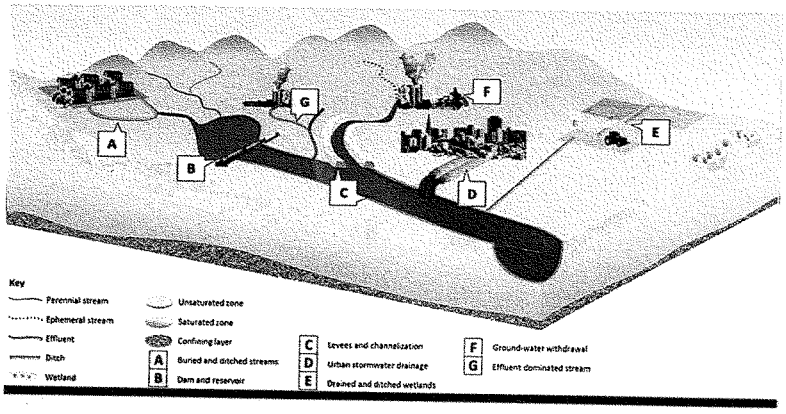
Nancy Stoner, Acting Assistant Administrator for Water

Updated July 7, 2014

There's been some confusion about EPA and the Corps' proposed "Waters of the U.S." rule under the Clean Water Act, especially in the agriculture community, and we want to make sure you know the facts.

* * *

Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.



CALIFORNIA ASSOCIATION of SANITATION AGENCIES
1225 8th Street, Suite 595 • Sacramento, CA 95814 • TEL: (916) 446-0388 • www.casaweb.org

January 30, 2015

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Barbara Boxer
Ranking Member
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Bill Shuster
Chairman
Committee on Transportation & Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Peter DeFazio
Ranking Member
Committee on Transportation & Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Subject: **Testimony of the California Association of Sanitation Agencies (CASA) to the Committee on Environment and Public Works' February 4, 2015 Hearing Into the U.S. Environmental Protection Agency's Waters of the U.S. Proposed Rulemaking**

Dear Mr. Chairmen Inhofe and Shuster and Ranking Members Boxer and DeFazio:

The California Association of Sanitation Agencies (CASA), a statewide association representing publicly owned clean water agencies serving the needs or more than 90 percent of California's 35 million residents and related businesses, respectfully requests that this letter be included in the formal record of the Committee on Environment and Public Works' February 4, 2015 hearing into the U.S. Environmental Protection Agency's (USEPA) Waters of the U.S. proposed rulemaking. CASA's member agencies operate wastewater treatment and water recycling facilities that discharge into waters of the United States, and as such have a direct interest in the proposed rule's promulgation as well as its implementation.

CASA believes that the history of this rulemaking demands this unprecedented bicameral hearing to ensure that all interested parties have an opportunity to detail their perspectives on the rule and its potential impacts. To this end, CASA expects that the extensive development of the proposed rule, the extended public comment period and the current review of the more than 600,000 public comments submitted to USEPA will ultimately lead to the promulgation of a thoroughly considered rule.

While the debate surrounding this rulemaking has been strident and unrelenting on all sides during the many years of this rule's evolution, CASA's focused message emphasizing support for the waste treatment exemption, the need for a specific exclusion of groundwater, and the necessity of addressing recycled water has been consistent over time. The effort officially began with the release of the draft *EPA and Army Corps of Engineers Guidance Regarding*

Identification of Waters Protected by the Clean Water Act (Draft Guidance), in lieu of regulation. Making such changes through guidance rather than regulation raised serious concerns of creating a precedent of imposing significant new mandates on the regulated community while denying interested parties a fully transparent and open review and comment period. At that time, CASA urged USEPA to undertake a formal rulemaking process to ensure that the regulated community could submit informed comments on the proposal. CASA was pleased that the Administration heeded the many calls for such a formal rulemaking process, and submitted its comments as part of the formal rulemaking process. I am enclosing a copy of these comments as a reference.

Today, the controversy surrounding the rulemaking has reached a point where we feel it is vital to take a step back and consider first and foremost the underlying reason that this rule has spurred so much controversy. Although the rulemaking appears to be merely an effort to redefine which waters of the U.S. are subject to permitting under the Clean Water Act, CASA believes that, more importantly, it is symptomatic of a much larger issue. In fact, we believe that this issue is so significant that it has culminated in this bicameral hearing, which is highly unusual. Simply stated, the policy debate over the contours of what constitutes a water of the United States is just one more indicator of a much larger need and its associated challenge; the fact that the Clean Water Act is a forty-year old statute that has not been updated to address the needs and realities of today's water quality problems.

We appreciate the frustrations surrounding this rulemaking, but after today's hearing, we hope that one outcome will be a common understanding that we need to holistically revisit the manner in which we mandate water quality improvements. Whether the issue is terms and conditions of permits, or how funding should be targeted to address the variety of water quality impairments, for example, Congress needs to seize the opportunity to develop a new approach to meet the water quality and water infrastructure challenges of the twenty-first century. CASA would welcome the opportunity to work with you in this endeavor.

With respect to the pending rulemaking, CASA has expressed its concerns and voiced alternatives throughout the process. Some of these were accepted, such as the retention of the existing waste treatment exemption. In other areas, such as water recycling and the potential of imposing new mandates on such facilities, we continue to hope that the final rule establishes, with clarity, a process that recognizes that such facilities contribute to an improved environment and water quality while addressing the challenges of a changing climate. However, it remains an open question as to how the agency will address the matter.

First and foremost, however, CASA appreciates that the proposed rule explicitly specifies USEPA is proposing no changes to the longstanding regulations that exclude waste treatment systems designed to meet the requirements of the CWA from the definition of "waters of the United States." These regulations provide an essential component of the existing regulatory framework that ensures effective clean water agency operations. The retention of the waste treatment exemption is one of the highest priorities for clean water agencies. We also endorse the proposed rule's clarification that USEPA does not intend to alter the regulation of groundwater at the federal level.

Despite our general support for these crucial elements of the proposed rule, there are areas where clarification is needed in order to protect wastewater operations, particularly those pertaining to recycled water production and storage. Specifically, we would appreciate if USEPA could clarify segments of the rule that could potentially create regulatory barriers to the effective implementation of recycled water projects as well as aspects of the rule that could complicate and interfere with core components of the wastewater treatment process.

In order to address the historic drought conditions currently plaguing the western states, water and wastewater agencies must rely on a full suite of flexible options to provide potable and recycled water supplies for a variety of ongoing uses. Thus, CASA opposes any direct or indirect new regulatory impacts on water recycling, water storage, and other mechanisms that play a part in recycled water infrastructure and processes as a result of the proposed rule. We believe it is important that the proposed rule expressly state that the waste treatment exemption extends to recycled water facilities.

California water recycling projects often depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. Because recycled water demand is variable with time of day and season, recycled water agencies maintain reservoirs or storage basins/ponds to store recycled water during periods of low usage in anticipation of peak demands. These features are an essential component of the recycled water process and integral to an agency's ability to continue reliably producing and supplying recycled water in many instances. If these features are considered waters of the U.S. and are not specifically included in the waste treatment exemption, they may no longer be considered an integral component of the waste treatment system, potentially forcing the closure of important recycled water projects critical to California's water supply. Moreover, a lack of clarity on this issue may stall or halt the development of recycled water projects at a time when recycling is urgently needed to address drought and climate resiliency priorities.

The proposed rule should affirm that these recycled water reservoirs, along with influent and treated effluent storage ponds, are within the scope of the waste treatment exemption, consistent with the existing federal regulatory definition of "complete waste treatment system." As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the U.S., and treatment systems should include any facilities, including storage ponds and basins, related not only to traditional treatment facilities and processes, but also to the production of recycled water.

In the alternative, recycled water facilities and features (including storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling) should be expressly exempted as part of the specifically identified features that are not considered waters of the U.S. within the proposed rule. In this case, recycled water facilities would be treated similar to artificial lakes, ponds, swimming pools, ornamental waters, and groundwater, which are specifically identified and expressly exempted. In either case, whether recycled water facilities are considered part of the waste treatment exemption or have their own specifically identified exemption, it is essential that the proposed rule not interfere with recycled water production and treatment by making those features jurisdictional.

The failure to include an explicit statement in the final rule would leave open the question of whether these features are considered "waters of the U.S." Such a situation could lead to regulatory disincentives to produce recycled water in California and other western states, compounding a water scarcity situation that is already dire. Pending and adopted federal and state legislation to address the impacts of our historic drought contain a number of approaches to encourage recycled water projects. Transforming components of the recycled water process, including integral systems such as storage ponds, into jurisdictional waters would undercut efforts to address the drought and have resoundingly negative water supply ramifications across the state. We concur with the comments of Representative Grace Napolitano (D-CA) delivered to the House Committee on Transportation and Infrastructure Committee during the hearing held on June 11, 2014, as she questioned why, in light of the severe drought in California, USEPA would not expressly include recycled water within the scope of the waste treatment exception. Given the drought and dire need to develop recycled water facilities in the arid west, clarification that excludes recycled water facilities from additional federal regulation is absolutely vital.

CASA's prior comments on the proposed rule contain references to interpretations of the waste treatment exemption that could benefit from clarification. For example, CASA seeks to ensure that spreading grounds/basins, treatment ponds/lagoons, and constructed treatment wetlands used as part of the wastewater process are subject to the same exemption as other waste treatment processes and are covered by the existing waste treatment exemption. We also seek to clarify that wastewater treatment processes, including man-made spreading basins, that are located near or even "adjacent" to rivers and tributaries are covered by the exemption, despite potentially being considered jurisdictional based on other language within the proposed rule. Some of these issues are relatively straightforward to resolve and nearly all of these are offshoots of our core concern: preservation and proper scoping of the waste treatment exemption. The crucial component of the rule for wastewater agencies remains the preservation of the waste treatment exemption, the explicit exemption for groundwater, and the need to clarify that recycled water infrastructure is similarly exempt from jurisdiction. With relatively straightforward modifications, the proposed rule is well on its way to resolving all of these issues.

Thank you for the opportunity to provide testimony on this matter.

David R. Williams

David R. Williams
President, California Association of Sanitation Agencies

AMERICAN SUSTAINABLE BUSINESS COUNCIL

Published on *American Sustainable Business Council* (http://asbcouncil.org)

Business Leaders Question SBA Advocacy's Comments on EPA's Water Rule

For Immediate Release:
October 2, 2014

Contact Info

Bob Keener, ASBC, bkeener@asbcouncil.org, 617-610-6766
Bryan McGannon, ASBC, bmcgannon@asbcouncil.org

WASHINGTON, DC (October 2, 2014)—The American Sustainable Business Council (ASBC) questioned the public comments submitted by the Small Business Administration's Office of Advocacy (SBA Advocacy) concerning the Environmental Protection Agency's proposed Waters of the United States rule. Those comments called for EPA to withdraw the rule.

"The SBA Advocacy comments submitted on the proposed water rule do not represent the views of most small businesses as shown in recent independent polling," said **David Levine, CEO of the American Sustainable Business Council.** "Once again, it appears that SBA Advocacy is arguing that polluting industries have the right to externalize their pollution and harm downstream businesses and the communities they serve."

Scientific polling of independent small businesses commissioned by ASBC about the business need for clean water contradicts the position taken by SBA Advocacy. Eighty percent of small business owners favor federal rules to protect upstream headwaters, as proposed in the EPA's new "Waters of the U.S." rule. Additional findings include:

- 78% of Republicans and 73% of independents joined 91% of Democrats in supporting the rule, which clarifies that federal rules apply to headland waters and wetlands.
- 71% of small business owners agree that clean water is necessary for jobs and a healthy economy.
- 67% are concerned that water pollution could hurt their business in the future.
- 62% agree that government regulation is needed to prevent water pollution.
- 61% believe that government safeguards for water are good for businesses and local communities.

- 60% believe that complying with clean water regulations is more economical than risking harm from neglecting safety practices.

"These data show that cross-sector, cross-industry support for these rules is strong," Levine added. "The Office of Advocacy, sadly, remains behind the curve on what the small business community is actually looking for."

*The **American Sustainable Business Council** and the **ASBC Action Fund** represent a membership network of more than 200,000 businesses nationwide, and more than 325,000 entrepreneurs, executives, managers and investors. The Council* www.asbcouncil.org [1] *informs policy makers, business owners and the public about the need and opportunities for building a vibrant and sustainable economy. The Action Fund* www.asbcaction.org [2] *advocates for legislative change.*

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  - Trade
  - Worker Ownership

Thomas J. Ellis
HD-4
2/4/15

CITY OF BALTIMORE
COUNCIL BILL 14-0185R
(Resolution)

Introduced by: Councilmembers Kraft, Scott, Henry, Middleton, Mosby, Holton, Welch, Reisinger, Stokes, Branch, Clarke, Curran, President Young
Introduced and adopted: September 8, 2014

A COUNCIL RESOLUTION CONCERNING

In Support of the Definition of "Waters of the United States" Under the Clean Water Act Proposed by the Environmental Protection Agency and the Army Corps of Engineers.

FOR the purpose of supporting the Environmental Protection Agency's ("EPA") and the Army Corps of Engineers' (the "Corps") proposed definition of "Waters of the United States" under the Clean Water Act; helping to enhance the protection of our nation's public health and aquatic resources, and increasing the Clean Water Act's program predictability and consistency by clarifying the scope of the "Waters of the United States" protected under the Act.

Recitals

The waters of the United States are a treasured resource. In Maryland, the clean water that they provide protects public health, recreational resources, and economic livelihood.

The Clean Water Act is the fundamental federal law protecting the waters of the United States from pollution, degradation, and destruction. Strong federal standards are needed to provide these protections because water does not respect political boundaries. More than one thousand peer-reviewed, scientific studies have confirmed that headwater intermittent and ephemeral streams and wetlands affect the quantity and quality of water in larger bodies of water downstream.

Critical streams and wetlands which supply drinking water, protect against floods, and filter pollutants were once protected under the Clean Water Act. Federal policy changes over the last decade, however, have left these streams and wetlands vulnerable to degradation and destruction. These vulnerable waters of the United States, now unprotected and vulnerable, directly impact sources of drinking water for over 117 million Americans, including 3,990,016 residents here in Maryland.

Both the EPA and the Corps have proposed a clarification of the definition so that there is no misunderstanding all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act. Of particular importance is the fact that an additional proposal not only leaves in place all of the existing agricultural exemptions but also creates new exemptions for agricultural practices related to conservation.

According to Clean Water Action, this will restore protections to 2,210 miles of streams in Maryland that 77% of its residents depend upon for drinking water. In the greater Baltimore area that constitutes roughly 1.6 million people, including every one of our City residents.

EXPLANATION: Underlining indicates matter added by amendment.
~~Strike out~~ indicates matter deleted by amendment.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF BALTIMORE, that the Council supports the proposed definition of "*Waters of the United States*" under the Clean Water Act and urges the Environmental Protection Agency and the Army Corps of Engineers to take whatever actions deemed necessary to finalize these important protections for our nation's resources.

AND BE IT FURTHER RESOLVED, That a copy of this Resolution be sent to the Mayor; the Administrator of the U.S. Environmental Protection Agency; the Assistant Secretary of the Army, Department of the Army, Civil Works; The Maryland House and Senate Delegations to the 113th Congress; and the Mayor's Legislative Liaison to the City Council.

Donna Edwards
MD-4
2/4/15

14-R-32

RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF COLLEGE PARK, MARYLAND IN SUPPORT OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND ARMY CORPS OF ENGINEERS' PROPOSED *DEFINITION OF "WATERS OF THE UNITED STATES"* UNDER THE CLEAN WATER ACT

A resolution for the purpose of protection of public health, recreational resources, economic livelihood related to clean water, under the Waters of the United States as it provides an extraordinary value for the City of College Park.

WHEREAS, the Mayor and Council recognize that the Clean Water Act is the fundamental federal law protecting the Waters of the United States from pollution, degradation and destruction, and that strong federal standards are needed because water does not respect political boundaries; and

WHEREAS, critical streams and wetlands which supply drinking water, protect against floods and filter pollution previously were protected under the Clean Water Act, but federal policy changes over the last decade have left these streams and wetlands vulnerable to degradation or destruction; and

WHEREAS, these vulnerable waters of the United States impact sources of drinking water for over 117 million Americans, including 5,885,000 residents in Maryland; and

WHEREAS, more than 1,000 peer reviewed scientific studies have confirmed that headwater intermittent and ephemeral streams and wetlands affect the quantity and quality of water in larger bodies of water downstream; and

WHEREAS, the U.S. Environmental Protection Agency and Army Corps of Engineers have proposed a clarifying rulemaking that all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act, which will restore protections to 2210 miles of streams in Maryland that 77% of our residents depend on for drinking water.

NOW, THEREFORE, BE IT RESOLVED that the Mayor and Council of the City of College Park, Maryland supports the proposed *Definition of "Waters of the United States"* under the Clean Water Act and urges the Environmental Protection Agency and Army Corps of Engineers to finalize these important protections for our nation's water resources.

ADOPTED by the Mayor and Council of the City of College Park, Maryland at a regular meeting on the 14th day of October, 2014.

EFFECTIVE the 14th day of October, 2014.

WITNESS:

Janeen S. Miller
Janeen S. Miller, CMC, City Clerk

CITY OF COLLEGE PARK, MARYLAND

Andrew M. Fellows, Mayor

MD-4
2/4/15

Read: October 14,2014
Voted and Adopted: 10/14, 2014

RESOLUTION 2014 - 13

A Resolution of the Town of Capitol Heights for the support of the Environmental Protection Agency and Army Corps of Engineer's proposed *Definition of "Waters of the United States" Under the Clean Water Act.*

For the purpose of protection of public health, recreational resources, economic livelihood related to clean water, under the Waters of the United States as it provides an extraordinary value for the Town of Capitol Heights and;

WHEREAS, The Mayor and Council of the Town of Capitol Heights recognizes the Clean Water Act is the fundamental federal law protecting the Waters of the United States from pollution, degradation and destruction and strong federal standards are needed because water does not respect political boundaries; and

WHEREAS, critical streams and wetlands which supply drinking water, protect against floods and filter pollution previously were protected under the Clean Water Act, but federal policy changes over the last decade have left these streams and wetlands vulnerable to degradation or destruction; and

WHEREAS, these vulnerable waters of the United States impact sources of drinking water for over 117 million Americans, including 5,885,000 residents in Maryland; and

WHEREAS, more than 1,000 peer reviewed scientific studies have confirmed that headwater intermittent and ephemeral streams and wetlands affect the quantity and quality of water in larger bodies of water downstream; and

WHEREAS, the U.S. Environmental Protection Agency and Army Corps of Engineers have proposed a clarifying rulemaking that all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act and according to Clean Water Action will restore protections to 2210 miles of streams in Maryland that 77% of our residents depend on for drinking water.

BE IT FURTHER RESOLVED BY THE MAYOR AND COUNCIL OF THE TOWN OF CAPITOL HEIGHTS supports the proposed *Definition of "Waters of the United States"* under the Clean Water Act and urges the Environmental Protection Agency and Army Corps of Engineers to finalize these important protections for our nation's water resources. This Resolution shall take effect immediately.

READ AND PASSED THIS 14 day of October, 2014.

ATTEST:

Stevie Cox

Town Administrator

APPROVED:

Marnitta L. King

Mayor

Victor L. James, Sr.

Councilmember

Renita A. Cason

Renita A. Cason

Councilmember

Tamil Perry

Tamil Perry

Councilmember

Linda D. Monroe

Linda D. Monroe

Councilmember

Darrell Miller

Councilmember

Elaine Williams

Elaine Williams

Councilmember

Donna F. Edwards
MD-4
2/4/15

Mayor and Town Council
of Edmonston, Maryland

Resolution 2014 - 03

A resolution in support of the Environmental Protection Agency and the Army Corps of Engineers' proposed *Definition on "Waters of the United States"* under the Clean Water Act.

WHEREAS, The Mayor and Council recognize the Clean Water Act is the fundamental federal law protecting the Waters of the United States from pollution, degradation and destruction and strong federal standards are needed because water does not respect political boundaries; and

WHEREAS, critical streams and wetlands which supply drinking water, protect against floods and filter pollution previously were protected under the Clean Water Act, but federal policy changes over the last decade have left these streams and wetlands vulnerable to degradation or destruction; and

WHEREAS, these vulnerable waters of the United States impact sources of drinking water for over 117 million Americans, including 5,885,000 residents in Maryland; and

WHEREAS, more than 1,000 peer reviewed scientific studies have confirmed that headwater intermittent and ephemeral streams and wetlands affect the quantity and quality of water in larger bodies of water downstream; and

WHEREAS, the U.S. Environmental Protection Agency and Army Corps of Engineers have proposed a clarifying rulemaking that all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act and according to Clean Water Action will restore protections to 2210 miles of streams in Maryland that 77% of our residents depend on for drinking water.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and Town Council of the Town of Edmonston, Maryland supports the proposed *Definition of "Waters of the United States"* under the Clean Water Act and urges the Environmental Protection Agency and Army Corps of Engineers to finalize these important protections for our nation's water resources.

ADOPTED by the Mayor and Council of the Town of Edmonston, the 14th day of October, 2014

BY ORDER of the Mayor and Town Council, I hereby certify that Resolution Number 2014- 03 is true and correct and duly adopted by the Mayor and Town Council of the Town of Edmonston

ATTEST/WITNESS:

Town of Edmonston, Maryland
Tracy Gant, Mayor

Michelle Rodriguez, Town Clerk

Donna F. Edwards
MD-4
2/4/15

Town of Forest Heights
5508 ARAPAHOE DRIVE
FOREST HEIGHTS, MARYLAND 20745-1998
(301) 839-1030
Fax (301) 839-9236

Jacqueline Goodall
Mayor

October 20, 2014

The Honorable Gina McCarthy, Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works

Re: Docket ID # EPA-HQ-OW-20011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy,

The Town of Forest Heights Council and myself support the US Environmental Protection Agency and US Army Corps of Engineers proposed *Definition of "Waters of the United States Under the Clean Water Act"* to clarify which streams, wetlands and other waters are covered by Clean Water Act protections, Wetlands and small streams, including those that flow only seasonally, have a direct impact on the health and quality of larger streams and rivers downstream. Without the protection of Clean Water Act, the surface water that provides the life blood to people and wildlife will be in even greater peril.

For its first thirty years, the Clean Water Act safeguarded nearly all of our nation's waters. These protections are necessary to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as intended by Congress when it passed the Clean Water Act in 1972. Despite the law's dramatic progress at combating water pollution nationally, federal policy changes in the last decade have left many small streams and "isolated" wetlands vulnerable to pollution or destruction.
These federal policy changes have called into question Clean Water Act protections for nearly 60% of our nation's streams miles and at least 20 percent of the 110 million acres of wetlands in the continental United States. This confusion has put the drinking water for 117 million Americans at risk, including 5,773,552 people in the State of Maryland. Millions of small streams and wetlands provide most of the flow to our most treasured rivers, including Potomac River and the Chesapeake Bay. If we do not protect these networks of small streams that make up your watersheds we cannot protect and restore the lakes, rivers and bays that our economy and way of life depend on. We will also be jeopardizing jobs and revenue in businesses that depend on clean water, including outdoor activities like angling and water-based recreation.

As local and state decision makers, we believe broad federal protections are critical to protecting our local waters. Water flows downhill, and each of the lower 48 states have water bodies that are downstream of one or more other states. Maintaining consistency among water pollution programs throughout these states is essential. Since the passage of the Clean Water Act, states have come to rely on the Act's core provisions and have structured our own water pollution programs accordingly.

We support the draft rule's proposal to restore Clean Water Act protection to all tributaries of navigable waterways. Failure to do so would jeopardize water quality in our larger riversheds and estuaries. It would also put at risk the millions of dollars and thousands of jobs generated by water related tourism activities and other businesses that are dependent on clean water supplies.

This commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade and better protection for critical water resources on which our communities depend. We strongly support finalization of *Definition of "Waters of the United States Under the Clean Water Act."*

Sincerely,

Jacqueline Goodall, Mayor
Town of Forest Heights

CC: US Senators and Representatives

Donna F. Edwards
MD-4
2/4/15

THE TOWN OF FOREST HEIGHTS
RESOLUTION 67-14

A RESOLUTION SUPPORTING THE ENVIRONMENTAL PROTECTION AGENCY AND ARMY CORPS OF ENGINEERS' PROPOSED *DEFINITION ON "WATERS OF THE UNITED STATES"* UNDER THE CLEAN WATER ACT

Introduced By:

WHEREAS, The Mayor and Council recognize the Clean Water Act is the fundamental federal law protecting the Waters of the United States from pollution, degradation and destruction and strong federal standards are needed because water does not respect political boundaries; and

WHEREAS, critical streams and wetlands which supply drinking water, protect against floods and filter pollution previously were protected under the Clean Water Act, but federal policy changes over the last decade have left these streams and wetlands vulnerable to degradation or destruction; and

WHEREAS, these vulnerable waters of the United States impact sources of drinking water for over 117 million Americans, including 5,885,000 residents in Maryland; and

WHEREAS, more than 1,000 peer reviewed scientific studies have confirmed that headwater intermittent and ephemeral streams and wetlands affect the quantity and quality of water in larger bodies of water downstream; and

WHEREAS, the U.S. Environmental Protection Agency and Army Corps of Engineers have proposed a clarifying rulemaking that all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act and according to Clean Water Action will restore protections to 2210 miles of streams in Maryland that 77% of our residents depend on for drinking water.

NOW, THEREFORE, BE IT FURTHER RESOLVED that the Mayor and Town Council hereby support proposed *Definition of "Waters of the United States"* under the Clean Water Act and urges the Environmental Protection Agency and Army Corps of Engineers to finalize these important protections for our nation's water resources.

APPROVED: By Resolution of the Town Council of The Town of Forest Heights, Maryland

ROLL CALL VOTE	YEA/NAY/ABSTAIN/ABSENT
GOODALL	YEA
KENNEDY II	YEA
STONER	YEA
BARNES	YEA

THE TOWN OF FOREST HEIGHTS
RESOLUTION 67-14

MANN	YEA
SMITH-BARNES	YEA
MUHAMMAD	YEA

I HEREBY CERTIFY that the above Resolution No. 67-14 was passed by the required yea and nay votes of the Mayor and Council of the Town of Forest Heights on the 3rd day of November 2014.

ATTEST:

SIGNATURE ON FILE

Bonita Anderson, Town Clerk

THE MAYOR AND COUNCIL OF THE TOWN OF FOREST HEIGHTS

SIGNATURE ON FILE

By: Jacqueline Goodall, Mayor

SIGNATURE ON FILE

By: Cynthia Mann, Council President

Resolution ##-2014
Page 1 of 2

Donna F. Edwards
MD-4
2/14/15

Introduced Read and Adopted 11/5 2014
Amended ____, 2014
Posted ____ to ____, 2014

CITY OF MOUNT RAINIER
RESOLUTION ##-2014
13

A Resolution in support of the Environmental Protection Agency and Army Corps of Engineer's proposed *Definition of "Waters of the United States" Under the Clean Water Act.*

WHEREAS, the Mayor and Council recognizes the Clean Water Act is the fundamental federal law protecting the Waters of the United States from pollution, degradation and destruction and strong federal standards are needed because water does not respect political boundaries; and

WHEREAS, critical streams and wetlands which supply drinking water, protect against floods and filter pollution previously were protected under the Clean Water Act, but federal policy changes over the last decade have left these streams and wetlands vulnerable to degradation or destruction; and

WHEREAS, these vulnerable waters of the United States impact sources of drinking water for over 117 million Americans, including 5,885,000 residents in Maryland; and

WHEREAS, more than 1,000 peer reviewed scientific studies have confirmed that headwater intermittent and ephemeral streams and wetlands affect the quantity and quality of water in larger bodies of water downstream; and

WHEREAS, the U.S. Environmental Protection Agency and Army Corps of Engineers have proposed a clarifying rulemaking that all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act and according to Clean Water Action will restore protections to 2210 miles of streams in Maryland that 77% of our residents depend on for drinking water.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL, show support for the proposed *Definition of "Waters of the United States"* under the Clean Water Act and urges the Environmental Protection Agency and Army Corps of Engineers to finalize these important protections for our nation's water resources.

Attest

Jeannette Gallese
City Manager

Mayor Malinda Miles

Jesse Christopherson

Jeremy Carlson

Brent Bailie

Donna F. Edwards
MD-4
2/4/15

Resolution 15-07
Support of Revised Clean Water Act Definition

October 15, 2014

FOR THE PURPOSE OF RESOLVING TO SUPPORT THE ENVIRONMENTAL PROTECTION AGENCY AND ARMY CORPS OF ENGINEERS' PROPOSED DEFINITION ON "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT.

WHEREAS, the Clean Water Act is the fundamental federal law protecting the Waters of the United States from pollution, degradation and destruction and strong federal standards are needed because water does not respect political boundaries; and

WHEREAS, critical streams and wetlands which supply drinking water, protect against floods and filter pollution previously were protected under the Clean Water Act, but federal policy changes over the last decade have left these streams and wetlands vulnerable to degradation or destruction; and

WHEREAS, these vulnerable waters of the United States impact sources of drinking water for over 117 million Americans, including 5,928,814 residents in Maryland; and

WHEREAS, more than 1,000 peer reviewed scientific studies have confirmed that headwater intermittent and ephemeral streams and wetlands affect the quantity and quality of water in larger bodies of water downstream; and

WHEREAS, the U.S. Environmental Protection Agency and Army Corps of Engineers have proposed a clarifying rulemaking that all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act and according to Clean Water Action will restore protections to 2210 miles of streams in Maryland that 77% of our residents depend on for drinking water.

NOW, THEREFORE, BE IT HEREBY RESOLVED, by the City Council of New Carrollton, Maryland that the Mayor of the City of New Carrollton be, and is specifically, authorized to support the proposed Definition of "Waters of the United States" under the Clean Water Act and urges the Environmental Protection Agency and Army Corps of Engineers to finalize these important protections for our nation's water resources.

ADOPTED AND ENACTED BY THE CITY COUNCIL OF THE CITY OF NEW CARROLLTON, MARYLAND THIS 15TH DAY OF OCTOBER, 2014.

SIGNED:

Katrina R. Dodro

Katrina R. Dodro
Chair
City Council

ATTEST:

Douglass A. Barber

Douglass A. Barber, CMC
City Clerk

APPROVED:

Andrew C. Hanko

Andrew C. Hanko
Mayor

City of Rockville
111 Maryland Avenue
Rockville, Maryland
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www.rockvillemd.gov

240-314-5000
TTY 240-314-8137

Donna F. Edwards
MD-4
2/4/15

October 15, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Re: Docket ID No. EPA-HQ-OW-2011-0880

Dear Sir or Madam:

On behalf of the Mayor and Council of Rockville, Maryland, the City would like to provide comment on the proposed regulatory definition of Waters of the United States jointly proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers on April 21, 2014. The proposed rule seeks to clarify the existing definition of "waters of the United States" used to determine where the Clean Water Act programs are implemented by the two agencies.

Rockville supports the rulemaking and encourages the agencies to provide even greater clarity in the final rule. Rockville is a Maryland leader in developing and implementing local environmental and sustainability programs. The City has a population of over 63,000, and three watersheds flow through our jurisdiction. Like many other cities in the country, we grapple with water pollution from our urban landscape. Rockville was the first local government in Maryland to adopt a stormwater regulatory program (1978), nearly ten years before the Clean Water Act required such programs. Further, the City holds four separate NPDES permits for various City discharges.

The City recognizes that the Clean Water Act provides essential safeguards for maintaining clean and healthy rivers and streams, as well as protections for people and wildlife that call these watersheds home.

Rockville applauds the agencies for proposing to revise the existing definition to conform to recent Supreme Court cases. The City understands that for the last several years, EPA and the Corps of Engineers have been filling this gap with program guidance to field staff. Rockville supports the agencies' efforts to bring increased certainty and predictability to this fundamental Clean Water Act definition and the City believes the proposed rule goes a long way toward that end. Rockville encourages the agencies to include even more specificity in the final rule to ensure that it is as clear as possible and reduce the possibility of

further litigation. For example, the City recommends that a definition of "ditches draining uplands" be added to the final rule.

The City acknowledges that the lack of specificity in the existing rule has led to the confusion, controversy, and litigation resulting in this proposal. The proposal seeks to

simplify the decision making process in the field and reduce the possibility of further litigation over whether a given water body is covered by the Clean Water Act's provisions.

Rockville is currently awaiting the reissuance of our MS4 general permit by the Maryland Department of the Environment. The delay in receiving this permit is hindering our ability to designate appropriate resources and evaluate the effectiveness of the measures that the City has already put into place meet the goals regarding Chesapeake Bay restoration. To the extent that some of this delay may be attributed to the pending definitional change, the City encourages the agencies to move expeditiously forward to complete the rulemaking.

The City firmly believes additional clarity in rulemakings always improves understanding and implementation of federal, state, and local environmental programs.

Sincerely,

Bridget Donnell Newton, Mayor

Beryl L. Feinberg, Councilmember

Tom Moore, Councilmember

Virginia D. Onley, Councilmember

Julie Palakovich Carr, Councilmember

The Mayor and Council of Rockville

Nina Ecker
MD-4
2/4/15

CLEAN WATER ACTION
MARYLAND

November 14, 2014

The Honorable Gina McCarthy
Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue
Washington, DC 20460

Re: Clean Water Rule Docket ID # EPA-HQ-OW-20011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

We, the undersigned state and local decision makers support the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed *Definition of "Waters of the United States Under the Clean Water Act"* to clarify which streams, wetlands and other waters are protected as Congress originally intended when it passed its landmark Clean Water Act in 1972.

For its first thirty years, the Clean Water Act safeguarded nearly all of our rivers, streams, lakes and wetlands in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." However, despite the law's dramatic progress at combating water pollution nationally, federal policy changes in the last decade have left many small streams and "isolated" wetlands vulnerable to pollution or destruction. These federal policy changes have called into question Clean Water Act protections for nearly 60% of our nation's stream miles and at least 20 million acres of wetlands in the continental United States.

Maryland's economy and quality of life has always depended on the protection and accessibility of clean water. Since the passage of the Clean Water Act, states have come to rely on the Act's core provisions and have structured our own water pollution programs accordingly. EPA's regulation in this area historically has been a prime example of the vital partnership between the states and federal government.

We support the proposed rule for the clear protections it restores to headwaters, intermittent and ephemeral streams, and to wetlands and other waters located near or within the floodplain of these tributaries. We urge the Agencies to strengthen the final rule by further clarifying that important wetlands and other waters located beyond floodplains are also categorically protected under the Clean Water Act.

Headwater and seasonal streams feed the drinking water sources of 117 million Americans, including 3,990,016 residents in Maryland. Clarifying that all tributary streams, regardless of size or frequency of flow are covered

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1120 N. Charles Street, Suite 415 | Baltimore, MD 21201
Phone: 410.235.8808 | Fax: 410.235.8816
www.cleanwateraction.org/md

under the Clean Water Act will restore protections to 2,210 miles of streams in Maryland that 77% of our residents depend on for drinking water. In several jurisdictions the number is as high as 100% of residents. Millions of small streams and wetlands provide most of the flow to our most treasured rivers that feed the Chesapeake Bay. If we do not protect these streams and wetlands, we cannot protect the livelihood on which communities and local economies depend. Leaving critical water resources vulnerable jeopardizes drinking water sources, public health and quality of life, as well as jobs and revenue for businesses that depend on clean water, including commercial fishing, outdoor activities and water-based recreation.

We support the Agencies' proposal to define all tributaries as "waters of the United States," including headwaters and small streams that may only flow seasonally.

Headwater streams, streams that have no other streams feeding into them, provide most of the flow to downstream streams and rivers, and account for 59% of the total stream miles in Maryland. In 2007, EPA estimated that 46% of individual NPDES discharge permits in Maryland are for discharges into headwater streams, including some streams that do not flow year round. As Maryland finalizes its next round of permits maintaining consistency among water pollution programs throughout the states and local jurisdictions is essential.

Intermittent and ephemeral streams may only flow during parts of the year, but they support water quality in downstream waters by filtering pollutants and capturing nutrients and making up 19% of streams in Maryland do not flow year round. These streams are also critical habitat for fish and other aquatic species. There is great potential for re-connecting and protecting the many miles of river and stream systems flowing throughout Maryland and into the Chesapeake Bay. These waters benefit resident freshwater and saltwater fish and wildlife alike, contributing significantly to the state's economy in commercial fishing industry, recreation and tourism.

As a major producer and processor of seafood in the U.S., Maryland is a national leader in supplying blue crabs and soft clams. The Chesapeake Bay provides 50% of the total blue crab harvest in the United States. Important commercial species, besides blue crabs and soft clams, including striped bass, oysters, flounder, perch, spot, croaker, catfish, sea trout, and bluefish add to the economic importance of the state's fishing industry. Each year, the Maryland seafood industry contributes some $600 million to the State's economy. Annual commercial landings have averaged 56.9 million pounds since 2000. The Agencies' proposal for protecting water resources is critical to the continuation and growth of this industry in Maryland and nationally.

Protecting small streams and wetlands is also vital for to the state's vibrant recreation and tourism industries as an essential driver of economic activity, bringing in revenue from residents and out-of-state visitors alike. Outdoor recreation attracts and sustains families and businesses, creates healthy communities and fosters a high quality of life. At least 43% of Marylanders participate in outdoor recreation each year. Overall outdoor recreation generated $9.5 billion in consumer spending in Maryland and supports 85,000 jobs. Additionally, the economic impact of tourism in Maryland is significant. More than 35.4 million people visited Maryland in 2012 and spent $14.9 billion on travel and other related activities.

Many of the names of our cities, towns and hamlets have their roots and derive their names from the very rivers, streams or water-bodies where they are located and have harnessed the abundant water supplies that fueled their local economies. Today many of these locations have transformed themselves into recreation and river tourism

areas. A 2011 US Census survey found that 1.6 million residents and nonresidents over the age of 16 fished, hunted, or wildlife watched, generating $1.3 billion in economic revenue for Marylanders.

As state and local decision makers we know that society operates best when there is regulatory certainty. We value the protection that the EPA and Army Corps guarantee for our water supply – consistent regulations that limit pollution and protect water at its source will enable Maryland to thrive and expand its economy. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade, eliminate permit confusion and delay, and better protect the critical water resources on which our communities depend.

Clean water is our state's lifeblood and is inextricably tied to the quality of life of our citizens. It drives us to become better stewards of our water resources, creating policies to address water purity, consumption and management issues. The Agencies' commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. Supporting policies that minimize our impact on water resources is part of being a responsible leader and representative. For these reasons, we support the draft rule's proposal to restore Clean Water Act protections to all tributaries of navigable waterways and encourage the Agencies to finalize the proposal without delay and reject any efforts to weaken it.

We thank the Agencies for their efforts to protect these waters and look forward to the final approval and implement of a strong *"Definition of Waters of the United States under the Clean Water Act."*

Sincerely,

Paul Pinsky
Maryland State Senate
22nd Legislative District

Jamie Raskin
Maryland State Senate
20th Legislative District

Karen Montgomery
Maryland State Senate
14th Legislative District

Roger Manno
Maryland State Senate
19th Legislative District

Richard Madaleno
Maryland State Senate
18th Legislative District

Delores Kelley
Maryland State Senate
10th Legislative District

Joanne Benson
Maryland State Senate
24th Legislative District

Ron Young
Maryland State Senate
3rd Legislative District

Shirley Nathan-Pulliam, RN
Maryland State Senate-Elect
10th Legislative District

Susan Lee
Maryland State Senate-Elect
16th Legislative District

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www.cleanwateraction.org/md

Cheryl Kagan
Maryland State Senate-Elect
17th Legislative District

Chairwoman Sheila Hixson
Maryland House of Delegates
20th Legislative District

Elizabeth Bobo
Maryland House of Delegates
12B Legislative District

Dan Morhaim
Maryland House of Delegates
11th Legislative District

Tom Hucker
Maryland House of Delegates
20th Legislative District

Barbara Frush
Maryland House of Delegates
21st Legislative District

David Fraser-Hidalgo
Maryland House of Delegates
15th Legislative District

Joseline Pena-Melnyk
Maryland House of Delegates
21st Legislative District

Shane Robinson
Maryland House of Delegates
39th Legislative District

Alfred Carr
Maryland House of Delegates
18th Legislative District

Heather Mizeur
Maryland House of Delegates
20th Legislative District

Mary Washington, PhD
Maryland House of Delegates
43rd Legislative District

Nathanial McFadden
Maryland State Senate
45th Legislative District

Terri Hill, M.D.
Maryland House of Delegates-Elect
12th Legislative District

Stephen Lafferty
Maryland House of Delegates
42nd Legislative District

Ana Sol Gutierrez
Maryland House of Delegates
18th Legislative District

Eric Bromwell
Maryland House of Delegates
8th Legislative District

Jeffery Waldstreicher
Maryland House of Delegates
18th Legislative District

Andrew Platt
Maryland House of Delegates-Elect
17th Legislative District

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www.cleanwateraction.org/md

The Honorable Gina McCarthy
Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works

Donna F. Edwards
MD-4
2/4/15

November 14, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue
Washington, DC 20460

Email to: ow-docket@epa.gov

Re: Clean Water Rule Docket ID #EPA-HQ-OW-20011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The undersigned owners and partners of craft breweries in Maryland support the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed *Definition of "Waters of the United States Under the Clean Water Act"* to clarify which streams, wetlands and other waters are protected under the Clean Water Act. American industries require clean and ample water supplies. American craft brewers especially depend on high quality clean water to produce our products.

Having a healthy water source is critical to our product. Beer itself is 95 percent water and without clean water, we cannot make great beer. In Maryland, many of the main sources of water to our breweries are protected by the Clean Water Act. But many of the wetlands that filter water and intermittent streams that feed these sources are not.

As business owners that have carved out a unique niche in the marketplace craft brewers rely on plentiful supplies of clean water to produce a safe and high quality product. This is certainly represented by the true economic impact that we have generated by tapping into strong consumer demand in Maryland. According to the Brewer's Association, the beverage industry uses more than 12 billion gallons of water annually to produce products valued at $58 billion. Small and independent craft brewers contributed $33.9 billion to the U.S. Economy in 2012 and provided more than 360,000 jobs.

In Maryland, craft brewers contributed $455.5 million to the economy in 2013 alone. The Agencies' proposal for protecting water resources is critical to the continued growth of industry in Maryland and nationally.

The science is clear that what happens upstream, in small streams and wetlands, impacts the quality and health of downstream tributaries and larger rivers. EPA's proposal recognizes the importance of wetlands and headwaters to rivers and streams downriver, and protecting these water resources is critical to the continued growth of the craft brew and microbrew industry in Maryland and nationally.

Maryland businesses have always depended on the availability of clean water for success. EPA's regulation in this area historically has been a prime example of the vital partnership between business and government. Clean and abundant water is the most important ingredient in our beer, and this action by the Agencies gives us the confidence that our growing businesses need to continue to thrive.

We value the protection that the EPA and Army Corps guarantee for our water supply – consistent regulations that limit pollution and protect water at its source enable our businesses to thrive and expand the local economies in which we work. We encourage the Agencies to finalize the proposed rule, Definition of "Waters of the United States," without delay and reject any efforts to weaken the proposal.

Sincerely,

Union Craft Brewing Co.
Jon Zerwitz
Co-Founder
1700 D Union Avenue
Baltimore, Maryland 21211

The Honorable Gina McCarthy
Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works

Donna F. Edwards
MD-4
2/4/15

November 14, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue
Washington, DC 20460

Email to: ow-docket@epa.gov

Re: Clean Water Rule Docket ID #EPA-HQ-OW-20011-0880

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The science is clear that what happens upstream, in small streams and wetlands, impacts the quality and health of downstream tributaries and larger rivers. EPA's proposal recognizes the importance of wetlands and headwaters to rivers and streams downriver, and protecting these water resources is critical to the continued growth of the craft brew and microbrew industry in Maryland and nationally.

Maryland businesses have always depended on the availability of clean water for success. EPA's regulation in this area historically has been a prime example of the vital partnership between business and government. Clean and abundant water is the most important ingredient in our beer, and this action by the Agencies gives us the confidence that our growing businesses need to continue to thrive.

We value the protection that the EPA and Army Corps guarantee for our water supply – consistent regulations that limit pollution and protect water at its source enable our businesses to thrive and expand the local economies in which we work. We encourage the Agencies to finalize the proposed rule, Definition of "Waters of the United States," without delay and reject any efforts to weaken the proposal.

Sincerely,

Heavy Seas Brewing Co.
Hugh Sisson
Founder
4615 Hollins Ferry Road
Halethorpe, Maryland 21227

The Honorable Gina McCarthy
Administrator
US Environmental Protection Agency

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
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Environmental Protection Agency
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The undersigned Maryland business supports the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed *Definition of "Waters of the United States Under the Clean Water Act"* to clarify which streams, wetlands and other waters are protected under the Clean Water Act. Clean and abundant water is the most important facet to our businesses, and this action by the Agencies gives us the confidence that our growing businesses need to continue to thrive.

The science is clear that what happens upstream, in small streams and wetlands, impacts the quality and health of downstream tributaries and larger rivers. These waters contribute to our drinking water supplies, support industry and recreational businesses, reduce flooding and property damage. Protecting streams and wetlands s is not only common-sense, it ensures the quality of water used in our manufacturing and production processes.

Maryland businesses have always depended on the availability of clean water for success. EPA's regulation in this area historically has been a prime example of the vital partnership between business and government. Food producers, high tech industries, outdoor recreation companies and beer manufacturers are just some of the businesses that rely on clean water to produce high quality and safe products and services.

As business owners, we recognize that plentiful supplies of clean water are as important to our business as the customers that walk through our front doors. This is certainly represented by the true economic impact that we have generated by tapping into strong consumer demand in Maryland and nationally. For example, according to The Brewer's Association, beverage industry uses more than 12 billion gallons of water annually to produce products valued at $58

billion. Small and independent craft brewers contributed $33.9 billion to the U.S. Economy in 2012 and provided more than 360,000 jobs. In Maryland, craft brewers contributed $455.5 million to the economy in 2013 alone. The Agencies' proposal for protecting water resources is critical to the continued growth of industry in Maryland and nationally.

Many of the names of Maryland businesses and locations have their roots in the very rivers, streams or water-bodies that harnessed the abundant water supplies that fueled their local economies. Today many of these locations have transformed themselves into recreation and river tourism areas. A 2011 US Census survey found that 1.6 million residents and nonresidents over the age of 16 fished, hunted, or wildlife watched, generating $1.3 billion in economic revenue for Marylanders.

Clean water is our lifeblood and is inextricably tied to the quality of our products and services. Recognizing this drives us to become better stewards of our water resources, which is why we continue to strive to address water purity, consumption and management concerns. We believe that supporting policies that minimize our impact on water resources is part of being a good corporate citizen and community partner.

American businesses operate best in an environment of regulatory certainty. We value the protection that the EPA and Army Corps guarantee for our water supply – consistent regulations that limit pollution and protect water at its source enable our businesses to thrive and expand the local economies in which we work. We encourage the Agencies to finalize the proposed rule, definition of "Waters of the United States," without delay and reject any efforts to weaken it.

Sincerely,

Hereford Bed &Biscuit
Thomas Durst
Owner
1201 Brandy Springs Road
Parkton, Maryland 21120

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Docket ID No. EPA–HQ–OW–2011–0880

Comments to the

Definition of "Waters of the United States"

Under the Clean Water Act,

79 Fed. Reg. 22188 (April 21, 2014)

Submitted on behalf of the League of Nebraska Municipalities by:

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PREFACE

Since 1909, the League of Nebraska Municipalities (the "League") has served as a voice for Nebraska municipalities in proceedings before state and federal agencies, tribunals, courts, and legislative and executive branches of government. The mission of the League and its member cities and villages is to preserve local control and empower municipal officials to provide effective leadership and improve the quality of life for their citizens.

The League appreciates the opportunity to submit these comments on the proposed *Definition of "Waters of the United States"* (hereafter "WOTUS") *Under the Clean Water Act,*[1] ("CWA") (collectively, the "Proposed Rule") issued by the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") (collectively, the "Agencies").

INTRODUCTION

The League's members face the ongoing challenge of planning, managing and financing the necessary infrastructure to handle wastewater, stormwater, and flood control systems, as well as provide drinking water, electricity, and natural gas[2] to 98% of Nebraskans living in municipalities. Each of these systems and utilities is subject to layers of state-based permitting programs and regulatory measures administered by the Nebraska Department of Environmental Quality ("NDEQ")[3], the Nebraska Department of Natural Resources ("DNR")[4], and Natural Resources Districts ("NRDs")[5], in addition to federal CWA permitting requirements under section 404 (administered by the Corps), and sections 303, 305, 311, 401, and 402 (administered by NDEQ with oversight from EPA).

Land values and access to water are two major components which dictate decisions by agricultural producers and private industry to locate facilities and engage in development activities.[6] These decisions are not only critical to creating and retaining jobs within Nebraska's 530 municipalities, but also bolster the local tax base upon which the League's members must rely in order to carry out statutory duties and responsibilities, which include the construction and maintenance of roads and wastewater, stormwater, and flood control systems, through the levy of

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[1] 79 Fed. Reg. 22188 (April 21, 2014)

[2] The League's members not only provide general governmental services, but also operate and manage publicly-owned utility systems. Of 530 municipalities in Nebraska, 463 own and operate water distribution systems, 122 own and operate electric distribution systems, 13 own and operate natural gas distribution systems, and over 400 own and operate wastewater collection and treatment systems.

[3] Nebraska Environmental Protection Act, NEB. REV. STAT. 81-1501, *et seq.*

[4] Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106.

[5] NEB. REV. STAT. §§ 2-3201 *et seq.* Each NRD is charged by statute with the regulation and administration of groundwater quantity and quality within their respective territory.

[6] Agricultural production and groundwater-dependent development form the backbone of Nebraska's economy. *See, e.g.*, Spencer Parkinson, Decision Innovation Solutions, "Economic Impact of the Ability of Nebraska Agriculture to Irrigate - The Case of 2012." November 26, 2012. http://www.nefb.org/resources/handlers/StorageContainer.ashx?path=b9f7ee3f-8bd1-42b7-91a8-f735dc64668e.

taxes, the issuance of bonds, and receipt of matching funds through partnerships with state and federal agencies.

Permit requirements under the CWA already add an additional layer of federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps' Omaha District Office, individual permits under section 404 of the CWA (hereafter "404 Permits") currently take up to eighteen (18) months to process. Permitting costs typically range between $25,000 and $100,000, accounting for legal, technical and logistical (e.g., mitigation) costs. Engaging the Corps in the permit application process is no guarantee a permit will be granted; in those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the Proposed Rule's expansion of the scope of federal jurisdiction, and will directly impinge on land-use decisions at the state and local level.

Furthermore, changes to the federal definition of WOTUS will impact the administration of CWA permit programs administered by NDEQ (section 402 NPDES permits, section 303 and 305 Water Quality Standards and TMDLs, and section 401 State Certification). The Proposed Rule's broad expansion of jurisdiction will not only require an in-depth review of NDEQ's rules, regulations, and CWA permitting procedures, but will also result in significant cost increases for the regulated community and overall delay in the development process.

The League supports the Agencies' goals of improving predictability and clarifying the scope of WOTUS under the CWA.[7] However, the Agencies seek to accomplish these goals through an unprecedented reliance on undefined groundwater connections, and non-hydrologic connections previously rejected by the Supreme Court, as the basis for the assertion of federal jurisdiction over any isolated intrastate body of water. The Agencies' flawed assumptions effectively shift the burden of proving liability under the CWA to the regulated community and ignore the impacts to numerous permit programs which incorporate the WOTUS definition. Within the Proposed Rule, the Agencies have also left open the question of whether or how current exemptions from the CWA will be retained. Furthermore, the Agencies have failed to comply with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (collectively, the "RFA")[8], which sets forth procedural steps designed to safeguard small governmental jurisdictions, which include all but two of Nebraska's 530 municipalities.

For these reasons, the Proposed Rule should be withdrawn. Below are detailed comments addressing the Agencies' impermissible expansion of federal jurisdiction, omission of current exemptions from the CWA, and failure to comply with the RFA.

[7] 79 Fed. Reg. 22188

[8] 5 U.S.C. §§ 601 *et seq.*

I. The Proposed Rule impermissibly expands the scope of CWA jurisdiction and effectively shifts the Agencies' burden of proof to the regulated community.

Under the CWA, the Agencies carry the burden of proving a person discharged a pollutant from a point source into a WOTUS without a permit. Under the current rule, jurisdiction is not always assumed, and a case-by-case, site-specific determination is often made by the Corps and NDEQ to determine whether jurisdiction will be asserted under the CWA.[9] Therefore, many of the projects and development activities undertaken by the League's members, as well as private landowners, irrigation districts, drainage districts, and small businesses located within the jurisdictional territories of the League's members are unpermitted by the Corps, or NDEQ, pursuant to the CWA.

Rather than respect constitutional constraints on the authority granted under the CWA, and set forth in *Solid Waste Agency of No. Cook Cty v. Corps of Engineers* ("SWANCC")[10] and *Rapanos v. U.S.,*[11] and their lineage, the Agencies have relied on overly broad scientific justifications (many tenuous at best) to convert the "significant nexus" concept (a legal term of art) into a sweeping regulatory tool under which *any* chemical, physical, or biological connection, alone or in the aggregate, legitimizes the Agencies' exercise of jurisdictional authority under the Proposed Rule.

Specifically, the Proposed Rule's expansive definitions of "neighboring," "riparian," and "tributary" expand the scope of presumed federal jurisdiction upon any showing by the Agencies that a chemical, physical, or biological connection between an isolated intrastate body or conveyance of water and a traditionally navigable body of water is not insignificant.

A. The new definitions of "neighboring" and "riparian area"

The Proposed Rule alters a current category of jurisdictional waters to include "**all waters** (not just wetlands) **adjacent**" to waters susceptible to use in interstate or foreign commerce, waters subject to the ebb and flow of the tide, impoundments and tributaries of such waters, and the territorial seas ("Proposed 1-5 Waters").[12] For these waters, jurisdiction is assumed by rule, and no case-by-case determination will be made by the Agencies to justify federal regulation.

Within the definition of the term "adjacency" is the term "neighboring" which is newly defined as all waters located within a riparian area or floodplain, as well as waters with a "shallow subsurface hydrologic connection" to Proposed 1-5 Waters. Also included within the term "neighboring" is the term "riparian area," which includes any area "bordering where surface or subsurface hydrology directly influence ... the animal community."

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[9] *See, e.g.*, Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.*, dated December 2 , 2008 (http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/juris_images.pdf); Title 119, NDEQ's Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System (http://deq.ne.gov/RuleAndR.nsf/Title_119.xsp).

[10] 121 S. Ct. 675 (2001)

[11] 126 S. Ct. 2208 (2006)

[12] 40 C.F.R. 230.3(s)(6)

No definition is provided for the scope of "shallow subsurface hydrologic connection" or "subsurface hydrology." Much of Nebraska has a relatively high groundwater table,[13] and the interconnection between groundwater sources and local river systems makes it unlikely that the League's member municipalities, or landowners within their respective jurisdictions, could engage in development activities or construct and maintain wastewater, stormwater, and flood control systems without creating some form of open water that would fall within the category of "adjacent waters."

In support of these sweeping definitions, the Agencies have also cited to overland migration patterns of plant and animal species, which ironically require **the absence of a surface hydrologic connection**. Remarkably, the Proposed Rule explicitly states that hydrologic connections are **not** necessary to establish jurisdiction where it can be shown that overland migration patterns of plants and animals establish links between and among water bodies.[14] Regardless of the number of species of plants or animals cited by the Agencies, this approach is no different than the previously-rejected Migratory Bird Rule,[15] which similarly failed to require any surface water connection between an isolated water and a traditionally navigable water.

B. The new definition of "tributary"

Under the Proposed Rule, a "tributary" is categorically jurisdictional, and includes wetlands, lakes, ponds, impoundments, canals, and ditches, whether natural, man-altered, or man-made, if they contribute flow either directly **or through another water** to an interstate water, interstate wetlands, or territorial sea.[16] No meaningful exemption from this definition is provided,[17] and no case-by-case determination as to the jurisdictional status of the water will be made. Under the plain language of the Proposed Rule, this means **any** hydrologic connection to a traditionally navigable water, interstate water, or interstate wetland, will result in the characterization of an isolated intrastate body or conveyance of water as a "tributary."

In Nebraska's large river valleys, it is impossible to engage in development or construction activities without creating some form of open water with some remote hydrologic connection to a traditionally navigable water, or other interstate water or interstate wetland.[18] Moreover, decades of development have also resulted in an extensive network of ditches throughout communities and along roads and agricultural properties, which terminate, at some point, in a

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[13] *See* Exhibit A, image depicting depth to groundwater in Nebraska

[14] 79 FR 22240, 22242, 22249 (discussing how overland movements of plants and animals establish the jurisdictional links between waters).

[15] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA "to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA."

[16] 40 CFR 230.3(u)(5) (emphasis supplied).

[17] *Id.* Exempt from the definition of "tributary" are ditches that "drain only uplands" and "do not contribute flow either directly or through another water" to any traditionally navigable water, interstate water, interstate wetland, or territorial sea.

[18] *See* Exhibit B, image depicting drainage basins of major rivers within Nebraska; *see also* Exhibit C, image depicting wetlands identified by EPA Region 7.

conveyance to a traditionally navigable water, interstate water, interstate wetland, or territorial sea. Under the Proposed Rule, every segment of these conveyances would qualify as a "tributary" and federal jurisdiction under the CWA would be presumed.

The images attached hereto as Exhibits A, B, and C drive home the magnitude of the proposed expansion of federal CWA jurisdiction due to the Agencies' expansive definitions of "neighboring," "riparian," and "tributary." As plainly illustrated in the attachments, no portion of Nebraska is outside of a floodplain, or lacking some form of a subsurface or remote hydrologic connection either directly, or through another water, to an interstate water. Thus, for all practical purposes, any ditch, wastewater, stormwater, or flood control system, or development activities undertaken by private individuals, entities, and other governmental units within the municipalities' jurisdictions would be immediately subjected to federal CWA jurisdiction, absent any showing by the Agencies that site-specific connections to interstate surface waters are in fact significant.

The maps illustrate the sweeping impact of the Proposed Rule's expansive definitions of categorically jurisdictional waters: by presuming all open intrastate bodies or conveyances of water have some chemical, physical, or biological connection to a traditionally navigable water that is not insignificant, every member of the regulated community will be saddled with the expensive, time-consuming burden of proving such connections are not significant.

Prior attempts to assert jurisdiction over isolated intrastate bodies or conveyances of water, whether through broad definitions of statutory terms or through identifying isolated waters as habitat for migratory birds, have been rejected as an overreach of the authority granted by the Clean Water Act.[19] The Proposed Rule is yet another attempt to expand federal jurisdiction over conceivably all waters through exactly the same means.

II. The Proposed Rule Indirectly Asserts Federal Control Over Groundwater and Local Land-Use Decisions.

By relying on shallow subsurface groundwater connections to justify categorical jurisdiction over otherwise isolated intrastate bodies or conveyances of water, the Agencies are indirectly regulating groundwater, over which the States alone have jurisdiction. The Court has established limits on the scope of the Agencies' authority under the Clean Water Act, holding in *Rapanos*:

> [C]lean water is not the *only* purpose of the [CWA]. **So is the preservation of primary state responsibility for ordinary land-use decisions**. ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that 'significantly affect the chemical, physical, and biological integrity of 'waters of the United States.' **It did not do that**[.]"

[19] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA "to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA." *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455 (1985) (the concept of adjacency is defined as wetlands that actually abutted on a navigable waterway).

Rapanos v. United States, 547 U.S. 715, 755-56, 126 S. Ct. 2208, 2234 (2006) (emphasis supplied).[20] The structure of the CWA indicates that Congress did not intend groundwater and navigable waters to be synonymous. As explained by the District Court in *Washington Wilderness Coal. v. Hecla Min. Co.*:

> If the terms were synonymous, it would not be necessary for Congress to make distinct references to groundwater and navigable water. ...The legislative history of the [CWA] also demonstrates that Congress did not intend that discharges to isolated ground water be subject to permit requirements. ... 'Because the jurisdiction regarding groundwater is so complex and varied from State to State, the committee did not adopt this recommendation.'

870 F. Supp. 983, 990 (E.D. Wash. 1994), citing S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3739. Moreover, a number of courts have concluded that the possibility of a hydrological connection between ground and surface waters is insufficient to justify CWA regulation.[21]

Despite the Agencies' statements to the contrary,[22] the Proposed Rule **does** include groundwater, because without groundwater, there is **no** hydrologic link between many isolated waters and traditionally navigable waters.[23] Any past practice or proposed standard under which the Agencies establish jurisdiction over isolated waters by virtue of groundwater, exempt waters, or any other undefined connections, must be rejected.[24] Simply put, the Agencies should not attempt to assert jurisdiction over an otherwise isolated water by piggybacking on non-jurisdictional waters. The Agencies are required to establish jurisdiction over each link from traditionally navigable water to isolated intrastate waters.

Equally troubling is the Agencies' disregard for all existing layers of state and local regulatory measures, which provide protection for groundwater and intrastate surface water.[25] These meaningful regulatory measures will only be hampered by another layer of federal interference,

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[20] *See also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 (1988); *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126 (1982); *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); and S.Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3739.

[21] *See Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.1994); *Kelley v. United States*, 618 F.Supp. 1103 (W.D.Mich.1985).

[22] "The agencies have never interpreted 'waters of the United States' to include groundwater and the Proposed Rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems." 79 Fed. Reg. 22218.

[23] Comments to the SAB Report indicate that in some cases, the *only* connection between water bodies is groundwater. *See* Science Advisory Board (SAB) Draft Report (4/23/14).

[24] 79 FR 22219; GAO Report – "Waters and Wetlands" (page 23) February, 2004.

[25] NEB. REV. STAT. §§ 2-3201 *et seq.*; Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106; Nebraska Environmental Protection Act, NEB. REV. STAT. §§ 81-1501, *et seq.*

and will directly impact land use decisions made by state and local governmental entities, such as the League's member municipalities, and private entities, which must account for the cost and timeframe for the permitting process and the impacts of permit denials on land values and potential development. The negative impacts to the local tax base for Nebraska's municipalities, and the stifling effect on development activities under the Proposed Rule cannot be discounted.

Asserting blanket jurisdiction over any and all waters will result in federal control over the regulation of land use – a primary responsibility of the States.[26] This infringement on State and local responsibilities to control the development of localized natural resources and land uses is not supported by the language or history of the CWA.[27] As written, the Proposed Rule is not based upon a permissible construction of the CWA and will not withstand a challenge.[28]

III. The Agencies Should Provide Greater Certainty to the Regulated Community by Amending the Proposed Rule to Explicitly Include All Existing Exemptions.

Formal regulatory exemptions from the CWA provide the greatest certainty for the regulated community. Agency representatives have repeatedly stated to Congress, the media, and the regulated community, that **all** existing exemptions will be maintained,[29] and a specific list of waters that will not be deemed WOTUS is included in the Proposed Rule.[30] However, the Agencies have failed to include the current language of all existing exemptions in the Proposed Rule. Instead, new qualifying language effectively negates the exemption for ditches, and the interpretive exemption for pits excavated in dry land for the purpose of obtaining fill, sand and gravel has been omitted from the list delineated within the Proposed Rule.

The Proposed Rule's exemption for ditches is particularly troubling, as it does not cover any ditches that contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, interstate wetland, or impoundments of such waters or tributaries.[31] The Agencies' overbroad assumptions regarding the impacts an isolated intrastate conveyance, such as a ditch, must have if it indirectly contributes flow to a traditionally navigable water effectively negates the exemption. Absent a meaningful exemption, most ditches will be swept into the

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[26] *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"); *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (Regulation of land use, as through the issuance of the development permits, is a quintessential state and local power.)

[27] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 683-84, 148 L. Ed. 2d 576 (2001) ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources[.]")

[28] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 684, 148 L. Ed. 2d 576 (2001).

[29] *See* http://www2.epa.gov/uswaters: ("All agricultural exemptions and exclusions from Clean Water Act requirements that have existed for nearly 40 years have been retained with clarification.")

[30] 79 Fed. Reg. 22218.

[31] Proposed definition at 40 C.F.R. 230.3(t)(4)

Proposed Rule's broad definition of "tributary" and countless activities, which are currently unpermitted, will become subject to federal jurisdiction.

Furthermore, the exemption for waste treatment systems is limited to those systems "designed to meet the requirements of the Clean Water Act." This exemption will be meaningless for any waste treatment system that does not account for impacts to the increased number of bodies and conveyances of water falling within the scope of the proposed WOTUS definition.

Failure to explicitly affirm all existing exemptions, including current EPA-approved state-specific exemptions from NPDES permitting requirements, within the Proposed Rule will create confusion within the regulated community as to whether the existing exemptions remain in effect, which is further complicated by the increase in federal jurisdiction discussed above. Clarifying the exemptions will allow members of the regulated community to avoid a burdensome permit application process, the cost and timeframe for which will directly translate into higher costs for development activities, or avoidance of development altogether.

IV. The Agencies have failed to account for the impacts of the expansion of the definition of WOTUS on existing CWA permits administered by the States.

Despite the Agencies' inexplicable assertions, the Proposed Rule will expand the scope of federal jurisdiction under the CWA. By refusing to recognize the obvious, the Agencies have also neglected to analyze the impact of a new federal definition of WOTUS, and its limitation and omission of exemptions, on State-administered CWA permit programs.

NPDES permits for municipal, commercial, industrial wastewater, industrial discharges to public wastewater treatment systems, industrial and municipal storm water, municipal combined sanitary and storm sewer overflows and discharges, and livestock waste control, Water Quality Standards, and stormwater management plans for Municipal Separate Storm Sewer Systems (MS4), among others, are all tied to the requirements of the CWA, which include the federal definition of WOTUS. Changes to the federal rule will impact the time and resources required to ensure State-based statutes, procedures, and rules and regulations meet federal requirements under the CWA. The costs associated with the administration of increased jurisdiction, and the additional time and resources which must be committed to ensure CWA duties are met, translate into an unfunded mandate on State agencies.The League's members will also be required to commit considerable time and resources to review current permits, obtain new permits, and adjust current infrastructure to adapt to changes which may be required for currently-permitted activities. These efforts will also translate into tax and rate increases to support the ongoing management of wastewater, stormwater, and flood control systems, as well as for the delivery of drinking water, electricity, and natural gas services.

Changes to fundamental definitions of CWA terms should not be proposed unless and until the Agencies have taken into account the administrative and financial implications of expanding the scope of federal jurisdiction.

V. The Agencies have violated the RFA, which was enacted and amended specifically to protect small entities, such as the League's member municipalities.

The RFA requires the Agencies to review the Proposed Rule to determine if it will have a "significant economic impact on a substantial number of small entities."[32] All but two of Nebraska's 530 municipalities qualify as "small entities" under the RFA. The Proposed Rule's expansion of the scope of waters deemed jurisdictional under the CWA will place additional, unnecessary burdens on those who rely on water for their personal and economic survival. Such burdens will negatively affect or otherwise prevent[33] development activities, production capacities, and land values, all of which are factors that directly impact the tax base of the League's member municipalities. The cost and timeframe for municipalities to construct and maintain wastewater, stormwater, and flood control systems, and to provide utility services will also be affected if the Proposed Rule is adopted.

Due to its extraordinary potential to adversely impact the regulated community, it is especially important that the Proposed Rule be subjected to all procedural steps designed to safeguard small governmental jurisdictions, such as Nebraska's municipalities, and other small entities, from overzealous regulation.[34]

In part because so many proposed rules were subjected to meaningless "rubber stamp" certifications, Congress amended the RFA by enacting the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"). The SBREFA amended section 611 of the RFA to allow small entities, such as the League's member municipalities, to obtain judicial review of agency noncompliance with the RFA and tightened the requirement for certifications so the Agencies must provide the factual basis that supports their certification statement.[35] The SBREFA also requires EPA to convene small business review panels whenever its planned rules are likely to have a significant economic impact on a substantial number of small entities. The SBREFA panels include small entity representatives who will be affected by the rule, who advise representatives from the Small Business Administration's Office of Advocacy, the Office of Management and Budget's Office of Information and Regulatory Affairs, and the Agencies on probable real-world impacts and potential regulatory alternatives. The panel must then prepare a report containing recommended alternatives to the Agencies and the panel's recommendations could be incorporated into the Proposed Rule.[36]

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[32] 5 U.S.C. §§ 601 *et seq.*; 5 U.S.C. § 601(6), "the term 'small entity' shall have the same meaning as the terms 'small business', 'small organization' and 'small governmental jurisdiction[.]'"

[33] *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States*, David Sunding, Ph.D., May 15, 2014 (at page 15-19).

[34] 5 U.S.C. § 602(a)(1). *See also* 5 USC § 601(5), "the term 'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand[.]"

[35] 5 U.S.C. § 611

[36] The RFA was further strengthened on August 13, 2002, when President Bush signed Executive Order 13,272. This Executive Order requires the Agencies to consider the Small Business Administration's Office of Advocacy's written comments on proposed rules and include a response to those comments in the final rule.

These laws and policies were put in place specifically to protect small entities such as the League's member municipalities. However, the Agencies have violated these laws and policies by disingenuously certifying the Proposed Rule will have no substantial impact on protected entities. Specifically, the Administrator concludes:

> The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. *See* 40 CFR 122.2 (defining "waters of the United States"). Because *fewer* waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

79 Fed. Reg. at 22220. This conclusion, and the factual basis on which it is predicted, is patently false. As set forth above, the *categorical* inclusion of *all* waters within so-called "neighboring" and "riparian areas" as "adjacent" based upon undefined groundwater connections and overland migration patterns of plant and animal species necessarily results in the assertion of federal jurisdiction over additional waters. Barring an obvious surface connection, these waters would have been subjected to case-by-case analysis, but will be automatically captured as jurisdictional.[37] In addition, the proposed aggregation of otherwise isolated waters to determine their cumulative impact on navigable waters will inherently sweep these otherwise non-jurisdictional waters into the regulatory network.[38] The same results from the inclusion of strictly ephemeral waterways located higher in stream systems.

The Agencies previously recognized their existing policy, as set forth in *Draft Guidance on Identifying Waters Protected by the Clean Water Act*,[39] would expand the number of waters over which they assert jurisdiction. They said of that guidance:

> The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in *SWANCC* and *Rapanos*.

The Proposed Rule, which codifies some elements of the Guidance, and expands on others, is clearly even broader in scope. Similarly, proponents of the Proposed Rule tout it for "restoring" protection to waters over which the Agencies do not presently assert jurisdiction, which is, of course, the basis of their support.[40]

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[37] 79 Fed. Reg. at 22219.

[38] *See* e.g., 79 Fed. Reg. at 22214.

[39] *See* http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

[40] *See, e.g., Advancing America's Clean Water Legacy: Proposed Clean Water Protection Rule Will Better Protect Streams and Wetlands* available at http://www.nrdc.org/water/files/clean-water-legacy-FS.pdf.; *The Clean Wa*

Most importantly, the fact that more waters will be regulated under the Proposed Rule was confirmed by the Agencies in their written analysis of the potential costs and benefits associated with this action, titled "*Economic Analysis of Proposed Revised Definition of Waters of the United States*," which states that more waters will be regulated under the Proposed Rule.

The Agencies have failed to prepare an initial regulatory flexibility analysis ("IRFA") as required by the RFA, and make it available for public review and comment simultaneously with the Agencies' publication of general notice of proposed rulemaking for the rule.[41] The IRFA must describe the anticipated economic impacts of the Proposed Rule on small entities, and evaluate whether alternative actions that would minimize the rule's impact on small entities would achieve the regulatory purpose.[42] The Agencies must also prepare a final regulatory flexibility analysis ("FRFA").[43] The FRFA must summarize any issues raised by public commenters, describe the steps taken by the Agencies to minimize burdens on small entities, and explain why the Agencies selected the final regulatory action they did, and why other alternatives were rejected.[44]

As President Clinton made clear in Executive Order 12,866, "The American people deserve a regulatory system that works for them, not against them[.]" The Order also demands: "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives[.]"[45]

The Agencies have improperly circumvented their duties under the RFA, and have impermissibly shifted their burden of proof to the regulated community. The very real costs imposed on small entities under the Proposed Rule cannot be ignored. The Agencies must perform a proper RFA analysis or the Proposed Rule will remain legally and factually deficient.

CONCLUSION

The Proposed Rule should be withdrawn, as the jarring increase in the scope of federal jurisdiction under the Proposed Rule only amplifies existing uncertainty and inconsistency in the application of the CWA, and further upsets the balance between state and federal control over land use decisions and the management of groundwater. The Agencies' goals are better served through an explicit affirmation of current exemptions; furthermore, the Agencies should abandon their efforts to regulate groundwater and assert jurisdiction over isolated intrastate waters under theories rejected by the Supreme Court, and must ascertain the real costs of this (or any subsequent) Proposed Rule in conformance with RFA requirements.

Rule: Protecting America's Waters available at http://www.nwf.org/~/media/PDFs/Water/WOTUS%20Proposed%20rule%20fact%20sheet%203252014.pdf.

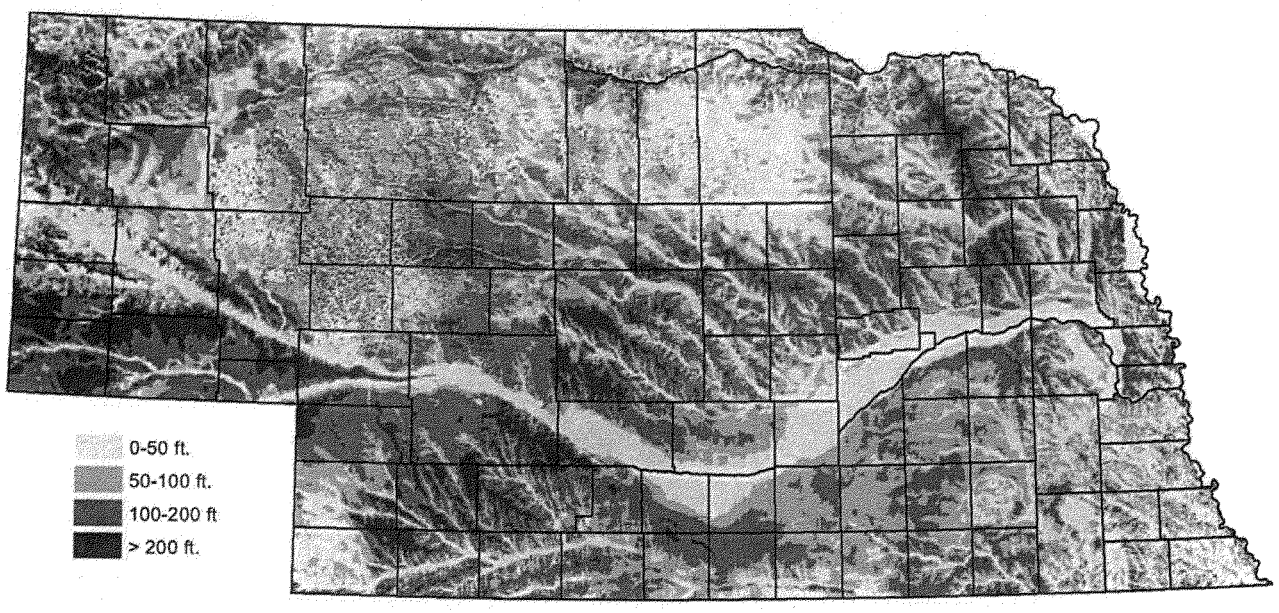
[41] 5 U.S.C. § 603(a)

[42] 5 U.S.C. § 603(b-c)

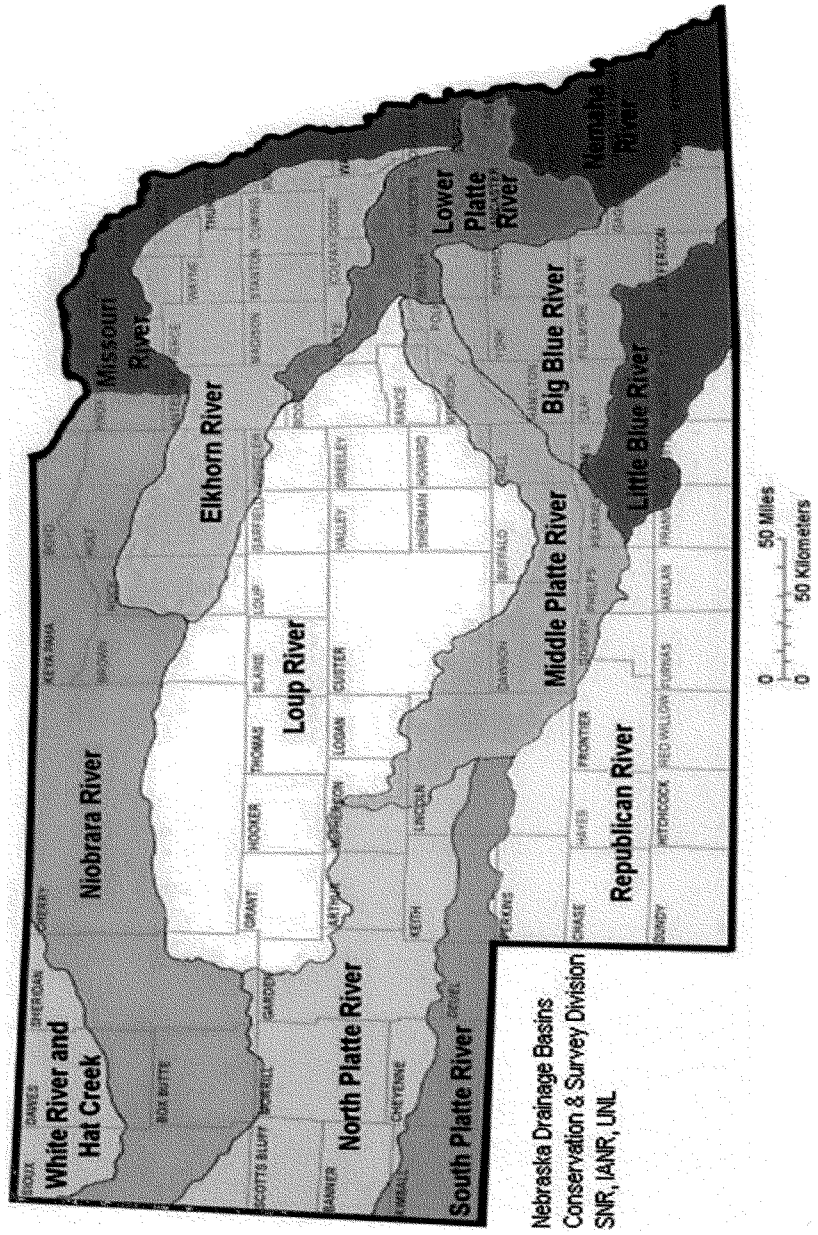
[43] 5 U.S.C. § 604(a)

[44] 5 U.S.C. § 604(a)

[45] *Id.*, Section 1(b)(11)



Generalized depth to groundwater. (Source: University of Nebraska, Conservation and Survey Division, 1998)


White River and Hat Creek
Niobrara River
Missouri River
Elkhorn River
Loup River
Lower Platte River
Nemaha River
Big Blue River
Middle Platte River
Little Blue River
North Platte River
Republican River
South Platte River
Nebraska Drainage Basins
Conservation & Survey Division
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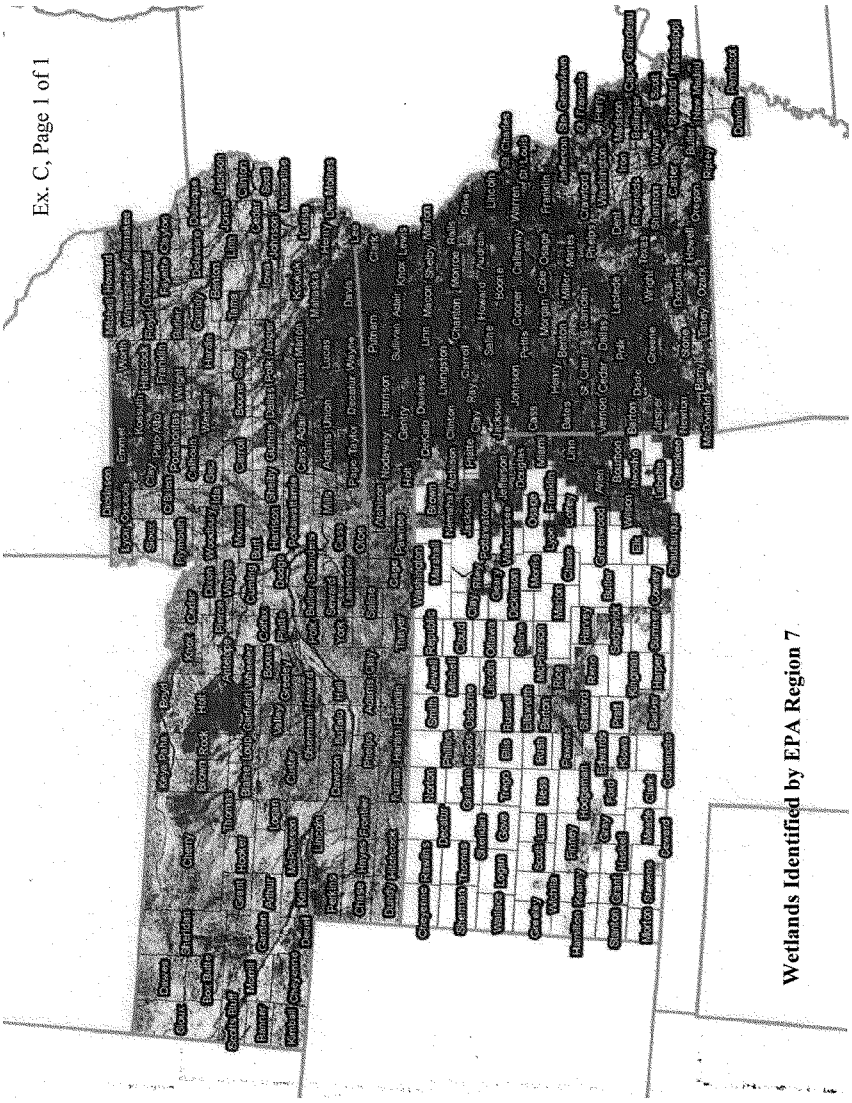

Ex. C, Page 1 of 1
Wetlands Identified by EPA Region 7

REGIONAL FLOOD CONTROL DISTRICT

October 27, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

RE: Docket ID No. EPA-HQ-OW-2011-0880

Dear Sir or Madam:

The Clark County Regional Flood Control District (District) has reviewed the *EPA and Army Corps of Engineers' Definition of Waters of the United States Under the Clean Water Act; Proposed Rule* published in the Federal Register dated April 21, 2014. The District appreciates the opportunity to provide comments on this proposed rule.

The District is a regional agency established explicitly by state statute and local ordinances to plan, fund, implement and maintain infrastructure in southern Nevada to protect the residents of and visitors to this area from the ravages of flooding. The District is committed to carrying out the provisions of the Clean Water Act (CWA) to protect the aquatic resources of the nation. We have a long history of working closely with a wide variety of Federal agencies, including EPA, the Army Corps of Engineers (Corps), Bureau of Land Management, and US Fish and Wildlife Service to ensure that the impacts of our projects and programs are identified, minimized, and when adverse impacts are unavoidable, appropriately compensated for.

As an active member of the National Association of Flood and Stormwater Management Agencies (NAFSMA), the District is fully aware of and supports the concerns and comments offered by that organization, which are being submitted separately. The comments offered below are in addition to those submitted by NAFSMA.

It was the District's hope that the proposed rule would provide clarity and consistency in the determination of which waters of the United States are subject to the Corps' regulatory authority under the CWA. Unfortunately, it appears that, rather than providing the needed clarity and consistency, the proposed rule mainly expands the scope of CWA jurisdiction. We are concerned that this guidance will make the permitting process more cumbersome and expensive than it already is, and cause additional delays.

600 S. Grand Central Parkway, Suite 300 • Las Vegas, Nevada 89106-4511
(702) 685-0000 • FAX: (702) 685-0001
Website: http://www.regionalflood.org

REGIONAL FLOOD CONTROL DISTRICT

Tributaries and ephemeral streams

Under the proposed rule, "the agencies provide a definition of 'tributary' supported by the scientific literature. The agencies also propose that all waters that meet the proposed definition of tributary are 'waters of the United States' by rule...because tributaries and the ecological functions they provide, alone or in combination with other tributaries in the watershed, significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas." The proposed rule defines tributary as a water physically characterized by the presence of a bed and banks and ordinary high water mark which contributes flow, either directly or indirectly, to another water. Flow may be ephemeral, intermittent, or perennial under the proposed rule.

While it is true that some ephemeral streams are headwaters for the nation's major rivers, not all ephemeral streams are headwaters. Many ephemeral washes in the desert southwest may not convey any actual water to downstream "waters" for years on end. In these washes, the presence of an ordinary high water mark indicates only that water has flowed through the area at some time in the past, NOT that it ordinarily flows through there.

The proposed rules states: " A review of the scientific literature, including the Report of the peer-reviewed science, shows that tributaries and adjacent waters play an important role in maintaining the chemical, physical and biological integrity of ...waters... because of their hydrological and ecological connections to...those waters." However, the post-meeting comments of the peer-review meetings says quite clearly that little is known of these hydrologic connections in the desert southwest. Those comments also indicate that the example used for Southwestern streams is not representative of streams in that region, most of which are ephemeral.

Under the proposed rule, ephemeral washes that have a bed and bank and ordinary high water mark would by rule be jurisdictional waters. However, a ditch that 1) is excavated wholly in uplands; 2) drains only uplands; and 3) has less that perennial flow would be exempt from the definition of "waters of the United States" and not subject to regulation under the Clean Water Act. ***Ephemeral washes in the desert southwest, excavated by infrequent flow in response to highly localized and very intense rainfall, largely meet the definition of the excluded ditches.***

Similarly, puddles are not "waters of the United States" subject to Clean Water Act jurisdiction. As presented by the Agencies, a commonly understood meaning of "puddle" is a relatively small, temporary (body) of water that forms on pavement or uplands immediately following a rainstorm, snow melt, or similar event. ***It cannot***

REGIONAL FLOOD CONTROL DISTRICT

be reasonably considered to be a water body or aquatic feature at all because it exists only for a brief period of time before the water evaporates or sinks into the ground. Again, this description in large part applies to ephemeral washes in the desert southwest.

The Agencies also exclude rills and gullies from the definition of "waters of the United States" but have difficulty in distinguishing them from "ephemeral tributaries".

We recommend that the Agencies recognize that ephemeral washes in the desert southwest are landforms over and through which infrequent flows have eroded the land surface, and which only rarely convey water to downstream jurisdictional "waters". The Agencies should by rule exclude ephemeral washes in certain Level III ecoregions, including ecoregions 13 Central Basin & Range and 14 Mojave Basin & Range and perhaps other ecoregions, from the definition of "waters of the United States".

Neighboring, adjacent, floodplain

The Agencies have added several definitions to the proposed rule in an effort to bring greater clarity to the understanding of what jurisdictional "waters of the United States" are. Water bodies "adjacent" to jurisdictional waters would be "waters of the United States" by rule. The term "adjacent" means bordering, contiguous or neighboring. The term neighboring includes waters located within the riparian area or floodplain of an (a) (1) though (5) water. The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

From the above definitions it is apparent that the Agencies are seeking to exert Clean Water Act jurisdiction over normally dry land surfaces and not only "waters of the United States". Alluvial fans are land forms which are both erosional and depositional surfaces by definition. These and other normally dry land surfaces which may be subject to infrequent inundation by high water flows would be "waters of the United States" subject to Clean Water Act protection by rule.

We understand and commend the Agencies' desire to establish consistency and clarity in identifying which waters are subject to protection under the Clean Water Act. At the same time, we believe it is appropriate for regulatory guidance and the currently proposed rule to recognize and allow for the substantial differences that

REGIONAL FLOOD CONTROL DISTRICT

exist across the nation in terms of geology, topography and meteorology. It is not sufficient that there is evidence that water has flowed through an area at some time in the past, or that a floodplain is inundated during periods of high flows for that area to be regarded as a "waters of the United States". Normally dry land surfaces and land forms are not "waters", and the Agencies should not regulate them as if they were.

The District very much appreciates the opportunity to comment on this critical issue. We remain as committed to protecting the environment and the water resources of the nation as we are to protecting the lives and properties of the communities within Clark County.

Sincerely,

Gale Wm. Fraser II, P.E.,
Chief Engineer/General Manager

GWF:tes

P:\Letters and Memos\Engineering - General\2014\comment letter WOUS 10 27 14.doc

Las Vegas Valley Watershed Advisory Committee

October 20, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW.
Washington, DC 20460

Attn: Docket ID No. EPA-HQ-OW-2011-0880

SUBJECT: DEFINITION OF 'WATERS OF THE UNITED STATES' UNDER THE CLEAN WATER ACT, PROPOSED RULE; DOCKET NO. EPA-HQ-OW-2011-0880; 79 FED. REG. 22188

On behalf of the Las Vegas Valley Watershed Advisory Committee (LVVWAC), these comments are being provided on the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rule defining the scope of "waters of the United States" (WOUS) protected under the Clean Water Act (CWA; Proposed Rule). 79 Fed. Reg. 22188 (April 21, 2014). The LVVWAC is comprised of southern Nevada water, wastewater, and stormwater agencies: including, City of Henderson, City of North Las Vegas, City of Las Vegas, Clark County, Clark County Regional Flood Control District, Clark County Water Reclamation District, Las Vegas Valley Water District, and the Southern Nevada Water Authority. The LVVWAC was formed to address water management practices and to protect the Las Vegas Valley's watershed resources, including municipal drinking water supplies, wildlife habitat, and recreation.

The LVVWAC member agencies own and operate facilities, including water treatment and delivery facilities, wastewater treatment and discharge facilities, flood control and erosion control facilities, and recreational facilities that are on or adjacent to WOUS in southern Nevada. Several member agencies have man-made water management features located on their property, such as ditches and ponds, which have not previously been considered jurisdictional under the CWA.

The Proposed Rule attempts to clarify the definition of tributaries that are WOUS subject to jurisdiction under the CWA. The proposed definition would include waters that "contribute flow directly or indirectly" to a traditional WOUS, such as navigable waters. Tributaries may be "natural, man-altered, or man-made water body and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches…"

The EPA and Corps did not propose any changes to the existing exclusion from jurisdiction for waste treatment systems designed consistent with the requirements of the CWA. However, the LVVWAC is concerned that the broad definition of "tributaries" under the Proposed Rule would result in man-made ditches, canals, and off-river storage ponds that are located on water and wastewater facility sites, but may not formally be part of waste treatment systems, to be subject to regulation as WOUS. This additional regulation would be unnecessarily burdensome, and affect LVVWAC members' ability to conduct timely maintenance of those features.

The EPA and Corps specifically excluded certain waters from its definition of WOUS under the Proposed Rule. The LVVWAC supports the intent of these exclusions, and requests that a clear exemption also be provided for all water management features that are located within water and wastewater facility sites. The LVVWAC requests the following exclusion be added to the Proposed Rule:

- Ditches, canals, ponds, and other man-made features used in the operation of water or wastewater treatment and supply systems.

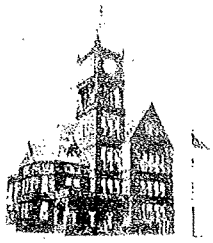
We appreciate your consideration of these comments, and are available to discuss if you have any questions.

Sincerely,

Thomas Minwegen

Thomas Minwegen
Chairman, Las Vegas Valley Watershed Advisory Committee

LL/pe



Commissioners of Columbia County

Court House, P.O. Box 380, Bloomsburg, Pennsylvania 17815
570-389-5600 (TDD: 570-389-5745) Fax: 570-784-0257

October 15, 2014

Donna Downing
Jurisdiction Team Leader, Wetlands Division
U.S. Environmental Protection Agency
Water Docket, Room 2822T
1200 Pennsylvania Avenue
Washington, D.C. 20460

Re: U.S. EPA and U.S. Army Corps of Engineers Proposed Rule on "Definition of "Waters of the United States Under the Clean Water Act," Docket No. EPA-HQ-OW-2011-0880

Dear Ms. Downing:

We are the Columbia County Commissioners and we are writing on the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) proposed rule regarding *Definition of Waters of the U.S. Under the Clean Water Act*, Docket No. EPA-HQ-OW-2011-0880. This proposed rule was released on April 21, it would amend the definition of "waters of the U.S." and expand the range of waters that fall under federal jurisdiction.

Counties are tasked with the heavy responsibility to protect the health, welfare, and safety of their citizens, as well as maintain and improve their quality of life. This includes protecting of valuable water resources, whether as a regulated entity or regulator, to ensure that the nation's waters remain clean. We are very concerned that the proposed rule would modify existing regulations, which have been in place for over 25 years. Because the proposed rule could expand the scope of CWA jurisdiction, counties could feel a major impact as more waters become federally protected and subject to new rules or standards.

The proposed "waters of the U.S." regulation from EPA and the Corps could have a significant impact on counties across the country, in the following ways:

- Seeks to define waters under federal jurisdiction: The proposed rule would modify existing regulations, which have been in place for over 25 years, regarding which waters fall under federal jurisdiction through the Clean Water Act (CWA). Because the proposed rule could expand the scope of

CWA jurisdiction, counties could feel a major impact as more waters become federally regulated and subject to new rules or standards.

• **Potentially increases the number of county-owned ditches under federal regulation:** The proposed rule would define some ditches as "waters of the U.S." if they meet certain conditions. This means that more county-owned ditches would likely fall under federal oversight. In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. **Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined.**

• **Applies to all Clean Water Act programs, not just Section 404 program:** The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. These programs would subject county governments to increasingly complex and costly federal regulatory requirements under the proposed rule which impacts local stormwater and pesticide application programs, state water quality standards designations, green infrastructure and water reuse.

Additionally, key terms used in the proposed regulation—tributary, adjacent waters, riparian areas, flood plains, and even ditch exemptions on uplands and flow—are unclear. It is uncertain how these definitions will be used to effectively implement various CWA programs.

More importantly, the agencies' cost-benefits analysis—*Economic Analysis of Proposed Revised Definition of Waters of the U.S.* (March 2013), acknowledges the data used and assumptions made to craft the analysis may be flawed. This is of supreme concern to local governments who may serve as both the regulator and the regulated under CWA. If costs and implications of the changes are not recognized ahead of time, it will have a negative impact on local governments.

If you have any questions, please do not hesitate to contact us.

Sincerely,

Chris E. Young Richard C. Ridgway David M. Kovach

CC: Congressman Barletta
Senator Casey
Senator Toomey

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