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WATERS OF THE UNITED STATES: STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF EPA'S PROPOSED RULE

HEARING

BEFORE THE

COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY

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WATERS OF THE UNITED STATES: STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF EPA'S PROPOSED RULE

Tuesday, March 24, 2015

UNITED STATES SENATE,
COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY,
Washington, DC

The Committee met, pursuant to notice, at 10:00 a.m., in room 106, Dirksen Senate Office Building, Hon. Pat Roberts, Chairman of the Committee, presiding.

Present: Senators Roberts, Cochran, Boozman, Hoeven, Ernst, Tillis, Sasse, Grassley, Thune, Stabenow, Klobuchar, Bennet, Gillibrand, Donnelly, Heitkamp, and Casey.

STATEMENT OF HON. PAT ROBERTS, U.S. SENATOR FROM THE STATE OF KANSAS, CHAIRMAN, COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY

Chairman ROBERTS. Good morning. I call this meeting of the Senate Committee on Agriculture to order. Today, we will cover an important issue that impacts the agriculture sector and all of rural America.

I know that my colleagues on this Committee hear regularly from a variety of constituents, whether it be from farmers, ranchers, state agency officials, or other representatives, about the Environmental Protection Agency's proposed rule that redefines "Waters of the United States" under the Clean Water Act.

As I have said before, this Committee will be the platform for America's farmers, ranchers, small businesses, and rural communities. Too often, I hear from my constituents that they feel ruled and not governed. The genesis of today's hearing is in response to exactly that commitment.

We have before us two panels of witnesses to provide firsthand concerns associated with the EPA's proposed rule on clarifying "Waters of the United States." I thank each witness for traveling to Washington DC and for providing essential testimony before the Committee on such an important issue.

The perspectives we will hear today range from legal interpretations of EPA's proposed action, agency officials, and state partners who will ultimately be responsible for the administration and, yes, enforcement of any changes to the Clean Water Act, and key stakeholders that will inevitably have to navigate the Clean Water Act permitting process and bear the unforeseen costs associated with

expansion of what constitutes a jurisdictional water under the Clean Water Act.

Despite EPA receiving over one million comments on this proposed rule, we will work to ensure that the voices of our constituents and stakeholders impacted by this proposed rule are heard by their government.

I find it particularly troubling that, despite the unanimous outcry from a broad coalition of stakeholders and industries that have voiced concern about the manner and process by which EPA advanced this proposed rule, the EPA continues to plunge ahead.

Just last week, EPA Administrator Gina McCarthy made public statements that the Agency is working to finalize the proposed rule as early as this spring or summer. However, the Administrator did say that they are changing the name of the rule from "Waters of the United States," WOTUS—that is the acronym—to the "Clean Water Rule."

Well, quite frankly, Administrator McCarthy, merely changing the name is not enough. We need to change the rule. If you want to protect clean water, it is time to listen and change the rule in a manner that allows for public input also collaboration and is effective for farmers, ranchers and rural America.

EPA also claims that they have listened to farmers and ranchers about the concerns they have raised with the proposed rule and all of those concerns will be addressed in the final regulation. Other than talking points, the EPA has provided no assurances based on concrete evidence to alleviate any concerns from the agricultural sector or rural America about this rule.

Given the economic impact this proposed rule will likely impose on farmers and ranchers and rural businesses, I have significant concerns about the administration's cost-benefit analysis for this rule. The EPA contends that the proposed rule would have a minimal economic impact. Many strongly disagree with that assertion and a study commissioned by a broad-based network of impacted stakeholders, the Waters Advocacy Coalition, suggests otherwise. The study raises critical questions and criticisms with regard to many assumptions the EPA factored into the Agency's cost-benefit analysis.

If anything, more economic analysis is needed before any significant change to the current law is made.

I look forward to hearing from our witnesses and with that, I recognize our distinguished chairperson emeritus, Senator Stabenow, for any remarks.

STATEMENT OF HON. DEBBIE STABENOW, U.S. SENATOR FROM THE STATE OF MICHIGAN

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

We welcome all of our witnesses today to a very important discussion on a very important topic for all of us.

For more than 40 years, the Clean Water Act has been a vital tool in promoting the health and livelihood of all Americans. Speaking as a Michigan native, those of us in the Great Lakes State feel a special connection to water, as you can imagine, and a strong appreciation for its importance to our everyday lives.

As chair of the Great Lakes Task Force, I see firsthand the effect water has on our economy and our way of life, how it sustains our growing agricultural production. In fact, we are very proud of what our access to water has allowed us to do in terms of diversity of crops and strength of Michigan agriculture. It boosts our manufacturing base and powers a vibrant tourism industry, and frankly, it is just part of who we are in Michigan.

Of course, quality of water is essential to quality of life in every state. All Americans need a clean, reliable source of water. It is for this reason we meet today to discuss the importance of maintaining the health and integrity of our nation's waters in a manner that will not unintentionally burden our nation's farmers and ranchers now or in the future.

Last year, as a result of confusion created by Supreme Court decisions in 2001 and 2006, the Environmental Protection Agency proposed a rule to define the "Waters of the United States." In fact, this is an issue that has been worked on for a number of years, with both the previous administration, the Bush administration as well as the Obama administration, to clarify the confusion.

Although the proposal was not meant to target agriculture, the proposed rule has led many to question its intent as well as the standing of agriculture's historic exemptions from Clean Water Act regulations.

In July, July of last year, 2014, I joined several of my colleagues in a letter to the EPA and the Army Corps, expressing strong concerns with certain parts of their proposed rule that we believe require clarification before a final rule is published. In the letter, we emphasized the importance of clean water and the need for providing certainty to the agricultural community. We also asked several hard questions, demanding better definitions on key issues that directly affect agriculture, including terms like ponds, ditches, and floodplains.

Based on the response I received and several discussions I have had with the EPA since then, I believe the appropriate changes will be made to ensure that our agricultural producers get the certainty they need and that they deserve.

This is critically important so that our farmers and ranchers can continue operating with the confidence that their farming activities will not be regulated under the Clean Water Act. In fact, I believe we are all committed to making sure that is the case.

Since the Clean Water Act's inception, the vast majority of agricultural activities have not been targeted by the EPA and states that implement the Act. I do not believe this rule will change that fact, and I agree that agricultural producers need to feel confident that is the case.

It is our responsibility to work with the EPA, and Mr. Chairman, I certainly want to work with you, to make sure that the final rule is clear concerning the historic role of the Clean Water Act and agriculture.

I look forward to working with members of our Committee to accomplish this goal so that we can maintain two essential needs, two essential needs for our people—clean water and agricultural productivity.

Mr. Chairman, there is a group of letters that I would like to submit for the record from sportsmen's groups like Trout Unlimited as well as the World Coalition comment letter, Ohio Farmers Union, a number of other organizations, who are part of the 87 percent of those 1 million comments you talked about that actually were supportive of moving forward.

Chairman ROBERTS. Without objection.

[The following information can be found on pages 240 through 295 in the appendix.]

Chairman ROBERTS. I thank the Senator for her statement.

Welcome to our first panel of witnesses before the Committee this morning.

Senator Boozman.

STATEMENT OF HON. JOHN BOOZMAN, U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator BOOZMAN. Thank you, Mr. Chairman, Ranking Member Stabenow.

We want to welcome Attorney General Rutledge from Arkansas to testify before the Committee today.

We appreciate the fact that you have extended the invitation for this distinguished witness from Arkansas to come up.

In fact, we thank all of you all for being here.

Attorney Rutledge was elected our state's 56th attorney general last November, and she is the first woman in Arkansas history to be elected to this office.

In her legal career, Ms. Rutledge served as legal counsel to the governor of Arkansas, was a prosecuting attorney, and provided legal services to the Arkansas Division of Children and Family Services, where she advocated for some of our most vulnerable young Arkansans.

Additionally, the attorney general has a personal connection to farming and ranching. She grew up on a cattle farm near Batesville, Arkansas. So she understands that protecting our land and our water is very important to Arkansas farm families and farm families in general.

The attorney general's written testimony highlights a few of the serious legal problems with the EPA's attempted power grab, and it demonstrates that Arkansas jobs and jobs across the country are really at risk if this rule is carried out.

I appreciate that the attorney general's testimony emphasizes that water quality has being well protected in the past through cooperation between the states and the Federal Government.

Unfortunately, I have got to—the only problem right now with being in the Senate is that you have got all of these different things that you have to be at. I am Chairman of a subcommittee, Financial Services, in Appropriations.

So I have got to run out. I will be back in a little bit, though, after I rapidly dispense with my committee.

Welcome to all of you.

Thank you once again for having our attorney general here to testify, Mr. Chairman.

Chairman ROBERTS. Ms. Rutledge, thank you very much.

Thank you very much, Senator.

Senator Tillis.

STATEMENT OF HON. THOM TILLIS, U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator TILLIS. Thank you, Mr. Chairman. Thank you for the opportunity to attend this hearing and for the personal opportunity for me to introduce one of the members of the panel, Dr. van der Vaart, our secretary of the Department of the Environment and Natural Resources down in North Carolina.

Dr. van der Vaart started his career in science about the same time that leisure suits and disco were popular. He has been in it for a long time. For two-thirds of that time, he has been in the State in a very important agency, and he has worked his way through that agency.

He has a Ph.D. in chemical engineering from Trinity College, University of Cambridge. He also has degrees from University of North Carolina-Chapel Hill and N.C. State, 2 of the 3 North Carolina schools in the Sweet 16.

If you take a look at his CV, I would point out he has written extensively on issues related to the environment and he spent a career in North Carolina serving under Republican and Democrat administrations and has shown a high degree of independence throughout that.

He has written numerous papers, many of which have titles I cannot quite pronounce, but he wrote one back in 2005 that I think is worth note. It is "EPA's Startup, Shutdown, and Malfunction Policy: The Cart and the Horse Are in the Ditch."

I think what strikes me most about Dr. van der Vaart is he has shown great independence and he is willing to come before this Committee, while serving as a head of an environmental agency in North Carolina, and he is here to talk about government overreach.

I hope everybody will listen to his words and his advice. I think we can learn a lot from it.

Thank you, Dr. van der Vaart.

Senator STABENOW. Mr. Chairman, might I have a word of personal privilege.

Chairman ROBERTS. Yes. The Senator is recognized.

Senator STABENOW. I just want to recognize also that Michigan State University is in the Sweet 16. We will see you there.

[Laughter.]

Chairman ROBERTS. I am happy to introduce to the Committee today, Ms. Susan Metzger, who serves as the Assistant Secretary of the Kansas Department of Agriculture.

Susan and I say "Go Shockers." A very unusual team, they play basketball like it should be played.

We are a little off-topic here.

Ms. Metzger brings a wealth of experience and knowledge about the topic of today's hearing. Prior to her role at the Kansas Department of Agriculture, Ms. Metzger served as Chief of Planning and Policy at the Kansas Water Office for 11 years.

One thing you may not know about her is that she is a licensed professional wetlands scientist.

I look forward to Susan's testimony and insight.

I would also like to introduce Mr. Josh Baldi, who currently serves as the Regional Director of the Washington State Department of Ecology. Previously, Mr. Baldi has served in several capacities at the Washington State Department of Ecology as well working in the conservation nonprofit sector.

Mr. Baldi, welcome, and I look forward to your testimony.

Ms. Rutledge.

STATEMENT OF THE HONORABLE LESLIE RUTLEDGE, ATTORNEY GENERAL, STATE OF ARKANSAS

Ms. RUTLEDGE. Good morning, Chairman Roberts, Ranking Member Stabenow, members of the Committee.

I am Leslie Rutledge, attorney general of Arkansas. It is an honor to appear before this Committee that includes my own Senator, John Boozman.

As Arkansas' chief legal officer, I wish to raise concerns with the proposed rule to amend the definition of "Waters of the United States" under the Clean Water Act and the practical effects this unlawful expansion of Federal jurisdiction will have on the Delta Farm Region of East Arkansas and the timber industries of the Southwest.

I grew up on a cattle farm near Batesville close to the White River and understand the impact this proposed rule would have on agriculture.

The Clean Water Act achieves its regulatory goals through jurisdiction of our navigable waters, which it defines as "Waters of the U.S."

The EPA and the Corps of Engineers have attempted to define and interpret "Waters of the U.S." through regulation. Often, the agencies' interpretation was applied too broadly and was struck down by the Supreme Court.

Recently, in the Rapanos case, a test emerged that requires the water or wetland in question to possess a significant nexus, or connection, to traditionally navigable waters. The agencies assert that the proposed rule is necessary to clarify the test, but nothing in the proposed rule offers clarity. Instead, it is complicated, overreaching, and infringes on states' rights.

First, the proposed definition of a tributary goes beyond the significant nexus test.

In Rapanos, Justice Kennedy stated that the Clean Water Act would not apply to drains, ditches, and streams remote from any navigable waters and carry only minor water volumes toward it.

However, the agencies expand the definition of tributary to include waters that contribute flow, whether directly or through another source. Even a trickle or roadside ditch can be characterized as flowing water. An irrigation canal running through a farmland to a local creek could be covered under the proposed rule in direct contradiction of Justice Kennedy's holding.

Second, the proposed case-specific determination of what qualifies as a significant nexus is vague and ambiguous, causing confusion and extra cost for states and business owners.

The Supreme Court has stated that administrative rules cannot be so vague that they fail to provide a reasonable opportunity to

understand what is prohibited. The vague terms used in the proposed rule would confuse a reasonable person.

Farmers and business owners should not have to wait until faced with a penalty to learn that the stream or wetland on their property falls under the Clean Water Act. Regardless of size, no farm or ranch can operate under such conditions.

At the same time as this rule was proposed, the agencies released an interpretive rule to clarify normal farming practices.

The Delta Region is home to advanced farming technologies that are cutting-edge and not considered normal in other parts of the country but provide benefits to our farmers and the environment through efficient use of water and fertilizer.

Although the rule was withdrawn, it is an example of the EPA to arbitrarily expand the Act without public notice and comment.

The scope of the proposed rule will have negative impacts on Arkansas beyond the legal arguments. In 2012, agriculture added over $20 billion to the Arkansas economy; that is 18 cents of every dollar added, 1 in every 6 jobs. Arkansas is first in rice production, third in cotton, fifth in timber, and tenth in soybeans and grains. Clearly, overreaching administrative rules would put this sector of our economy in jeopardy.

As the first conservationists protecting the land and water, farmers and ranchers want to follow the law. Restrictive and confusing administrative rules will inhibit their ability to farm and drive future generations out of agriculture, ultimately impacting the food supply of all Americans.

My office has urged the agencies to withdraw the rule and will pursue all legal challenges necessary to prevent an unlawful rule from impacting the State of Arkansas.

Thank you, again, Mr. Chairman for the opportunity to appear before you today.

This concludes my testimony, and I am happy to answer any questions that you or other members of the Committee may have.

[The prepared statement of Ms. Rutledge can be found on page 133 in the appendix.]

Chairman ROBERTS. We thank you very much for your testimony.

Secretary van der Vaart.

STATEMENT OF DONALD VAN DER VAART, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Mr. VAN DER VAART. Chairman Roberts, Ranking Member Stabenow, and members of the Committee, thank you for inviting me to testify today.

Governor Pat McCrory, Agriculture Commissioner Steve Troxler, and I would like to recognize Senator Tillis, who sits on this Committee, and thank him for being such a great advocate for North Carolina's agricultural industry.

As Secretary of the North Carolina Department of Environment and Natural Resources, I appreciate the opportunity to share my views on the topic of the proper definition of WOTUS, particularly as it affects the agricultural industry in North Carolina.

I would note that my remarks today are consistent with the positions taken by the North Carolina Department of Agriculture and Consumer Services on these proposed rules.

The agricultural industry contributes approximately $78 billion to our state economy annually and employs 16 percent of the workforce. North Carolina's 52,000 farmers grow more than 80 different commodities and utilize more than a quarter of the state land to furnish consumers a dependable and affordable supply of food and fiber.

We are greatly concerned that the proposed rule will cause this important industry, and other significant segments of our state's economy and infrastructure, to fall victim to ever-expanding Federal overreach that will unnecessarily stifle economic growth and prosperity with little, if any, environmental benefit.

The Clean Water Act delegates primary responsibility for managing land and water resources to the states. North Carolina, like many other states, has programs in place to protect water quality that are comprehensive and sophisticated. Our effective regulatory framework nullifies any justification for the Federal agencies' proposed expansion of the meaning of WOTUS.

I agree with other stakeholders, including the North Carolina Farm Bureau, that expanding the definition will likely be particularly problematic for farmers, especially those in Eastern North Carolina. If the proposed rule goes into effect in its current form, large swaths of farmland could become WOTUS, and land that is close to those newly determined waters could also be subject to state and Federal regulatory programs.

One way the EPA proposal will subject farms in North Carolina to more pervasive Federal intrusion is through the newly proposed definition of "adjacent." The proposed redefinition adds the extreme and the entirely new terms, "riparian areas" and "floodplains" and "surface" or "shallow subsurface hydrologic connection" as a basis for inclusion into features into the jurisdiction.

Their definitions for floodplain and riparian area are both exceedingly elastic, providing no time reference or limitation on scope, and leaving critical determinations ultimately to be made by the EPA.

The effect of these proposed definitions will be akin to an unfunded mandate. Many more waters will be brought into the Clean Water Act jurisdiction, requiring the issuance of more Federal and state permits. Increases in state permit applications will further tax our limited state resources. Additional permitting requirements and added costs will apply not only to the agricultural industry but will span many other sectors, including construction, manufacturing, transportation and tourism industries as well as local governments.

North Carolina already has regulatory programs in place for the protection of our surface and groundwater resources. The inclusion of many more features within the scope of WOTUS will trigger the applicability of these exclusively state law-based programs on areas that were never intended to be regulated.

The lack of EPA's transparency during this rule development is also deplorable. The EPA assembled maps that demonstrate the massive Federal takeover of dryland in America, but the Agency

was reticent to make them public. It was only in response to questioning at the congressional hearing in July of 2014 that the EPA admitted they had even assembled these maps which show that, for example, almost all of North Carolina could be considered to be streams and water bodies under the new rule.

Finally, there are legal concerns to consider as well. If EPA, based on the claim of statutory ambiguity, moves forward with this new interpretation, claiming that drylands are navigable waters, it will yet be another example of the EPA abusing the public trust it was granted by the judiciary through the Chevron decision. This raises the question of whether the EPA should be afforded any deference in interpreting statutory provisions.

Simply stated, before EPA buries the most efficient and productive farmers in the world with red tape, I would urge them to sit down with scientists and engineers that actually implement these rules and listen to what they have to say.

Thank you for the opportunity to provide this testimony, and I would be happy to answer any questions you may have.

[The prepared statement of Mr. van der Vaart can be found on page 142 in the appendix.]

Chairman ROBERTS. Thank you, Mr. Secretary.

We are under very strict time restrictions because we have 10 witnesses and we have votes at noon.

Secretary Metzger.

STATEMENT OF SUSAN METZGER, ASSISTANT SECRETARY, KANSAS DEPARTMENT OF AGRICULTURE

Ms. METZGER. Thank you, Mr. Chairman, and thank you for the opportunity to appear today and share Kansas's perspective on the impact of the Clean Water Rule on Kansas agriculture and water management.

According to the EPA web site on the Clean Water Rule the rule is purported to help states manage their water resources and will not broaden the coverage of the Clean Water Act. I am here today to testify that presumption is not true when describing the rule's application in Kansas.

We contend that while certain tributaries are "Waters of the U.S." under the existing regulation, the proposed rule gives a regulatory definition of tributary that covers waters to include all streams with or without flow. There will be no more need to make a significant nexus determination for dry streams or their adjacent waters because the rule automatically considers them to be "Waters of the U.S."

Applying this blanket definition of tributary in Kansas will result in a nearly 460 percent increase in the number of stream miles classified as "Waters of the U.S." in Kansas, subject to all programs and provisions of the Act.

A nationally defined one-size-fits-all definition for terms like "tributaries" is not appropriate given the scarcity of flow in western states, such as Kansas, and the inherent variability of those streams to impact downstream waters.

Rainfall across Kansas ranges from about 15 inches or less with our border with Colorado to more than 40 inches in Southeast Kansas.

Low rainfall in the west combined with deep depths to the high plains aquifer make all but the major streams in the west, ephemeral, with their channel beds permanently above the water table. These streams, now and forever, only flow in response to localized rainfall. Yet, under the proposed rule, any stream with a bed, bank, and ordinary high-water mark will be deemed a tributary and, in such, considered jurisdictional under the Act.

In 2001, the Kansas legislature defined a classified stream for purposes of applying the Clean Water Act and water quality standards in implementing programs. The statute and associated regulations directs protection and water quality to the State's significant water resources while, logically, excluding ephemeral streams, grass, vegetative or other waterways, culverts, and ditches.

Kansas has demonstrated great success in managing our water resources through the implementation of locally driven water quality plans. Kansas has produced improvements in water quality, including the removal of several water bodies from the State's list of impaired waters. These improvements are the result of appropriate, positive coordination of state agencies with local jurisdictions and individual landowners.

The proposed rule and the intervention of Federal agencies into management of marginal waters will degrade those positive relationships.

The distraction and diversion brought forth by this rule will incur additional expenditures at the state level for marginal environmental benefit and diminished success in water quality improvements in Kansas.

The inevitable slowdown in permit reviews and increase in bureaucratic paperwork will unnecessarily delay and deter economic growth and impede the adoption of soil and water conservation practices by the farmer and ranchers of Kansas

As shared during the public comment period by many of the agriculture-related organizations and state agencies in Kansas, as well as Governor Sam Brownback, we request the proposed rule be withdrawn and any future discussions begin anew with the full consultation and advice of the State.

Mr. Chairman, as we saw with the now withdrawn interpretive rule, Federal rulemaking without proper consultation with the states lead to unintended consequences.

I believe that today's panel discussion restores state-level discussion toward the development of a better, meaningful rulemaking under the Act. We hope that the states, as primary implementers of the Act, begin to have a significant role in crafting the future of rules by the Federal agencies.

Thank you for the opportunity to share Kansas's perspective.

[The prepared statement of Ms. Metzger can be found on page 74 in the appendix.]

Chairman ROBERTS. We thank you for your testimony.

Mr. Baldi.

STATEMENT OF JOSH BALDI, REGIONAL DIRECTOR, WASHINGTON STATE DEPARTMENT OF ECOLOGY

Mr. BALDI. Chairman Roberts, Ranking Member Stabenow, members of the Committee, thank you for the opportunity to testify before you today.

The region I oversee in Northwest Washington includes a large portion of Puget Sound, is home to Washington's tech and aerospace industry, and is also an important part of the State's $49 billion agricultural sector. Notable commodities produced in the region are milk, nursery, potatoes, and we are the nation's leader in raspberry production. Washington State is also renowned for unique resources such as shellfish and salmon, which are important to our economy, way of life, and tribal cultures.

As the water quality authority for Washington State, Ecology is responsible for implementing all Federal Clean Water laws and regulations, including 401 water quality certifications for Federal Clean Water Act Section 404 permits.

Ecology was one of 4 Washington State agencies that signed a consensus comment letter on November 12, 2014, expressing support for the Corps and EPA to clarify the definition of "Waters of the U.S." The other signatory agencies were the State Departments of Transportation, Fish and Wildlife, and Agriculture. That comment letter has been submitted for the record.

We appreciate the Corps' and EPA's attempts to clarify jurisdiction for "Waters of the U.S." through the proposed rule. As the Federal agencies worked through the public comment process last summer and fall, we have been appreciative of their interaction with the states. Work does remain, but the EPA, in particular, has been responsive to many of the concerns that have been raised.

Ecology believes the rule helps to clarify what types of water would be considered jurisdictional under the Clean Water Act and, specifically, where proponents may need Section 404 permits from the Corps and related Section 401 water quality certifications from the State. The increased clarity provided by the proposed rule should help increase predictability and streamlining where permits are justified.

The proposed rule does not resolve all the uncertainty over what ditches are jurisdiction. So case-by-case determinations will still be needed. However, the rule attempts to narrow the number of individual jurisdictional calls needed by identifying those ditches that are clearly non-jurisdiction, such as those excavated in, and draining only, uplands.

As a practical matter, the types of waters that the rules identifies as the "Waters of the U.S." are consistent with the jurisdictional calls that we have seen in practice by the Corps in Washington State for many years. Consequently, the rule will not result in regulatory change for permittees in our State.

At the Federal level, we also do not believe the proposed rule affects the existing broad exemptions under the Clean Water Act for farming and ranching activities. Under the "Waters of the U.S." Rule, some farm ditches may be jurisdictional tributaries, but maintaining them in the course of normal agriculture does not require a Section 404 permit.

The rule does acknowledge that some ditches are tributaries that should be protected. Some Washington ditches are actually channelized streams, and as such, they are appropriately designated as tributaries.

In our experience, the Corps has not exerted jurisdiction over ditches that are not streams or which drain only uplands.

Ecology believes there are some definitions that can, and should, be further refined on a regional basis. We recommend development of these regional appropriate definitions of matters such as floodplains and riparian areas so that state and Federal agencies have a common understanding of those terms.

In closing, Washington State supports the proposed rule because efforts to date between Federal agencies and the states have been interactive and positive. Additional work does remain, but we would like to build upon that interagency cooperation.

The proposed rule will clarify that a small, but important, number of streams and wetlands deserve coverage under "Waters of the U.S."

The increased clarity sought in the rule will help create a more predictable and efficient permitting system.

Lastly, the approach embodied in the EPA and Corps proposed rule adheres closely to the system Washington State has had in place for more than 25 years. It is an approach that has worked for people, farms, and fish, and we believe Washington State's approach can be strengthened by the proposed rule.

Thank you for the opportunity to appear before this Committee and share our State's perspective on this important rule.

[The prepared statement of Mr. Baldi can be found on page 52 in the appendix.]

Chairman ROBERTS. I ask unanimous consent to enter the following into the hearing record: A statement on behalf of the Association of American Railroads, a statement on behalf of the National Cattlemen's Beef Association, a statement on behalf of the National Association of Realtors, and a study entitled "Review of 2014 EPA Economic Analysis of the Proposed Revised Definition of Waters of the U.S.," without objection.

[The following information can be found on page 185 through 206 in the appendix.]

Chairman ROBERTS. Secretary Metzger, simply put, given your role at the Kansas Department of Agriculture, what do you hear most from producers in Kansas about the proposed rule?

Ms. METZGER. Well, 90 percent of the land use in Kansas is devoted to agricultural production. So, mostly, we hear that any expansion has a great impact on the land use in Kansas. We rank third in the nation in agricultural production of acres in land use.

I would say the primary concern that we hear is that the expansion of those waters that are now classified as "Waters of the U.S." and fall under Federal jurisdiction means an expansion of potential Federal oversight into basic water management and land management from an agricultural perspective.

I also hear increasing reluctance from producers to participate in Federal cost-share programs for conservation practices as a result of the proposed rule.

Chairman ROBERTS. Thank you for that.

To date, the EPA has not released any mapping capabilities associated with the proposed rule to illustrate exactly what water bodies they are trying to capture.

Given what you know today, how many water bodies in Kansas do you think will be considered "Waters of the U.S." and how will this impact an agriculture producer in Kansas?

Ms. METZGER. Sure. Mr. Chairman, today, under the existing regulation, we classify "Waters of the U.S." to be those classified streams in Kansas. Those are those water bodies with a designated use according to Kansas statute, which is about 30,400 stream miles in Kansas.

In the absence of a map or different information from the EPA, we are going by what we consider to be the definition as described in the proposed rule and using the national hydrographic database. Using that and the defined streams in Kansas would result in an increase of those "Waters of the U.S." now being around 170,000 stream miles. So that is where we come up with the 460 percent increase in classified waters or "Waters of the U.S."

Again, that reaches now into water bodies throughout Western Kansas and has a significant impact not only in traditional Clean Water Act 404 regulations but then bleeds into pesticide applications and NPDES permits and livestock waste management.

Chairman ROBERTS. Well, let the record show we have not had much water in Western Kansas for three years, but we hope that changes.

This is for the entire panel:

What economic impacts would this proposed rule have on your state?

Would any other industries that support rural America be affected?

Would there be any potential impacts on the number of acres in production or an adverse impact on land values because of the regulatory burden associated with this proposed rule?

Ms. Rutledge.

Ms. RUTLEDGE. Thank you, Mr. Chairman.

I believe that the economic impact alone could be devastating for Arkansas, particularly, as I mentioned in my statement, the eastern part of Arkansas. Again, Arkansas is first in rice, third in cotton, fifth in timber, tenth in soybeans and grains. The Delta Region of Arkansas would simply be crippled.

If you are a farmer in Arkansas, trying to determine whether or not one of your fields would fall under this proposed rule, you would look to this. I hold not a copy of "War and Peace," not a copy of the "Good Book," but a copy of the proposed rule. Nearly every farmer in Arkansas would have to obtain legal counsel to determine whether or not a field on their land falls under this EPA proposed rule.

Chairman ROBERTS. Can you hold that a little higher?

Ms. RUTLEDGE. I do not know that my muscles can, sir, but I will try.

Chairman ROBERTS. We will have a little exercise, if you can wave that around.

Secretary van der Vaart.

Mr. van der Vaart. Well, I would like to add to comments already made. In looking at North Carolina's—or, I should say EPA's view of, North Carolina's wetlands, which has massively expanded how we regulate them a concern that has not been raised so far is the uncertainty and the devaluation in land prices that uncertainty will bring.

If farmers need to go to the bank, the uncertainty will bear a cost. Their land values clearly will go down until this is all sorted out, and that results in a reduction in the farmers ability to expand their operations.

Chairman ROBERTS. Susan, I think your testimony pretty well covered it. Do you want to add something real quick?

Ms. METZGER. Sure. Thank you, Mr. Chairman.

I might note from our State's perspective we do spend about $300,000 every year on our classified waters, monitoring them, and updating our use attainability analyses. If this rule is adopted, that would certainly expand our universe of those waters and need to expend state limited resources on those use attainability analyses.

Chairman ROBERTS. Mr. Baldi, you are for this rule, and you want to build on it. Any comment on my question?

Mr. BALDI. Just again, in the State of Washington, we have been implementing a system with the Federal Corps and EPA for about 25 years that is very similar.

We believe this rule clarifies our approach in Washington State. The Federal Clean Water Act clearly exempts from permitting under Section 402 and 404 permits.

We do not see this proposed rule as changing that.

Chairman ROBERTS. Senator Stabenow.

Senator STABENOW. Thank you, Mr. Chairman.

First, let me say one of the things that I think is important just to emphasize we certainly want clarity. We certainly want agriculture not to have the impacts you are talking about.

The good news is, Ms. Rutledge, what you held up. All the historic agricultural exemptions are in there. So that is the good news—that, in fact, if you are in agriculture, those exemptions are in there, and we want to make sure they are in there, and the fact that we want to make sure that we are clarifying so that our farmers have the certainty that they need.

Mr. Baldi, could you talk a little bit more about what, if any, practices that you have, as it relates to regulating agriculture, would change under the proposed rule?

Mr. BALDI. Yeah. In general terms, the agricultural community is encouraged to implement best management practices through 319 funding, other funding sources, in terms of the exclusion rules for Section 402 and 404.

Again, clearly, we do not believe that any additional permitting would result from this rule.

It is important to note that concentrated animal feeding operations, are not exempt. Those require NPDES permits in the State of Washington. There are 11 facilities that are covered under the CAFO permit. But that is the only Federal regulation through permits that we do in the agricultural sector in the State of Washington.

Chairman ROBERTS. That is current law, correct?

Mr. BALDI. Correct.

Senator STABENOW. That is under current law.

Mr. BALDI. Correct.

Senator STABENOW. So that would not change.

Did you have concerns about the proposed rule?

I am wondering if you felt that you were heard by the EPA and the Army Corps as it relates to the outreach and the 200 and, I think it is, 7 days of input that they have received on the comments.

I mean, do you think that the final rule is going to reflect the concerns that you raised, if you raised any?

Mr. BALDI. We certainly raised concerns early in the process. When the Corps and EPA announced this rule, like the members of the Committee, like the other states, we had significant concerns with the original proposal that was introduced last summer.

Perhaps in response to this Committee's intervention or perhaps just in response to the outcry, subsequent late summer/fall, EPA in particular; they held webinars. They had conference calls. They met in person. They really doubled their efforts, in our opinion, to work with the states and listen to the states and be responsive, working towards clarification.

As has been mentioned, we believe there are some additional details that could be worked out—regional details. There are regional differences.

There has been other types of rulemaking, such as the electronic reporting for the NPDES rule, that EPA has worked very closely with the states to finalize that e-reporting rule. We would recommend as they finalize that rule that they engage in a similar process to recognize regional differences for the proposed "Waters of the U.S." Rule.

Thank you.

Senator STABENOW. Thank you very much.

For Ms. Rutledge and Secretary van der Vaart and Ms. Metzger, I think it is important to clarify sort of the historical positions of your states because after the 2001 Supreme Court decision that limited the reach of the Clean Water Act the EPA, at that time under the Bush administration, began writing a rule in response to the decision. Many states, including each of your states, submitted comments to the EPA in 2003, asking the Agency not to reduce the jurisdictional reach of the Clean Water Act.

In fact, Mr. Chairman, I want to submit those letters for the record.

[The following information can be found on page 245 in the appendix.]

Senator STABENOW. We have, in fact, in there, North Carolina specifically asked the EPA to allow the Clean Water Act jurisdiction over "intermittent and small perennial streams."

Kansas defended the Clean Water Act jurisdiction over "isolated, interstate, non-navigable waters."

Arkansas argued against the EPA reducing the Clean Water Act reach over any areas they currently regulated before the court case, including "perennial, intermittent, and ephemeral streams and wetlands."

Arkansas specifically stated, "In 1985, the Supreme Court upheld Congress's grant of broad jurisdiction based on the recognition that all waters are connected. The narrow Swank decision should not completely undermine that previous broader ruling."

So that is clearly different.

I realize there has been a second decision that muddied the waters even more in terms of confusion, but this seems to be the opposite of what you are saying today. So I am wondering about the reason for the reversals.

Mr. van der Vaart. Senator Stabenow, from North Carolina's viewpoint, we do not see that as a reversal. The position back then is, in fact, not consistent with the proposed rule.

The proposed rule far expands jurisdictional waters from the heady days of early 2000. We do regulate intermittent streams in North Carolina, but that is not the limit of the definition in the proposed rule.

So we think we are being consistent.

Ms. METZGER. Great. Thank you, Senator Stabenow.

I would concur that Kansas appreciated that there was the effort in the past two years to provide some additional clarity on "Waters of the United States." We were offered the opportunity to provide that input. We provided that input both as a State and through the Western States Water Council.

We do not believe that what is embodied now in the proposed rule reflects the concerns and the ideas that we brought forward at that time.

In fact, after 2001, when we adopted our state regulations for defining classified waters and asked the EPA to review those, they provided a concurrence on the waters that we defined to be classified waters and "Waters of the United States" and agreed with our exemption of certain ephemeral waters from that. We feel that this proposed rule goes back on that agreement.

Ms. RUTLEDGE. Senator Stabenow.

Senator STABENOW. Yes.

Ms. RUTLEDGE. I thank you for the question.

Yes, this proposed rule goes far beyond the intent of Congress and the Clean Water Act. It flies in the face of the Congress. It flies in the face of the judiciary in the Rapanos holding, which was a plurality holding; so it is not majority law.

What is being proposed by the EPA expands so far beyond that it includes waters that might flow into the waters whereas, before, it was a set piece of water, and I think that is the difference that you have seen, as Mr. Secretary pointed out, that this is such a great expansion of the rule.

I conclude with the confusing rule before us and that clarity—it does not provide clarity. It provides confusion, and it would violate the due process of those in our State.

Senator STABENOW. Thank you.

Chairman ROBERTS. It would appear that was then, and then is now.

Senator Tillis.

Senator TILLIS. Thank you, Mr. Chairman.

In the case of Secretary van der Vaart, back then, he was in the same department that he is now the head of now, and I am glad

that you were able to make that clarification with respect to the prior question asked.

Before I get to my question, I do want to make the statement that we are talking about the uncertainty and the cost within the agriculture sector, but this rule goes far beyond that. If you take a look at transportation costs, infrastructure costs, this is a significant, potentially unfunded, certainly unfunded, mandate to the states. I think it is disruptive.

While I was serving as the Speaker of the House just last year, I recall us having discussions about this. Preparing for it as a state, I think is problematic.

Secretary van der Vaart, the question I had for you: The EPA says that the proposed rule does not really change the way they have been implementing the Clean Water Act. I assume that you disagree with that.

Can those of the panelists who also think that this is a significant change give me some ideas of why you feel that way?

We will start with you, Secretary.

Mr. van der Vaart. Right, and that is puzzling to me because, first of all, the proposal itself is very vague. So it is not absolutely clear what in the world it does say other than it provides the EPA a lot of discretion, and perhaps through third-party suits, to further extend the ideas of navigable waters.

But, nevertheless, the EPA did assemble, in spite of saying that it is all the status quo, these maps which do not represent the current extent regulation in North Carolina, the scope of which has been approved by the EPA.

We have agreed with the Wilmington District of the Army Corps of Engineers when we issue 401 certifications. The Corps issues the 404. We have an understanding; the understanding is not this map.

All I can conclude is that the EPA, if we are to believe this has done an abysmal job of enforcing the Clean Water Act on their own. If they think that they are consistent in any way, shape, or form with this proposal—that is, the status quo is consistent—then they have done an abysmal job of implementing the Clean Water Act.

Senator TILLIS. Any other panelists have anything to add?

Ms. METZGER. Thank you, Mr. Tillis.

From Kansas's perspective, our interpretation is it is a substantial increase in the miles of waters that are now going to be under Federal jurisdiction. We contend we have been doing a remarkable job of protecting the waters in Kansas. This new Act will now divert resources from getting a job well done to waters that have marginal impact on the improvement of our water resources.

Senator TILLIS. Ms. Rutledge.

Ms. RUTLEDGE. In Arkansas, we have a number of state agencies that oversee water and clean water and clean air, including the Arkansas Department of Environmental Quality, the National Resources Commission, and Oil and Gas Commission, to name a few.

Likewise, in all 75 counties in Arkansas, we have conservation districts. These are local controlled. They know exactly what is going on. They talk to the farmers. They talk to the landowners and the business owners in their area. They are elected from those

bodies. So they know the land, and they know the complications, and they are very protective of their land because it is a way of life.

So what the EPA has done, as I have said, is gone beyond the scope of the intentions of the Clean Water Act and has created something so vague that it cannot be followed.

Senator TILLIS. Mr. Baldi.

Mr. BALDI. Again, as mentioned in testimony, there are clearly regional differences here. The system we have been implementing in the State of Washington for more than 25 years—our understanding is this would be very similar to what we are currently implementing.

EPA has estimated that the rule may result in an additional 3 percent of permittees.

Senator TILLIS. Mr. Baldi, if I may because I am about to run out of time, I want to ask one other question. It relates to something that your State has determined was necessary to manage water quality in your State, and so the—what I am trying to get to is it appears as though rules that you have decided to apply in Washington that may make sense based on the geography in the region that you are in now are going to be applied more on a national basis.

Is that a fair assessment, to kind of compare Washington policy to the rest of the nation?

Mr. BALDI. Well, that is what we have mentioned. One of the pieces that needs to be worked out is the regional definitions for the different states. So we would encourage the Federal agencies to continue working with the states. That may address some of the concerns you have heard from the other panelists.

Senator TILLIS. Mr. Chairman, my time is about out. I am going to honor the time commitment.

I hope at some point we can have a discussion about the Chevron deference and how it plays into this.

Thank you.

Chairman ROBERTS. Next we have Senator Klobuchar.

Senator KLOBUCHAR. Well, thank you very much, Mr. Chairman, and thank you for holding this hearing and to all the witnesses that are here.

I especially want to acknowledge on the second panel—I have two other hearings going on, so I do not know if I will quite make it back, but—Robert McLennan. He is the president and CEO of Minnkota Power Coop, which serves more than 125,000 customers in both Northwestern Minnesota and Eastern North Dakota. Anyone that can straddle Minnesota and North Dakota must be pretty smart. So we welcome him here today.

I also wanted to note I know there will be a witness from the counties, but I have heard a lot of concerns about this from our rural counties as well as our farmers, and I just wanted to note that. I told them I would share.

As we know, this proposed rule, in the wake of the two Supreme Court cases, created significant uncertainty for states and businesses and ag. We know there are also issues with these rules.

I have been one that has written letters and called. One of the things—I am still trying to go back and forth.

I know that you, Ms. Metzger and Ms. Rutledge, said it is better to actually scrap the final rule.

I think you, Mr. Secretary van der Vaart, have a little different view.

Could I just hear that debate? I have a specific question I want to ask, but I guess I would start with you, Ms. Metzger.

Ms. METZGER. Sure. Thank you, Senator.

Our decision for just completely rescinding the rule and starting from ground zero is at this point it is all in the hands of the agencies, of coming back and deciding what they have heard from us and putting that into writing. There is certainly a level of mistrust and uncertainty of what that actual proposed rule would look like and if it would actually reflect the changes that we have recommended.

I think we have seen from the panel, just with the four of us, there is such diversity in our regions that the best approach is to sit with us in a room and craft it out together.

Senator KLOBUCHAR. Okay. Secretary?

Mr. van der Vaart. Well, I am afraid we are in favor of scrapping this rule. We are worried about the lack of transparency that the EPA followed. So we very much, as I said in my statement, would love to sit down with the EPA and develop this, using our scientists' and engineers' experience, who are the ones who actually are on the ground, implementing these rules day to day.

Senator KLOBUCHAR. Okay. So you do not think exemptions or changing the rule would be better than just sort of going with the uncertainty from before?

Mr. van der Vaart. Well, the uncertainty is amplified under the current rule.

Certainly, everybody likes certainty, but the EPA simply saying that this is more certain does not get it with us. This is an agency that has used fraudulent e-mails to avoid Freedom of Information Act. They have been reticent to share these maps with us.

You know, we are concerned.

Senator KLOBUCHAR. Okay. Thank you.

Ms. Rutledge?

Ms. RUTLEDGE. Thanks, Senator Klobuchar.

As the chairman noted at the beginning, changing the name is not enough. What the EPA has done with this rule is simply rearranged the words.

In light of the Rapanos ruling, as I have mentioned time and again, it has gone far beyond legally what that ruling held. That ruling was a plurality; it is not even considered clear law.

The EPA took a simple definition, which is a traditional navigable waters, interstate waters——

Senator KLOBUCHAR. No, I——

Ms. RUTLEDGE. —et cetera——

Senator KLOBUCHAR. Yes.

Ms. RUTLEDGE. —and they have made it into a very long, lengthy, three-parts, multiple subparts, seven new definitions.

Senator KLOBUCHAR. So you would rather go back to just where it was.

Ms. RUTLEDGE. I would rather throw this rule out with the bath water, yes, ma'am.

Senator KLOBUCHAR. Okay. Thank you.

I had one question about this: The EPA's proposed rule adds new language explicitly exempting certain waters from jurisdiction that are not currently exempt. These exemptions will be enforced by the Army Corps as they are under current regulations.

Now I have heard from producers in my State who feel that existing exemptions are not always enforced uniformly across the different Army Corps districts. For example, the St. Paul District of the Army Corps of Engineers, which includes Minnesota, requires a Section 404 permit for the installation of drain tile through a wetland, but in neighboring North Dakota in the Omaha District installation of drain tile is exempt from Section 404 permitting.

Have you heard from states in different Army Corps districts that they are not consistently applying, and how would we fix this?

Anyone?

Mr. van der Vaart. I will simply vote that, yes, we have seen inconsistencies. We are fortunate to work with professionals and some of our own folks who have worked elsewhere in the country, and we have sat down with the Army Corps out of Atlanta to raise this issue of consistency, and we hope to meet some level in our district.

Senator KLOBUCHAR. Okay. Anyone else?

Ms. Metzger.

Ms. METZGER. Thank you, Senator.

I think a good example from Kansas is we actually fall under the jurisdiction of just one regulatory district, the Kansas City District. Other states sometimes have several jurisdictions that fall under their purview.

We go through battles in the discrepancies of the way that the Federal mitigation rule is applied in Kansas versus some of our neighboring states and that there is a requirement in Kansas that we have a permanent, in perpetuity, conservation easement placed on all of our mitigation projects. That is not universally applied in other Corps districts throughout the states.

So we do see quite a bit of diversity in the way that the existing rules are applied.

Senator KLOBUCHAR. Okay. Well, thank you very much, and thank you for coming today and sharing these concerns which I have heard a lot of in our state.

Thank you.

Chairman ROBERTS. Senator Sasse.

STATEMENT OF HON. BEN SASSE, U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator SASSE. Thank you, Mr. Chairman, both for holding this particular hearing and for making oversight a priority of this Committee.

As my colleagues have noted, addressing the "Waters of the U.S." Rule as it relates to producers across the country and rural life across our country is not only entirely appropriate, but it is an urgent necessity. You hear about it in all 93 of Nebraska's counties when you travel our State.

I am scheduled to be presiding on the Senate floor later this morning. So, before turning to my questions, with the chairman's

indulgence, I want to introduce Jeff Metz of Morrill County, Nebraska, who will be testifying on the second panel.

His son is with him today as well and told me yesterday that he is happy to be missing three days of school,

transferring his education to Washington, DC over the course of this week. So we are happy to oblige.

Mr. Metz is the owner and operator of Metz Land and Cattle Company of Angora, Nebraska, where runs a cow-calf operation and farms winter wheat and other crops. Since 2010, Mr. Metz has also served as a county commissioner in Morrill County. So his perspective is informed not just by his role as a producer but also by his role in local government.

Mr. Metz is here because, like so many Nebraskans, including myself, he cares deeply about the land and water that helps form the backbone of the agriculture of our State but also is the place where he is raising his kids.

I suspect that he is here because he expects that at least one, and maybe both, of his sons will one day be farming the ground that he currently farms.

I would also mention that his great grandfather first homesteaded the land that he lives on today. So he is the fifth generation of producers living on that land.

There is nobody in Washington, DC who cares more about the environment in Morrill County than he does. Mr. Metz's commitment to clean water, as his testimony today makes clear, should be understood in the light of the legacy of five generations living and working that land and one that he expects to pass on to the next generation.

So thank you for being here today. We look forward to hearing from you on the second panel.

As far as—thank you, Mr. Chairman.

As far as questions for this panel, I would like to begin with Secretary van der Vaart. Your written statements talk a good bit about Chevron deference, and I wonder if you could unpack that a little bit and also to speak about whether or not you think that regulatory agencies are increasingly incentivized to find ambiguities in statutes so as to exploit Chevron later.

Mr. van der Vaart. Thank you.

That is exactly right. I testified here last week on Section 111(d), curiously called the Clean Power Plan.

The issue here is that Congress bestowed upon the EPA the authority that—the trust to implement the Clean Water Act, and over time the EPA has successively done a poorer and poorer job of that.

If you take a look at appellate level and above cases, the EPA loses more than they win, and that is in the cases that are so-called non-ambiguous. In the ambiguous side, they are meant to take deference.

But that is a public trust that was bestowed on them, both by this Congress as well as by courts in the Chevron case.

My question is, increasingly, how often does the EPA have to miss, how often do they have to misinterpret laws before Congress revokes this public trust?

That is a very serious question because, as you said, it has now been used in a lot of cases to develop sue-and-settle strategies

where we do not really even go through rulemaking. EPA finds some benevolent Federal judge to define rules for us through a cherry-picked process.

So it is very concerning, and I hope that we—that Congress takes a look at it.

Senator SASSE. Thank you.

General Rutledge, I wonder if you have views on that question as well.

Ms. RUTLEDGE. Thank you, Senator Sasse, Mr. Chairman.

Yes, I believe that the EPA has continually gone beyond its scope.

Recently, in a Supreme Court case of Perez v. Mortgage Bankers, the holding in that case simply stated that administrative agencies do not have to submit interpretive rules to public notice and comment. This should frighten everyone who hears that because what will prevent the EPA or any agency from claiming to offer further clarity on issues and pushing through an interpretive rule without public comment.

This rule alone received one million public comments.

Senator SASSE. Mr. Chairman, I recognize that I am about at time.

So I will simply say that when you travel—I am new here. When you travel across our State, people actually believe in a Madisonian system of checks and balances. They believe in three separate, but equal, branches that check and balance one another.

The increasing executive unilateralism we see out of this administration did not begin simply because of this administration but because the Congress has regularly passed laws that need to be passed before people can find out what is in them.

We need a government that is more self-consciously self-limiting because it believes in the Federalism that many of you have advocated more. Most governance should be delivered at the state and local level where possible.

Thank you, sir.

Chairman ROBERTS. We thank the Senator.

Senator Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman.

Obviously, this is a rule that has generated a lot of discussion in every state, especially states like ours, in Kansas and North Dakota, where over 90 percent of our land mass is engaged in farming.

Unlike Kansas, we have had an unusual wet cycle. I recently had another member touring the border, and we were in a helicopter. I pointed down to Northwestern North Dakota, where it has never been wet like this before—and I said, do you think EPA and the Corps have jurisdiction over that water?

That is the question. Do they have jurisdiction, or don't they have jurisdiction?

I think the most important thing we can do is provide certainty.

I understand what you are all saying about this or that. But I would point out, General Rutledge, the IRS issues letters of opinions, interpretative opinions, every day. You have to be careful when you are saying all interpretive rules would be subject to notice and rulemaking because there is a lot of that going on.

We are engaged—Senator Lankford and I are engaged in a process where we are actually trying to sort out how this process should go forward.

But the point that I want to make, I think, is that what is the "Waters of the United States?"

[No response.]

Anyone want to give me a one-minute definition of what the "Waters of the United States" are?

[No response.]

Senator HEITKAMP. It is pretty hard. It is pretty complicated. We all know it is complicated, from jurisdictions to when we used to have the EPA cow that we drank out of the pothole and that created interstate commerce jurisdiction.

We know it is not navigable, and I think the court told us in Rapanos it is not navigable in the traditional sense. So that has created a whole lot of uncertainty that we need to resolve.

But I think that we need to appreciate that all of us are in this together. The worst thing that we can do is create, I think, a subindustry here of people coming and spending and spending, and we spend millions of dollars on controversy when we should be sitting down, answering that question, because the court did not do a very good job.

I would suggest, Secretary, that when you talk about 111(d)—the EPA was pretty certain they did not have jurisdiction over CO2. But what did the Supreme Court tell them? They had jurisdiction over CO2 and had to at least contemplate regulation.

So regulation through litigation is not our path forward. It is expensive, and it creates uncertainty. So we need to figure that piece out.

But I would suggest to you, Mr. Baldi, that if you were proposing a rule and it generated enough interest that we have to hold the hearing in this room and, literally, unanimous opposition from every farm group in North Dakota and every farm group across the country, wouldn't you rethink that rule?

Wouldn't you step back and say, "well, obviously, one of the two things, they are not understanding what I am trying to do, or maybe I am overreaching and we need to have another conversation?" Wouldn't you do that?

Mr. BALDI. Rules are complicated business, and when you have interests on all sides you sometimes have strong opposition from one interest or another. That does not necessarily cause an agency to go back to the beginning.

You started by asking the question, what are "Waters of the U.S."?

I, actually, on the plane flight here, was doing the same thing, looking down at the waters as I was coming across the nation. Very difficult to tell from a picture or from a plane what are, and what are not, "Waters of the U.S."

What we believe the Corps and EPA have done here is clearly identified some waters that are clearly not "Waters of the U.S."

Senator HEITKAMP. But I would tell you that no one thinks what they have done here has clarified what, in fact, is "Waters of the United States."

Does it mean a connection through subsurface connections? What exactly are we going to have?

We need to remember we do not have an EPA rule that we are talking about. We have a proposed rule and a promise that we are going to fix it.

I think there is a whole lot of distrust on whether we are, in fact, going to see a rule that clarifies and fixes some of the concerns, and I think that is where we are at right now.

I guess my point is wouldn't it be better to basically propose a new rule—and it can be the rule that they are working on now—and open it back up for comments so that people can have additional dialogue and additional consultation with states?

Here are three states saying they want that additional discussion. Wouldn't that be a better path forward?

Mr. BALDI. Well, from Washington State's perspective, we would like them to do additional work on the rule before it is finalized. So we agree that there are some improvements that we can see in the rule. However, we have seen the Federal agencies in other rulemaking actually improve and work with the states and, again, the last eight months, have been very different from when they proposed the rule. So we have believed that they have been much more interactive, EPA in particular.

Senator HEITKAMP. But having the ability to see where their thinking is now and comment on it and have further dialogue before it is finalized, can't you see some value in that?

Mr. BALDI. We anticipate more interaction, and again, that is why we have called for these regional discussions, regional definitions, with the Federal agencies. They have been responsive in other rulemaking. We believe they will be here as well.

Senator HEITKAMP. I guess my point is that we have had a lot of controversy around this rule. It seems to me that we ought to have more conversation and more certainty.

Simply saying "trust us" probably is not going to sit very well with a lot of the witnesses and a lot of the discussion on this panel.

Thank you, Mr. Chairman.

Chairman ROBERTS. I thank the Senator.

Mr. Baldi, you ought to take those EPA folks you are working with, and the Army Corps of Engineers, and send them down to Kansas and over to North Carolina and to Arkansas That would be very helpful.

Mr. BALDI. I will see what I can do.

Chairman ROBERTS. When you were flying over, trying to determine what was wet, that is what the EPA determines, and they have actually flown planes over Kansas to determine what is wet.

So we will go from there.

I apologize to Senator Donnelly, who is recognized at this point.

Senator DONNELLY. Thank you, Mr. Chairman. No reason to apologize.

I will note very quickly that my alma mater will be playing Wichita State in a few days.

[Laughter.]

Senator DONNELLY. I hope that the fact that you are the chairman and I am just one of the members is not going to influence the outcome.

To everybody here, I think we all know well the need for EPA to rework the rule, to provide greater clarity for our farmers, ranchers, and state regulatory agencies. We all want a rule that protects our waters from pollution, but we also need a rule that provides certainty and confidence for all stakeholders. Even EPA admits they need to improve the rule to reset balance.

So, to all of you, would you feel more confident if EPA had to take all the information received from the public on this proposed rule, then go through all the procedural steps they skipped the first time, like consulting with states, consulting with small businesses, and finally, re-propose a WOTUS rule within some guidelines that say EPA cannot define things like erosional features or isolated ponds as "Waters of the U.S."?

Ms. Rutledge, we will start with you.

Ms. RUTLEDGE. Yes. Thank you, Senator Donnelly, for the question.

Yes, in Arkansas, we would welcome the EPA to come visit with our farmers, our landowners, our business owners, and to read the comments submitted by those in our State and those in the other states, of those one million comments, before proposing another rule.

Senator DONNELLY. Mr. Secretary?

Mr. VAN DER VAART. Yes, exceedingly novel perhaps, but yes, we would very much encourage that.

Senator DONNELLY. Ms. Metzger?

Ms. METZGER. Thank you.

Yes, if EPA and the Army Corps of Engineers truly took Executive Order 13132 seriously and consulted with the states in revising this rule and did not put our feedback in the same—relegate it to the same feedback as all those other million comments, then we would appreciate that, if it was reflected in the final rule.

Go Shockers.

Senator DONNELLY. We will strike the last part from the record.

[Laughter.]

Mr. Baldi?

Mr. BALDI. Again, as the previous exchange demonstrated, we have been working with EPA.

We do not recommend that they go back and start again.

We do recommend strongly that they form these regional committees to work out the final details of the rule.

Senator DONNELLY. I think what is important to understand—and I have mentioned this before—is that when I look at Indiana's farmers and, I know, the ag community across the country, nobody wants to have cleaner water, nobody wants to have better land conditions, than the family that actually lives on the farm, right there.

Our waters in our State are the cleanest they have been in my lifetime, and it is everybody working very, very hard to make progress. They are doing it because they care about it and they want to and they know it is their children's future.

I think it is really important for us to have some faith and confidence in the wisdom of the people and the ag community throughout this country and put a lot more faith in them than we have been.

Thank you, Mr. Chairman.

Chairman ROBERTS. Senator Cochran.

Senator COCHRAN. Mr. Chairman, thank you.

It occurs to us that there are inevitably going to be costs imposed on landowners and others, state governments, on and on. EPA has estimated that the state governments alone would experience about a million dollars annually in additional costs to administer and process permits in addition to some other costs that are associated with the permitting process.

What do you have in your testimony that would indicate to the Committee what the costs are expected to be? Have you done any analysis of that?

Ms. METZGER. From Kansas's perspective, we have estimated that we spend $300,000 annually from state general funds in the implementation of our state regulations for "Waters of the U.S.," defining use attainability analysis and monitoring. We would expect that would certainly increase if this rule were adopted—funds we think are better spent by actually implementing best management practices on the ground that improve water quality.

Senator COCHRAN. Other witnesses who have comments to make on that?

Mr. VAN DER VAART. I would like to note——

Senator COCHRAN. —comments to make on that?

Mr. VAN DER VAART. Yes, sir. I would also like to note that the exemptions are—that we have heard today do not apply to water quality standards or NPDES permitting or, for that matter, possible TMDLs. So I do not want anyone to think that this rule and this interpretation will not have impacts on existing farms right now.

Senator COCHRAN. What is TMDL, as a matter of curiosity?

Mr. VAN DER VAART. It is, essentially, when surface waters have exceeded water quality standards despite compliance with point source discharge limits and you need an additional plan to bring the surface waterbody into compliance with water quality standards. Under that program, we can regulate to any wetlands, including those newly designated and to so-called exempted farms.

They are only exempted from 404 permitting. Sorry.

Senator COCHRAN. Oh.

Ms. RUTLEDGE. Senator Cochran, I do not have any specific data on how much it would cost the State to issue the permits.

But I do have information that it is very costly for farmers or landowners to obtain these permits, but the cost of not obtaining them is even more so. A landowner could be penalized up to $37,500 per violation per day in violation of the Clean Water Act. That is a heck of a lot of money, sir.

Senator COCHRAN. It is in Mississippi; that is for sure.

Mr. BALDI. Senator, likewise, we have not performed an analysis. As I mentioned, this is very similar to the system we currently operate.

I will say that EPA has estimated there will be an additional 3 percent permittees nationwide. So there will be cost, but in our experience we do not believe it will be significant.

Senator COCHRAN. Yes. Thank you, Mr. Chairman.

Chairman ROBERTS. That will conclude the first portion of our hearing this morning.

Thanks to each of our witnesses very much for taking time out of your busy schedules to come to Washington and share your professional perspectives about the impact of the EPA's proposed rule on the "Waters of the United States."

To my fellow members, we would ask that any additional questions you may have for the record be submitted to the Committee clerk 5 business days from today or by 5:00 p.m. next Tuesday, March the 31st.

We now invite the second panel of witnesses to come to the table.

[Pause.]

Chairman ROBERTS. I would like to welcome our second panel of witnesses before the Committee.

We have a vote at 12:00, and so, like King Tut, we are pressed for time. Sorry about that.

Ms. Lynn Padgett joins us today on behalf of the National Association of Counties.

Senator BENNET. Mr. Chairman.

Chairman ROBERTS. Oh, I beg your pardon, Senator Bennet.

Senator BENNET. Thank you.

Chairman ROBERTS. Senator Bennet would like to introduce this witness.

Senator BENNET. Well, it would be much classier to be introduced by the chairman than by me, but I would like to have the——

Chairman ROBERTS. You are welcome, sir.

STATEMENT OF HON. MICHAEL BENNET, U.S. SENATOR FROM THE STATE OF COLORADO

Senator BENNET. Thank you, Mr. Chairman.

Actually, I have the chance this morning to introduce not one, but two, witnesses from Colorado. Thank you for allowing them to testify.

First, I would like to introduce Lynn Padgett, second term county commissioner from beautiful Ouray County situated in Colorado's San Juan Mountains.

Lynn has been a great partner to me over a number of years, whether it has been working together to allow "Good Samaritans" to clean up abandoned hard rock mines or strategizing on the best way to ensure our rural communities get their full payment in lieu of taxes—PILT. Lynn worked with this Committee and the full Senate to help secure a one-year extension of PILT payments during the conference committee for the 2014 Farm Bill.

Lynn, welcome, and thanks for being here today.

I would like to introduce on the panel the other witness from Colorado, Kent Peppler, who is at the other end. We have got bookends today.

Kent is a fourth-generation farmer from Mead, Colorado, where he grows barley, alfalfa, corn, and wheat on his 500-acre farm. In the past, Kent has also grown sugar beets and sunflowers and tended to hogs, sheep, and cattle.

Kent knows the importance of clean water to his farm, and that is why he is here today, to support the Clean Water Rule.

Kent is the president of the Rocky Mountain Farmers Union, a graduate of Colorado State University, father of two kids, and has been married to his wife, Colleen, who is here today, for 3 years.

Welcome, Kent.

Mr. Chairman, thank you for the privilege of introducing these two witnesses.

Chairman ROBERTS. I thank the Senator very much.

Second, we have Mr. Furman Brodie, who joins us today, traveling from South Carolina on behalf of the Charles Ingram Lumber Company.

In his professional capacity, Mr. Brodie currently serves as the Vice Chairman of the Southeastern Lumber Manufacturers Association, which represents the forest product industry and sawmills throughout that region of the country. Mr. Brodie also served as Chairman of the South Carolina Forestry Association and on the board of the Treated Wood Council. He is the present Chairman of the Southern Pine Inspection Bureau and the Vice Chairman of the American Lumber Standards Committee.

Thank you for being here today. I look forward to your testimony.

Jason Kinsley, pardon me, Kinley, joins us today from Emmett, Idaho, where he is the district director for the Gem County Mosquito Abatement District. Mr. Kinley also serves on the American Mosquito Control Association Board of Directors for the North Pacific Region. In this role, Mr. Kinley also serves as the Executive Director of the Northwest Mosquito and Vector Control Association since 2009.

Welcome. I certainly look forward to your testimony, sir.

Mr. Robert "Mac" McLennan of Minnkota. Senator Hoeven was scheduled to introduce this witness. In case, he is not here, and so I will proceed.

Mr. Robert "Mac" McLennan is the president and CEO of Minnkota Power Cooperative, Inc., an electric generation and transmission co-op based in Grand Forks, North Dakota, that serves areas in North Dakota and Minnesota.

Early in his career, Mr. McLennan has also worked for the National Rural Electric Cooperative Association as the director of Environmental Affairs. Pardon me.

Welcome, and I look forward to your testimony.

Mr. Jeff Metz, Senator Sasse, I think you have already introduced this witness. Would you like to add anything at this point?

Senator SASSE. No, just that we are grateful that Jeff is here and that his son has accompanied him, and he is not only a farmer and producer in the Western Panhandle of Nebraska, but he is also the president of the Farm Bureau of Morrill County.

So, glad you are here, Jeff.

Chairman ROBERTS. What is Mr. Metz's son's name?

Senator SASSE. I think we have Logan and Dylan. Just Dylan here.

Chairman ROBERTS. Would he stand?

Young man, there is going to be a test on this tomorrow. So, take good notes.

[Laughter.]

Senator SASSE. This is when you are supposed to claim you are a Shockers fan. Just say, and we will talk football with the chairman later.

Chairman ROBERTS. All right. Mr. Kent Peppler of the Rocky Mountain Farmers Union. Senator Bennet, I think, has already done that job.

I think that pretty much concludes introductions. If I have left anybody out, I apologize.

Let's move right away to Commissioner Padgett.

STATEMENT OF THE HONORABLE LYNN M. PADGETT, COMMISSIONER, OURAY COUNTY, MONTROSE, COLORADO

Ms. PADGETT. Thank you, Chairman Roberts, Ranking Member Stabenow, and members of the Committee for the opportunity to testify on the "Waters of the U.S." Proposed Rule.

My name is Lynn Padgett. I am an elected county commissioner from Ouray County, Colorado, and today I am representing the National Association of Counties.

Ouray County is considered rural, with a population of approximately 4,500 residents. Known as both the "Switzerland of America" and the "Gateway to the San Juan," my county is home to scenic ranch lands, historic mining districts, wild lands, trails and public and private hot springs. Approximately 45 percent of our county is comprised of Federal public lands and 23 percent is agricultural.

As a county commissioner and small business owner, I interact with constituents and businesses on a daily basis. Throughout Colorado, I have heard concerns about how the state and local governments, businesses and residents could be affected by the proposed rule. These concerns have been echoed by counties, large and small, across the country.

After consultation with county experts, including county engineers, public works directors, stormwater managers, and legal staff, NACO called for the agencies to withdraw the proposed rule until after further analysis and consultation with local officials is completed. This decision was not taken lightly.

Today, I will discuss the on-the-ground impacts on rural counties nationwide and why counties called for the proposed rule to be withdrawn.

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, bridges, flood control channels, stormwater systems and culverts.

Many of these road systems are in very rural areas. Seventy percent of counties are considered rural with populations of less than 50,000.

Additional Federal regulation would be challenging, especially since rural counties own most of the road miles and ditches. My county is responsible for over 300 public road miles and the majority of bridges which help to support our local economy and tourism industry.

Because we own so much infrastructure and are responsible for public safety, defining which waters and conveyances fall under Federal jurisdiction has a direct impact on counties.

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. However, this process was not completed by the agencies.

Third, due to this inadequate consultation, many terms in the proposed rule are vague and create uncertainty at the local level. For example, the proposed rule introduces new definitions of "tributaries," "significant nexus," "adjacency," "riparian areas" and "floodplains." 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 uncertainty over how it would be implemented consistently across all regions.

Our final reason for calling for the withdrawal is that the current permitting process tied to the "Waters of the U.S." already presents significant challenges for counties and the proposed rule only complicates matters. The jurisdictional determination process is already complex, time-consuming and often triggers other Federal laws. We have many examples from across the country, from the coastal areas to the arid West, of instances where existing rules under the Federal permitting process are being implemented inconsistently.

In conclusion, while many have attempted to paint this as a political issue, in the eyes of county governments, it is a matter of practicality and partnership. We look forward to working with you and with the agencies to craft and clear and workable definition of the "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.

[The prepared statement of Ms. Padgett can be found on page 76 in the appendix.]

Chairman ROBERTS. Mr. Brodie.

STATEMENT OF FURMAN BRODIE, VICE PRESIDENT, CHARLES INGRAM LUMBER COMPANY

Mr. BRODIE. Thank you, Chairman Roberts. I would like to thank you and the Committee for holding this hearing on the impacts of the "Waters of the U.S." Proposed Rule.

I would also like to take this opportunity to thank the Committee for all your hard work on the 2014 Farm Bill, including your work on the Forest Roads Provision.

My name is Furman Brodie, Vice President of Charles Ingram Lumber Company in Effingham, South Carolina. I also currently serve as Vice Chairman of the Southeastern Lumber Manufacturers Association, or SLMA.

Charles Ingram Lumber Company is a family-owned company that manufactures Southern Yellow Pine lumber. We also own timberland where we grow trees for pulpwood and saw timber.

SLMA is a trade association that represents sawmills, lumber treaters, and their suppliers in 16 states throughout the Southeast.

Charles Ingram Lumber Company originated in 1931 as the Bynum-Ingram Lumber Company, and the third generation of the Ingram Family now helps manage the operation of the mill. Our mill produces approximately 120 million board feet of Southern Yellow Pine annually, and we support 150 good paying jobs in our community.

Our industry has reviewed this proposal, and we have identified a variety of concerns. Many of these concerns are similar to those expressed time and again by others in agriculture, forestry, and throughout rural America, namely, that the proposed rule is vague, excessively expands jurisdictional waters, and opens up stakeholders to endless and costly litigation.

That said, as timber owners and sawmill operators, we do have some unique concerns that I would like to briefly outline.

In South Carolina and other states, there are already best management practices, or BMPs, in place to ensure that proper precautions are taken to control water runoff during forest management activities. These BMPs are successful in large part because they are tailored for specific regions and terrains.

We fear the complexity of this rule will create untenable administrative burdens on the state agencies. Additionally, the complexity of the rule could frustrate landowners' inclination to reinvest in forest management and even push some landowners to consider other land use options. Such unintended consequences of the proposed rule could be devastating.

The "Waters of the U.S." Rule would also impact our sawmill operations. Our operations typically involve a number of operations that generate a water discharge. Some of these activities are already regulated by the Clean Water Act, but some are not.

Our biggest fear is that, under this proposed rule, creative litigators could find a way to argue that virtually every aspect of our operation, from forest to mill, would be regulated by EPA.

Administrator McCarthy has made several public statements to indicate that there will be significant changes. We would like to point out that her comments are not legally binding and provide little reassurance to those of us whose business are at risk.

Fixing this rule in the way necessary to be supportive of rural economic engines such as ours will require major changes. If significant changes are made to the rule, then additional opportunity for stakeholder comment is necessary.

We hope members on both sides of the aisle will appreciate that we simply cannot be asked to blindly trust the EPA to get it right. We respectfully request an opportunity to review the changes to the rule and comment on these changes before we are asked to comply with this new regulation.

In conclusion, I would like to thank the Committee for taking the time to hold this hearing today and hear our perspective, and I look forward to answering any questions you may have.

[The prepared statement of Mr. Brodie can be found on page 55 in the appendix.]

Chairman ROBERTS. Thank you, Mr. Brodie.

Mr. Kinley.

STATEMENT OF JASON KINLEY, DIRECTOR, GEM COUNTY MOSQUITO ABATEMENT DISTRICT

Mr. KINLEY. Good morning, Mr. Chairman and members of the Committee.

My name is Jason Kinley, and I am the director of the Gem County Mosquito Abatement District, a special purpose district established in Emmett, Idaho, to control mosquitos. I welcome the opportunity to provide a public health perspective to the deliberations of this Committee concerning impacts the "Waters of the United States" Proposed Rule will have.

Over one million people die worldwide each year from mosquito-transmitted diseases. The costs associated with the treatment of mosquito-borne illness run into the millions of dollars each year in the United States.

Alarmingly, the future of public health protection through mosquito abatement itself is in jeopardy due to the increasing costs associated with pesticide registration, the reduction of epidemiology and laboratory capacity grants, and burdensome requirements of the Clean Water Act's National Pollutant Discharge Elimination System Permits. These costs and the reduction of grant funding divert already scarce taxpayer dollars to regulatory compliance instead of using those funds to meet mandated public health missions and objectives.

Indeed, the end result compromises both the quality and extent of protection mosquito control offers to the public and may result in the loss of protection for those constituencies who cannot afford to pay these increased costs.

If the proposed rule is finalized consistent with its current form, the number of waters protected by the Clean Water Act will increase. EPA has stated that this increase in jurisdiction will aid in protecting the nation's public health and aquatic resources.

I certainly support the protection of our nation's waterways and wetlands. However, I am also concerned that the expansion of "Waters of the United States" under the proposed rule will increase regulatory burdens to conduct necessary, integrated mosquito management initiatives and, thus, inhibit such work.

Mosquito control products are rigorously reviewed under FIFRA. If approved, those products will be required to carry labels that include application instructions and environmental considerations. The impact of pesticide application upon water bodies and aquatic species is thoroughly considered before a product is ever allowed on the market.

In contrast to the Clean Water Act, violations under FIFRA are based on sound science, EPA-approved label language, and specific enforcement benchmarks. Violations under FIFRA are not based on personal perceptions or personal opinion, and only government agencies that have been empowered to process violations do so.

Currently, staff of the Gem County Mosquito Abatement District spend approximately three weeks per year tabulating and reporting activities for the season on "Waters of the United States."

The District has had to invest in the geographic information system for accurate reporting of applications to "Waters of the United States," the purchase of the necessary hardware and software required, an investment of 20 percent of our annual operating budget. The District was forced to make this hardware and software investment to comply with NPDES reporting requirements solely as it was not necessary for FIFRA compliance.

The costs associated with reporting compliance diverts funding away from the mission of protecting public health in Gem County. These costs would only increase with the expansion of defined regulated waters as there would be a larger number of water bodies where compliance is required.

Again, all of these regulatory requirements would either require increased taxation of our citizens or a diversion of resources away from our public health mission. Either way, neither the environment nor the public would be well-served.

The current climate of mosquito control in the United States is dynamic. Recently, there has been an influx of invasive species of mosquitos, such as Aedes albopictus and Aedes japonicus, in many parts of the country and new diseases, like chikungunya virus, that are not endemic to North America. The costs associated with addressing influxes and invasive species and new disease are exacerbated by redundant regulation and reporting requirements.

The increase in jurisdictional scope of the proposed rule compounds these costs, making a great many mosquito management programs potentially unsustainable. This will ultimately result in adverse impacts on communities, recreation, and both animal and human health.

Thank you for the opportunity.

[The prepared statement of Mr. Kinley can be found on page 59 in the appendix.]

Chairman ROBERTS. Mr. McLennan.

STATEMENT OF ROBERT "MAC" N. MCLENNAN, PRESIDENT AND CEO, MINNKOTA POWER COOPERATIVE, INC.

Mr. MCLENNAN. Thank you, Mr. Chairman, Ranking Member Stabenow, and members of the Committee.

I am happy to reflect the views today of America's rural electric co-ops and particularly those within our region in Eastern North Dakota and Northwest Minnesota, sometimes referred to as the "Land of 10,000 Lakes" and certainly the "Prairie Pothole Region" of this country.

So as EPA begins to talk about redefining or reclarifying what "Waters of the U.S." means, it has a significant impact on the individuals in our area. We have a slightly different view than those of the farmers and ranchers who most of our members serve but, nonetheless, the same concerns as it relates to clarity associated with this proposal.

We have about a 35,000-square-mile territory in that region that runs along the Red River Valley of North Dakota, which I will talk about specifically in just a moment.

We have about 3,000 miles of transmission line, and our members have tens of thousands of miles of distribution lines in those areas.

So, as you talk about redefining the areas that we have to operate in, we take very close, and pay very close, attention to that.

Our view is that the current rule, as it is proposed, is not really a clarification. It is a substantial expansion that results in, more likely than not, more costs, delays, and confusion but not likely to improve the environment—its stated goal.

Today, utilities operate under a nationwide permit, No. 12, that allows us certain freedoms as it relates to "Waters of the U.S." and our ability to do activities. We have the ability as long as in that project, or in a project, we do not disturb more than a half-acre of "Waters of the U.S."—manageable most of the time in our region but still a challenge at times based on the nature of our topography.

So when, under the proposed rule, ETA—or, EPA contemplates expanding that definition to include tributaries that directly or indirectly contribute flow to a navigable body of water, yet to be determined what that means—obviously, in the heart of this discussion—without defining to taking into consideration the frequency, duration, amount of flow, or its proximity to navigable waters, further complicates the issue for us and creates a challenging process.

Further in this rule, when you add the challenges that wetlands and manmade features are being considered as it relates to part of this, it gets even more complicated.

Finally, the last part for our part of the country and region of the world is when the proposed rule specifically refers to the "Prairie Pothole Region," or those areas we live, for a potential jurisdiction. Getting that right is imperative and very troubling to us as it relates to how it might work.

I mentioned the Red River Valley in North Dakota and Minnesota splits. That is the border between the states, and it is dead in the middle of our service territory. Grand Forks, where our office is located, is right on it.

For those of you who are not familiar with the Red River Valley, we live in an extremely flat region subject to significant seasonal flooding.

I live, personally, right on the river. At times, where I live, the river is two to three hundred yards wide. During the spring, it is several miles wide.

So, when the water recedes and the spring fades, the water just does not flow back down to the river. Every low spot, every small pond, every ditch, every field, every wet area ends up staying there until such time as either the sun heats it up and it evaporates or it finds another way.

Clearly, it is not a water that is there on a permanent basis nor is it navigable nor does it—and it occurs. So this year we will have a very easy spring, and it is unlikely that those waters will exist.

So, as you look at that in our valley, as those recede or those—the question I think Senator Heitkamp asked earlier is are those "Waters of the U.S." The concern for us today is we do not know. So it becomes a potential nightmare to manage that as we move forward.

Those are a lot of what-ifs.

On a practical front, our experience has been, however, that as the agencies enforce those what-ifs, they enforce them with an error on the side of caution, and that caution is out of fear or criticism that they are going to be challenged over that.

On a practical front, that leads to numerous challenges and months of delay over the projects.

I will just close by saying the preamble to the rule says we want to enhance protection for the nation's public health and aquatic resources by increasing clarity.

I would argue it does not increase clarity at all and, in fact, makes it much more difficult for those people in our region to figure out what it means.

So, thank you, Mr. Chairman.

[The prepared statement of Mr. McLennan can be found on page 65 in the appendix.]

Chairman ROBERTS. We thank you.

Mr. Metz.

STATEMENT OF JEFF METZ, OWNER AND OPERATOR, METZ LAND AND CATTLE COMPANY

Mr. METZ. Good morning. My name is Jeff Metz. My family and I farm and ranch in the Western Nebraska Panhandle, where we raise cattle, wheat, and other dryland crops.

Thank you for allowing me the opportunity to provide a farmer-rancher and a local government perspective on this proposed rule.

I want to thank the Chairman and Ranking Member for holding the hearing.

The proposed "Waters of the U.S." rule represents a dramatic expansion of the Federal Government's reach into the everyday activities of farmers, ranchers, homebuilders, local county governments, and virtually everyone who turns earth with a shovel.

Throughout my land, I have seasonal valleys, draws, and canyons, as well as ponds and other natural depressions, that at times fill or flow with water. In fact, there are many examples in Nebraska of waterways that have what the rule defines as jurisdictional—a bed and a bank and a high-water mark.

Unless there is a significant amount of precipitation, many of those examples are waters that flow only a short distance before evaporating or seeping into the ground. Yet, it appears that I will now need a Federal permit to farm those areas.

A Federal permit will cost me time and money, and even more problematic, the Federal Government is under no obligation to give me that permit, even if I need one to farm.

Nebraska is also home to the Sand Hills, the center of Nebraska's critical cow-calf industry. This area is also home to meadows that sit on top of a very shallow water table. These wet meadows will fill with water during the spring but will dry out during the summer, allowing ranchers to mow that grass for hay. As the mowing of these areas is extremely time-sensitive, a delay of a few days or even weeks to obtain a Federal permit could mean the loss of an entire year's worth of cattle feed.

As I said earlier, this rule's impact will reach much further than just agriculture. As one of three county commissioners in Morrill

County, Nebraska, we are charged with maintaining 900 miles of county roads, all of which have ditches that run along each side. Maintaining these roads is expensive and time-consuming, and it is one of the most important tasks to a county government. We simply cannot afford a Federal permit each time we maintain these roads because of the ditches that run along each side.

As I read the proposed rule, as well as portions of the Clean Water Act, it has become very clear to me that the only ones who seem to be confused as to where the regulatory limits lie is the EPA and the Corps, not farmers and ranchers.

What we need is something far more focused on common sense rather than a regulation which grants the Federal Government blanket authority over virtually all bodies of water.

Thank you for the time today, and I will be happy to answer any questions.

[The prepared statement of Mr. Metz can be found on page 69 in the appendix.]

Chairman ROBERTS. We thank you very much.

Mr. Peppler.

STATEMENT OF KENT PEPPLER, PRESIDENT, ROCKY MOUNTAIN FARMERS UNION

Mr. PEPPLER. Good morning. My name is Kent Peppler. I am president of Rocky Mountain Farmers Union, a general farm organization whose members live in Colorado, New Mexico, and Wyoming.

Water is critical to the livelihoods of family farms and ranches.

The rulemaking process is designed to encourage conversation with, and feedback from, the regulated community. It is unreasonable to expect the proposed rule to get all the nuances precisely correct.

Despite confusion over the rule, the basic process is still in place. EPA issued a proposed rule, sought feedback from the agricultural community, and fully expects to make changes, acknowledging farmers' and ranchers' expertise and insights.

Our understanding of this process compelled us to stress the advantages of the new rule and present EPA with instructions on how to make the rule work for family farmers rather than resist the process entirely. We believe EPA's efforts to define these regulations puts all farmers and ranchers on the same page rather than having to guess what is or what is not allowed project by project, permit by permit.

RMFU echoes National Farmers Union's four critiques of EPA's proposed rules.

First, while NFU argues wetlands should not be considered tributaries, RMFU believes that wetlands should not be considered tributaries unless they are in a floodplain.

Second, there must be strict limits on what waters can be considered similarly situated.

Third, groundwater connections warrant further examinations before they may be used as a basis for jurisdiction.

Fourth, the definition of "perennial flow" should be clearly defined, allowing farmers to know with certainty whether ditches on their property are jurisdictional or not.

Right now, family farmers are subject to a convoluted pair of Supreme Court decisions on a statute that has not substantially been revisited since 1987. EPA and the Army Corps have had trouble applying the rules of the court rulings with consistency, preventing farmers from anticipating the jurisdiction status of the water on their land with any confidence.

RMFU does not view the proposed rule, as some groups do, as a greedy grab for power or land. It is an attempt to meet the demands of the Supreme Court and allow commerce and agriculture to proceed without fear of unexpected permitting complications.

The current regulatory landscape is unacceptable. We need more clarity and reliability. While the proposed rule did not accommodate all of agriculture's concerns, I understand that the EPA will take all feedback, including that offered by Farmers Union members, under serious consideration. I expect a final rule from the EPA that will protect the nation's water resources without obstructing our ability to farm and ranch productively.

I would encourage all parties presenting testimony today to stop politicizing this matter and be good advocates for American farm families by telling EPA what needs to change in the rule.

The value of our communities in the West is based on having pristine water for communities, for recreation, for agriculture, and for food processing. Eastern States are blessed with ample supplies of water. In the West, water is the most critical resource we have. We do not want that water to waste, and we cannot afford to pollute it.

In conclusion, concerns over proposed definitions of "tributary" and "adjacent" are unwarranted because those definitions merely clarify existing jurisdiction. The final rule should establish that wetlands cannot be considered tributaries. Groundwater connections to jurisdictional water needs to be more.

Rocky Mountain Farmers Union stands ready to provide this Committee with any further information or explanation that may be helpful in this matter.

Thank you.

[The prepared statement of Mr. Peppler can be found on page 121 in the appendix.]

Chairman ROBERTS. We thank you, Mr. Peppler.

Mr. Kinley, I have three questions for you.

Number one, you said that one million lives are lost every year worldwide due to the various problems with mosquitos and other infections. Is that correct, sir?

Mr. KINLEY. Yes, Mr. Chairman, that is correct.

Chairman ROBERTS. Do you have any figures for the United States?

Mr. KINLEY. Any figures for the United States, they fluctuate given each year and each mosquito season, depending on the situation, and we have seen this in past year.

If you look at just the State of Idaho, in 2006, we had——

Chairman ROBERTS. Right. You had the West Nile.

Mr. KINLEY. —West Nile virus, a severe outbreak where 40-some people lost their lives, and there were over 1,000 human cases in a state where the population is only 1.2 million.

Since numbers fluctuate year by year, I do not have actual averages over the course of time for the United States.

One thing we have working in our favor is that we have robust mosquito control programs established in many jurisdictions, and that helps balance the impact that these diseases have.

Chairman ROBERTS. So we are talking about lives here, and I think people ought to understand that.

With a proposed rule that is—we worry about costs. We also, obviously, worry about overregulation. My favorite commentary is regulating a farm pond where no self-respecting duck would ever land.

That is all well and good, but you are talking about actual lives.

I want to know if added costs—are there added costs that your county is having to pay as a result of the new permitting requirement, and if so, does this impact the frequency or type of treatments you are able to use?

Mr. KINLEY. There are added costs, Mr. Chairman. Some of the costs are not necessarily quantifiable in terms of the amount of money that is spent.

But, ultimately, what happens is to comply with these regulations time is spent identifying waters and in seeing what appropriate applications can be made to abate mosquitos and other pests in those waters and then costs associated with the time that it requires to report these activities.

We actually have to delineate what applications we make to "Waters of the United States" from applications that we make to private lands and state lands and other waters that are not necessarily under the jurisdiction of the Clean Water Act.

Mosquitos do not care about time, and that is the bottom line, Mr. Chairman.

Chairman ROBERTS. If the scope of regulated waters is expanded as EPA has proposed—and you have already answered this partially—how would this impact the work that you do?

Mr. KINLEY. As jurisdiction is increased, we fear that more and more agencies—and these are Federal agencies, such as the Bureau of Reclamation or the Bureau of Land Management—will put further restrictions on what we can and cannot do on those lands as they pertain to water that exists on those lands, therefore, prohibiting the applications that we could make to control mosquitos that are actually developing on those Federally regulated lands and prohibiting our ability to do our jobs for the citizens that live near and around those properties.

Chairman ROBERTS. Are you aware of this same type of concern in other counties in other states?

Mr. KINLEY. I am very much so, Mr. Chairman. California, Oregon, and the State of Washington have very real issues with trying to deal with the NPDES reporting requirements, the NPDES permit as it stands at the state level, and so it is a very real concern, especially in the western part of the United States.

Chairman ROBERTS. I thank you for your comments.

Senator Stabenow.

Senator STABENOW. Well, thank you very much, Mr. Chairman.

Thanks to each of you.

Just one clarification, though, Mr. Kinley. It is my understanding that there has not been any general permit denied under the new law for spring. You do very important work, and it is my understanding there has not been any permits that have been denied. Is that your knowledge as well?

Mr. KINLEY. As far as I know, Senator, that is correct.

Senator STABENOW. Thank you.

Mr. Peppler, I wonder if you could talk a little bit more about your family farm operation.

By the way, thank you to everyone who has talked about the Farm Bill, on which we pride ourselves in working together and across party lines together on behalf of agriculture, farmers, and ranchers, and appreciate the comments that have been made about the work we were able to get done.

But I wonder if you might talk about how your operation is currently affected by the Clean Water Act and what you will have to change, in your judgment, under the proposed rule and what your interaction has been related to the EPA.

You talked about feeling that agriculture's concerns will be addressed, and certainly, we all want that to happen.

But talk a little bit about how you are affected by the Clean Water Act and what you would anticipate changing in terms of what you do, as you understand what will happen in terms of the rule.

Mr. PEPPLER. Well, first of all, I would like to take this time on behalf of the farmers in the Rocky Mountain Farms Union to thank all of you for the fine job that you did on the Farm Bill. That was a feat that is not very common in Washington these days, and we respect all of you a great deal for it and thank you.

Senator STABENOW. Thank you.

Mr. PEPPLER. You asked me to talk about my farm. We cannot be here all day.

[Laughter.]

Mr. PEPPLER. I farm 500 acres of flood-irrigated ground in Northern Colorado. Our water source—I do not have wells. So our water source comes strictly from the mountains and snow pack. We have storage lakes along the front range of Colorado, Northern Colorado, to store this water, as well as we get some water from the other side of the Continental Divide through a reclamation project.

I have upland ditches on our property that probably will not come under the rule, but our wastewater runs into sloughs that probably will come into the rules.

We also have pretty significant oil and gas development on our farms also.

To talk about the changes, what we would like to see as the fallout from the changes from the rule is that we would like to have more clarity. At this point, we are farming a little bit in the dark.

I watched a World War II show last night, and General Montgomery said the Americans, they just do not know the rules. It is so much easier to play the game when you know the rules.

Well, that is kind of the way I feel agriculture is. We just do not know the rules of the game, and we are hoping that this provides clarity and we will be able to utilize best management practice and

plan down the road those best management practices to help with our farming operation.

Senator STABENOW. You know, Mr. Peppler, I wonder if I might—just on that point, talking about certainty, we have heard a lot of concerns about keeping the comment period going, going back and doing it over, and so on.

Since people want and need certainty, it seems to me I would be concerned about going back and starting over another 200 days and still not knowing.

I mean, the court created a mess, this last decision with five different opinions. I never heard of that before.

There is no question everyone feels they are trying to figure out what is going on.

So I am wondering if you think limiting the Clean Water Rule and starting all over again would be wise for creating certainty at this point in agriculture.

Mr. PEPPLER. The Rocky Mountain Farmers Union thinks that we ought to continue the course that we are on in the rulemaking.

To just ditch the rule, as some would say—time is money, and it will be costly, and it will cause a rise. We think it will cause a rise to more lawsuits, which puts the decision-making in the hands of the court. I would rather put the decision-making in those of us on this panel and those of you up there.

Senator STABENOW. Thanks very much, Mr. Chairman.

Chairman ROBERTS. We have a vote at 12. So we would—the Chair would like to advise Senators if we could keep it down to a reasonable time.

Senator Boozman, please.

Senator BOOZMAN. Thank you, Mr. Chairman.

In the interest of time, I really just want to—in fact, I will ask Commissioner Padgett.

A lot has been said about certainty. My understanding, as somebody that has been in water resources, in one form or another for the last 13, 14 years while I have been in Congress, is the new rule is so broad. You know, it can be interpreted so many ways. Instead of making things certain, it really creates a lot of uncertainty.

So I guess my question would be: Because of the situation that we are in, wouldn't it make sense to provide legislation that would make these things crystal clear as far as the concerns that we have in agriculture?

Ms. PADGETT. Yes. Thank you, Senator.

It would make the most sense at this point to follow what NACO is requesting, which is to withdraw the rule and go back to having a good consultation process with partners. We are calling for a stronger collaborative rulemaking process.

What I am hearing here at the table, Mr. Senator, is that from the various perspectives there is uncertainty, not just for counties but for all of the stakeholders. But counties are partners and we have public safety mandates that are very serious. So we really need to make sure it is done right.

We have provided the agencies with a list of questions that was very detailed since they did not consult with us prior to publishing in the Federal Register, and those questions largely are still unan-

swered. Only a handful were able to get answered, which, again, just keeps highlighting this uncertainty and confusion.

If we cannot have certainty, we really do need to go back.

I just want to point out a couple things about the flawed process.

If we go back to—the Corps will tell you that the Corps did consult with counties a little bit before, 10 years ago, before they published in the Federal Register.

They did not consult with the counties prior to publishing, and in fact, the 17 months leading up to that publishing for public comment there was absolute silence.

Questions that we have from counties: The roadside ditches. If culverts flood, are we going to be able to save our assets, and save our residents and visitors, when the roads flood. In the arid West we have monsoons that quickly turn into flash floods.

That is just one example, sir.

Senator BOOZMAN. Thank you.

Thank you, Mr. Chairman.

I think the reality is they do not know the answer to those questions themselves, which is a real problem.

So, thank you, Mr. Chairman.

Chairman ROBERTS. Thank you.

Senator Bennet.

Senator BENNET. Thank you, Mr. Chairman.

Before I ask my questions, I would like to submit several documents into the hearing record.

The first is a letter that our office authored, with help from elected officials and leaders in Colorado's water community, to the EPA, asking for clarity on several provisions of the rule that have heightened importance for those of us from the arid West.

Secondly, I would like to enter several letters in the record from elected officials in Colorado.

I would ask unanimous consent.

Chairman ROBERTS. Without objection.

Senator BENNET. Thank you, Mr. Chairman.

[The following information can be found on page 159 in the appendix.]

Senator BENNET. I know time is short. So I am just going to ask one question of each Coloradan that is here today.

Kent, this panel has heard today that EPA's stated goal in this rulemaking is to restore the Clean Water Act to its historic reach, to return it to the law that was enforced by President Reagan, by two President Bushes.

You were born and raised in Colorado and have had the chance to see the importance of the Clean Water Act on the ground firsthand, both as a farmer and as a citizen of a state where water is truly the lifeblood of our economy, and our culture, for that matter.

Can you talk a little bit about your experience having seen Colorado's rivers and streams before and after the Clean Water Act was passed?

Mr. PEPPLER. I think I can shed some light on that.

First of all, you are exactly right. In Colorado—and I do not care what farm organization you belong to. I do not care what rotary club you belong to—water is the number one issue, and clean, pristine water is the key to our economy.

We were just talking about this the other day, that people beat up on the environmental movement. They beat up on the EPA. But those of us that have lived along these rivers, along the front range in Colorado, know the significant improvements that have come in the last 40 to 50 years.

When I was a young boy and we would go to Denver, the Platte River was so putrid you did not even want to look at. There were all kinds of different industries dumping pollutants in there.

Isn't your office at Confluence Park?

Senator BENNET. Yes it was.

Mr. PEPPLER. I will tell you when I was a little boy you would have never had your office at Confluence Park because you could not stand the stench, and today, there are people out there kayaking in it. That is the change that we have seen.

So the importance of clean water to the State of Colorado and to this country, you cannot put a value on it. It is absolutely priceless.

Senator BENNET. Thank you, Kent.

Commissioner Padgett, Lynn, you have been a tireless advocate for clean water in Colorado as well.

One issue that we have worked on together in the past is the so-called "Good Samaritan" legislation that provides regulatory flexibility for groups like Trout Unlimited or the Boy Scouts of America to get out on the ground and clean up abandoned hard rock mines that are harming water quality.

You have been one of the nation's leaders on this issue, and since we are discussing clean water here I was hoping you could share some of the challenges your community is facing that stem from the legacy of abandoned hard rock mining operations.

Ms. PADGETT. Thank you, Senator.

Yes, it is true I have been very active on the ability of parties who have no connection, financial connection, to historic mines that were mined before there were even permits, to measurably and demonstrably improve water quality.

That means, for those of us in the room that are not from Colorado or from areas with hard rock mining to remove acidic conditions and remove metals that may be toxic in local water resources.

But the Clean Water Act that we are talking about today, the proposed rule, is really about the proposed definition change to the "Waters of the U.S." Unfortunately, it does not change the situation of "Good Samaritans," those who are not financially responsible, being able to improve water quality at hard rock abandoned mine sites without liability, without lawsuits.

Counties, I just want to say, are very much in support of clean water. In Ouray County, as a headwaters community in the mountains, we very depend on this clean water, not just for agriculture but for municipal and industrial use. We depend on it for tourism, recreation, and our environment.

We want to work with the Federal Government and the states and other partners to implement Clean Water Act programs that are clear and consistent, and that is what our concern is from counties—is that the current proposed definition does not address, in our opinion, the flaws in the current definition of the "Waters of the U.S." in the Clean Water Act.

I will point out I am a Clean Water Act baby. I was one year old when the Clean Water Act was passed, and I am very grateful that the water and the whole nation has been improved by the Clean Water Act.

But as a county commissioner, if I cannot provide public safety services because of the proposed "Waters of the U.S." definition change and how that cascades to other Federal regulations—there are limitations on the number of acres you can treat with a permit, for example, and for counties that is a big concern. A limited number of acres you can do public safety services on in a single calendar year.

We have concerns about being able to balance the clean environment, clean water, and our public safety, and also ensure that our agricultural patterns are also going to be intact.

Senator BENNET. Thank you, Mr. Chairman. My time is up.

Chairman ROBERTS. Senator Cochran.

Senator COCHRAN. Mr. Chairman, thank you.

My question is for Mr. Brodie, Vice President of Charles Ingram Lumber Company in South Carolina, dealing with ways to reduce impact on the "Waters of the U.S." Rule.

The lumber industry shareholders in my State of Mississippi are concerned, to me, and have expressed concern to me about the imposition of new costs and burdens on forestry operations that would provide no real benefits in addition to what existing regulations permit.

Does the lumber industry in South Carolina have this same opinion?

Mr. BRODIE. Yes, we do, Senator. I will just give you one example of an additional cost.

Our BMPs require us to, when we are harvesting a tract of land, if there is an ephemeral stream or flowing body of water, to leave a buffer zone on either side of that water feature.

If, in fact, ditches now become jurisdictional waters and we have to leave buffer zones on the sides of ditches, it is going to take out of production a vast amount of land in our area. We are in the coastal plain of South Carolina, and it is basically flat, and you have ditches everywhere.

That is just one example of the additional costs.

Then the other cost that really concerns us is it looks to me like the way this rule is written it is some lawyer's "Dream Act" for bringing suits against industry, and then the courts will be deciding whether or not this applies, not Commissioner McCarthy. That is the biggest fear that we have right now.

Thank you.

Senator COCHRAN. Thank you, Mr. Chairman.

Chairman ROBERTS. Senator Thune.

Senator THUNE. Thank you, Mr. Chairman, and thanks to the panel today.

What concerns me the most about this EPA-proposed "Waters of the U.S." Rule is that it is just another example of what has become an all too common practice of this administration, to reach into the lives, livelihoods, and pocketbooks of the American people that it is supposed to be helping.

Even before this rule is finalized, the cost of just the proposed rule to the people that it is supposed to be helping is staggering. Think about the amount of time taken for respondents to file over a million comments to the proposed rule, the number of congressional hearings, including this one, and individuals, small businesses, and county and state governments who have worked hard to keep this rule from destroying their livelihoods. It has cost already millions of dollars to counter a government that was created to be of assistance.

So, Mr. Chairman, I would like to just share some of the comments taken from the testimony of each of today's witnesses. I think they tell the story of what is a misguided rule better than any of us on the Committee can tell it.

These are just some of the excerpts about the proposed "Waters of the U.S." Rule from today's testimony:

Lacks clarity, consistency, certainty.

One-size-fits-all regulation is not the answer.

State and local governments were not adequately consulted.

Undefined and unclear and lack of clarity.

I have yet to receive a direct answer from EPA.

Adds to confusion.

It complicates already inconsistent definitions.

The number of waters protected by the Clean Water Act will increase.

Increases regulatory burdens.

Significant costs.

Fails miserably at adding clarity.

Threatens the agricultural community.

Extensive legal arguments have been made explaining how the rule is unlawful.

Vagueness and uncertainty surrounding the rule.

States were not included in a meaningful way in creating the new definitions.

EPA proposal will subject agricultural operations to more pervasive Federal intrusion.

The rule is clearly focused on expanding the role of the Federal regulatory agencies into the daily lives of people around the country.

It appears that I will now need a Federal permit in order to plough, apply fertilizer or pesticides, graze cattle, or even build a fence in these areas or even around them.

A Federal permit will cost me time, money, and the Federal Government is under no obligation to even give me.

Simply cannot afford to be required to obtain a Federal permit each time we go out to maintain these roads because of the ditches that run alongside them.

There are ambiguities in the present regulatory landscape that many producers have found arbitrary and confusing.

Those are just a few of the comments that were in the testimony that we received today from these various witnesses.

I would submit, Mr. Chairman, that this is just a very, very wrongheaded move. The rule excessively expands jurisdictional authority and, due to a lack of clarity, creates opportunities for all

kinds of unintended consequences to plague the forestry sector and other sectors of our economy for years to come.

So my question, I guess, I would say to all of you because I think is something that we have raised. We raised this last year in a meeting with the administrator, and that is do you believe that the EPA did an adequate job of reaching out and soliciting information from your respective industries, businesses, or entities before it published the proposed rule because EPA Administrator McCarthy told many of us on the Committee last year that her agency would make an intensive effort to solicit information from stakeholders before publication of the final "Waters of the U.S." Rule.

Did any of you believe that happened?

Chairman ROBERTS. Let's start with Commissioner Padgett. You each have about five seconds to respond to that.

[Laughter.]

Ms. PADGETT. No, sir, it was inadequate.

Chairman ROBERTS. Mr. Brodie.

Mr. BRODIE. No.

Chairman ROBERTS. Mr. Kinley.

Mr. KINLEY. The American Mosquito Control Association, Northwest Mosquito Control Association, and many mosquito abatement districts were not aware of this proposed rule until after it was published.

Chairman ROBERTS. Mr. McLennan.

Mr. MCLENNAN. No.

Chairman ROBERTS. Mr. Metz, representing Nebraska, who left the Big 12 to go to the Big 10.

[Laughter.]

Mr. METZ. Not at all, sir.

Chairman ROBERTS. Mr. Peppler.

Mr. PEPPLER. I think the EPA has gone out of their way and is making a definite effort to reach out to all stakeholders.

Chairman ROBERTS. Well, five out of six is not too bad.

Mr. Hoeven.

Senator THUNE. He is a very still——

Chairman ROBERTS. Batting cleanup.

Senator THUNE. He is very sore about that Big 12 thing I feel you should know.

[Laughter.]

Senator HOEVEN. Thank you, Mr. Chairman.

When Senator Thune started talking, I was not sure where he was. I found him there.

Senator THUNE. I am down here in the kids section of the end bench.

Senator HOEVEN. I want to begin by thanking Mac McLennan for joining this panel and for being here to testify on "Waters of the U.S." and for leading a company, Minnkota Power, that is doing amazing things in producing cost-effective, dependable energy from both traditional and renewable sources, and doing it without outstanding environmental stewardship and, in fact, right now building transmission at a time when that is very hard to do, to produce more energy, again from both traditional and renewable sources. That is the way to do it.

The right guy to have here because we are talking about good environmental stewardship, but we are talking about doing it in a way that works.

Mac, thanks for being here. Thanks for what you do.

I know you will agree with me, both that "Waters of the U.S." is not the way to accomplish good environmental stewardship and that, second, the UND hockey team, currently rated number one in the country, is going to march through the tournament to the Frozen 4.

Mr. MCLENNAN. I would just say they better play better than they did last weekend.

Senator HOEVEN. They are getting ready. They are going to do it.

The question I want to start with, though, is to you, Mac, and then I am going to follow up and let everybody respond.

But "Waters of the U.S." has been put forward by the EPA as a proposed rule. Last year on the Appropriations Committee, we defunded the interpretive rule, which helps our farmers, but the underlying proposed regulation is still there. We need to defund it or, better, to deauthorize it, which myself and others here are working to do.

But talk for a minute about the impact on costs—and then I want to go to the others here—because energy is a foundational industry sector. When you provide energy, everybody else uses that energy, and so when your costs are driven up, that affects everybody else.

We have talked about the impact on our farmers, how EPA is going beyond their authorized authority. They have authority over navigable bodies of water. They have now extended it beyond what the Supreme Court has said they have authority to do.

They not only make it almost impossible for our farmers and ranchers to know what they can do on their own farm or ranch, which is a private property right, but they are affecting every other industry sector.

Talk for a minute about how this driving up your costs, a company that works very hard on environmental stewardship, will impact ag but all industry sectors as you work to provide power.

Mr. MCLENNAN. Thank you, Senator Hoeven.

A couple of comments on the cost side.

You are right. The costs really come in two-fold. One is the processing cost, and everybody pays that as it relates to your permits and so on. Real cost comes in delay and uncertainty associated with what you do.

I mentioned in my earlier testimony that today utilities operate under a nationwide permit which allows us flexibility and is manageable most of the time.

The challenge with this is that if you redefine waters and you add wetlands and you add a whole series of things for which our ability to operate under that nationwide permit is not any longer allowed, now we go to a full permitting process, and so the real cost associated with that becomes delay.

So the longer to get your projects done and the longer to get them permitted because it is not—water is not the only thing, particularly in a linear project like a transmission line, that you have

to worry about. So bird issues and any number of other things. They work in harmony.

So we had a—I will use an example of what cost means. You referenced we just completed a 350-mile or a 250-mile transmission line for $353 million. We paid $30 million for that line more because of a challenge with the Corps of Engineers over what do we do with bird diverters—a simple, little plastic thing up there that the birds can see the lines so that it can work.

So you talk about—that did not have anything to do with the cost of the diverters. That was just a delay to the line.

So you increase, with this proposal, the opportunity that we end up with more of those, and those are the real expenses.

We can probably all live with the processing of the permits. It is really the what happens to a project schedule and timeline and framework as it relates to projects that are linear and extremely expensive.

Senator HOEVEN. Don't those increased costs get passed on to your consumers?

Mr. MCLENNAN. They do in our case. There is nowhere else to go in a co-op except to those rural electric consumers who are paying for it.

Senator HOEVEN. So I would ask each one of our witnesses, briefly:

One, are you for good environmental stewardship? Are you working to achieve that?

But, in terms of "Waters of the U.S.," doesn't that create uncertainty that makes it more difficult to do not only what you are trying to do but make sure that you are complying and meeting good environmental standards?

Start with Commissioner Padgett.

Ms. PADGETT. Thank you, Senator.

The costs come in two ways.

They come in hard costs—costs of getting permits, costs of hiring consultants, for small counties especially, consultants for cultural resources, consultants for the Endangered Species Act—which cascade over what is jurisdictional. So not understanding what is clearly jurisdictional, is costly.

Then, delays. Delays in performing those public safety duties can be costly in terms of money. We can lose tourists, we can lose sectors of our economy, and we can actually sometimes have injuries or lose worse.

Senator HOEVEN. Mr. Brodie.

Mr. BRODIE. We are certainly in favor of environmental conservation. That is the source of our livelihood.

What does concern me is that we have a 35 to 40-year planning horizon. I am investing money in trees today that will be harvested 35 to 40 years from now as all of these Federal regulations come along.

You wonder, well, what is the next regulation? What is the next regulation? What is that going to do to us?

At some point, that impacts the desire of people to plant trees and invest in forestry. The best way to clean up water is to plant more trees.

Senator HOEVEN. Mr. Kinley.

Mr. KINLEY. I do not know a mosquito control profession out there, Senator, that is not an environmental steward, and we take that very, very seriously in our profession.

To follow up with a previous question, while no NPDES permits have been denied to a mosquito control program, the costs of administering NPDES permits is substantial and is very significant.

I mentioned it takes 3 weeks per year and a 20 percent investment in software and hardware to comply with the regulatory requirements and the reporting requirements associated with the Clean Water Act, the NPDES permits, and "Waters of the United States" pesticide applications.

What we have seen over the course of the last several years is that there really is no additional environmental benefit.

Senator HOEVEN. Mac, another? Anything else?

Mr. MCLENNAN. I am good, Senator.

Senator HOEVEN. Thanks.

Mr. Metz.

Mr. METZ. Thank you.

The "Waters of the United States" expands the reach of the Federal Government. We are all for clean water, but this rule puts such a heavy burden on farmers and ranchers.

Farmers and ranchers are the best stewards of the land. I mean, we are environmentalists.

Senator HOEVEN. I know.

Mr. METZ. We are the true environmentalists of this land. We have to have clean water to do our farming practices the right way. Otherwise, we are not in business.

We have no way to pass that cost or extra burden or extra regulatory authority on. We are takers of what the market is, whether it is corn, wheat, cattle. We cannot set the price. We cannot pass that on to a consumer. We take what that market is per bushel or per pound.

Thank you.

Senator HOEVEN. You may have left the Big 12, but that was certainly well said.

Mr. METZ. Thank you.

Senator HOEVEN. Mr. Peppler.

Mr. PEPPLER. You know, it is difficult for me to measure the costs to agriculture, and one of the reasons is we have a tremendous amount of exemptions involved with this rule. I think the costs will be less maybe compared to other industries.

But I agree with Mr. Metz. The reason we have those exemptions is because we have earned them. We have embraced conservation. We have embraced increased productivity. We have embraced productivity; we have increased.

We do not run away from issues. Whether it is a conservation issue or a rulemaking issue, we do not run. We have earned those exemptions.

I just want it on the record because I have been dressed down a little bit on why agriculture gets treated better. But we are the true conservationists.

Senator HOEVEN. Thank you, Mr. Peppler.

Thank you, Mr. Chairman.

Chairman ROBERTS. Thank you, Senator Hoeven.

Today, we have heard from members of both sides of this dais raise concerns with this rule and suggest EPA and the Corps of Engineers reconsider.

I certainly hope the EPA and this administration listens to the vast majority of stakeholders and the views that have expressed here today.

This concludes the second panel.

Thank you again to each of our witnesses for being part of government in action. We hope that is two words.

The testimony provided today is valuable for lawmakers to hear firsthand; it has been.

Statements and questions for the record are to be submitted to the Committee clerk 5 business days from today.

The Committee is adjourned.

[Whereupon, at 12:21 p.m., the Committee was adjourned.]

A P P E N D I X

MARCH 24, 2015

STATE OF WASHINGTON

REGIONAL DIRECTOR
DEPARTMENT OF ECOLOGY
JOSH BALDI

Chairman Roberts, Ranking Member Stabenow, members of the committee, thank you for inviting me to speak to this committee today. My name is Josh Baldi, and I am Regional Director of the Washington Department of Ecology's Northwest Office. Ecology's Northwest Region includes a large portion of Puget Sound and is home to Washington's tech and aerospace industry. It also is an important part of the State's $49 billion agricultural sector. Notable commodities produced in the region are milk, nursery and potatoes, and we are the nation's leader in raspberry production. Washington State is also renowned for unique resources such as shellfish and salmon, which are important to our economy, way of life and tribal cultures.

Ecology is quite experienced in matters associated with United States Army Corps of Engineers (Corps) and the Environmental Protection Agency's (EPA) "waters-of-the-US" jurisdiction. As the water quality authority for Washington State, Ecology implements the state's water pollution control act (RCW 90.48) and is the state water pollution control agency responsible for implementing all federal water pollution control laws and regulations, including 401 water quality certifications for federal Clean Water Act section 404 permits.

The Department of Ecology was one of four Washington state agencies that signed a consensus comment letter on November 12, 2014 expressing support for the Corps and EPA to clarify the definition of waters-of-the-US. The other signatory agencies were the state departments of Transportation, Fish and Wildlife, and Agriculture. That comment letter has been submitted for the record.

We appreciate the Corps' and EPA's attempt to clarify jurisdiction for waters-of-the-US through the proposed rule. As the federal agencies worked through the public comment process last summer and fall, we have been appreciative of their interaction with the states. While work remains, we believe the EPA and the Corps have been responsive to many concerns raised.

Ecology believes the rule helps to clarify what types of waters would be considered jurisdictional under the Clean Water Act and specifically where proponents may need Section 404 permits from the Corps and related Section 401 water quality certifications from the State.

The increased clarity provided by the proposed rule should help increase predictability and streamlining where permits are justified.

The proposed rule does not resolve all the uncertainty over what ditches are jurisdictional, so case-by-case determinations will still be needed. However, the rule attempts to narrow the number of individual jurisdictional calls needed by identifying those ditches that are clearly non-jurisdictional, such as those excavated in and draining only uplands.

As a practical matter, the types of waters that the rule identifies as waters-of-the-US are consistent with the jurisdictional calls that we have seen in practice by the Corps in Washington State for many years. Consequently, the rule will not result in a regulatory change for permittees in our State.

At the federal level, we also do not believe the proposed rule affects the existing, broad exemption under the federal Clean Water Act for farming, ranching and silvicultural practices. That exemption is found under 40 Code of Federal Regulation part 122.3 (NPDES) and section 404(f)(1)(A).

Under the waters-of-the-US rule, some farm ditches may be jurisdictional tributaries but maintaining them in the course of normal agriculture does not require a section 404 permit. Washington State uses the same approach of allowing ongoing farming maintenance and uses without a permitting process.

The rule does acknowledge that some ditches are tributaries that should be protected. Some Washington ditches are actually channelized streams and as such, they are appropriately designated as tributaries. In our experience, the Corps has not exerted jurisdiction over ditches that are not streams or which only drain uplands. And again, farming activities involving ditches are still exempt from needing a Section 404 permit in the course of normal farming practices.

Ecology supports the definition of a tributary to include the criteria of having a bed and bank and ordinary high water mark. Regional manuals on determining Ordinary High Water Mark (OHWM) will be important to ensure clarity. Washington is fortunate to have an OHWM manual for streams in addition to a regional manual being developed by the Corps that will include non-perennial streams.

More specifically, Ecology supports the concepts of including waters that are located in the floodplain of a jurisdictional water as well as those located in riparian areas along waters and tributaries. Washington floodplains support many wetlands that are used by salmon for protection and rearing. These wetlands are often connected to rivers via shallow subsurface flows as well as by overbank flooding. Wetlands in these areas provide critical functions such as flow attenuation and habitat for invertebrates, amphibians and fish. They directly affect the physical, chemical and biological properties of downstream waters and are appropriately included as waters-of-the-US. However, while we support the inclusion of waters in these areas, the definitions for floodplain and riparian in the rule are quite broad.

The breadth of some definitions is a remaining concern. Given the variety of conditions across the country, it is understandable that the rule has such definitions. Ecology believes that these definitions can and should be further refined on a regional basis. We recommend the development of these regionally-appropriate definitions of floodplains and riparian areas so that the state and the federal agencies have a common understanding of those terms and how they are applied on the landscape.

In closing, Washington State supports the proposed waters-of-the-US rule because:

Efforts to date between federal agencies and the states have been interactive and positive. While additional work remains, we would like to build upon the interagency cooperation;

The proposed rule will clarify that a small but important number of streams and wetlands deserve coverage under waters-of-the-US; and,

The increased clarity sought in the rule will help create a more predictable and efficient permitting system.

Lastly, the approach embodied in the EPA and Corps' proposed rule adheres closely to the system Washington State has had in place for more than 25 years. It is an approach that has worked for people, farms and fish, and we believe Washington State's approach can be strengthened by the proposed rule.

Testimony for the Senate Committee on Agriculture, Nutrition and Forestry
Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule
T. Furman Brodie, Vice President
Charles Ingram Lumber, Inc.
March 24, 2015

Chairman Roberts, Ranking Member Stabenow and Members of the Committee, thank you for holding this hearing in regards to the Waters of the United States rule proposed by the Environmental Protection Agency (EPA) and Army Corps of Engineers. I would also like to thank the Committee for its hard work on the 2014 Farm Bill, which addressed important issues for the forest products industry such as the forest roads provision, expansion of the BioBased program to include lumber products, as well as research and conservation funding. We were very fortunate as an industry to have so many strong advocates sitting around this table during the farm bill process.

Company Background

I am Furman Brodie, Vice President of Charles Ingram Lumber Company, Inc. in Effingham, SC. I also currently serve as Vice Chairman of the Southeastern Lumber Manufacturers Association (SLMA). Charles Ingram Lumber, Inc. is a privately held, family-owned company that manufactures, dries and planes Southern Yellow Pine lumber that is sold throughout the United States. The Southeastern Lumber Manufacturers Association is a trade association that represents sawmills, lumber treaters, and their suppliers in 16 states throughout the Southeast. SLMA's members manage over a million acres of forestland, employ thousands of people in rural America, and produce more than 3 billion board feet of solid sawn lumber annually. These sawmills are often the largest job creators in their rural communities, and have an economic impact that reaches well beyond people in their direct employment.

Charles Ingram Lumber Company, Inc. originated in 1931 as the Bynum – Ingram Lumber Company. The third generation of the Ingram family is now represented in the management of the company. The Ingram family owns approximately 56,000 acres of timberland where we grow trees for pulpwood and saw timber. We have an active hunt lease program on our timberlands and recognize the recreational value of these lands. We also own and operate a lumber mill that employs 150 people and now produces approximately 120 million board feet of Southern Yellow Pine annually. The timber necessary to produce this lumber is sourced primarily from within 50 miles of the sawmill from a variety of landowners, taken from tracts of land averaging 60 acres. We support responsible logging and compliance with Best Management Practices (BMP), and we participate in the South Carolina Forestry Commission's BMP program.

We understand that the EPA and Army Corp of Engineers have proposed the Waters of the United States rule as a result of a Supreme Court case. However, we believe the proposed rule excessively expands jurisdictional authority, and due to a lack of clarity creates opportunities for

unintended consequences to plague the forestry sector for years to come. In the remainder of this testimony we will outline some of our specific concerns both as forestland owners and mill operators.

Impacts of the Proposed Rule on Forestland Owners

As a company that depends on the sustained health of the environment and our forestlands to stay in business, we fear this proposed rule will do more harm than good. In South Carolina, and other states, BMPs are in place to be sure that proper precautions are taken to control water runoff pollution during forest management activities. By expanding the jurisdiction of the Waters of the United States through this complex rule, we are concerned the administrative burdens will add to the workload of state agencies that are already overseeing successful BMPs. Additionally, we believe the complexity of the additional controls that will be required as a result of this rule will frustrate a landowner's inclination to invest in forest management and thereby consider other land use options. Obviously, we must have trees to sustain our industry and the jobs we support.

We are specifically concerned with the proposed rule's definition of all "tributaries" as Water of the United States, including many man-made ditches and certain water features within lands adjacent to tributaries such as riparian areas and floodplains. This will greatly expand the reach of the federal government. The proposal also places Clean Water Act jurisdiction on features that only contain water at certain times of the year where federal jurisdiction was rarely if ever asserted in the past. Additionally, we are worried that using the terms "significant nexus," "ecoregions" and "other similarly situated waters" without scientific definitions that are easily applicable to the various landscapes around the country will lead to confusion about what waters should actually be under federal jurisdiction. In a rule intended to provide certainty, terms that are vague and difficult to apply will lead to the opposite result. Additional uncertainty will be created for state agencies and landowners when waters previously unregulated by the EPA, such as roadside ditches, are suddenly required to meet water quality standards.

Our industry's use of herbicides for regeneration in trees provides a specific example of our concerns. We have an existing NPDES permit requirement for these applications, some of which are done aerially. However, expanding WOTUS to all ephemeral and intermittent streams as well as some upland ditches will greatly expand the need for these permits and complicate the use of existing general permits for these applications. The unknown scope of the expansion to riparian areas and floodplains will have a similar effect. Additionally, with the expansion of WOTUS new water quality standards will have to be developed for these areas. In short, there is a large amount of uncertainty created just in the spraying of this herbicide, and this uncertainty creates opportunities for regulatory creep and litigation.

We have discussed these issues and other possible impacts of the proposed rule with multiple attorneys and water experts, and the consensus is that they do not know what the exact impact

will be on our forestlands and milling operations. They have told us that we, as landowners, will be more vulnerable under the Clean Water Act to litigation and possibly additional regulatory requirements. These vulnerabilities might be unintended consequences from the rule as it is proposed, but whether intended or not, the threat to our family business is real.

Impacts of the Proposed Rule on Sawmill Owners

Clearly, the adverse impacts on our industry's forestlands across the US could be severe. It is important to note, however, that the timber industry will feel the impacts of the proposed rule beyond just our activities in the forests. We will also be impacted by the proposed rule at our lumber manufacturing facilities.

Lumber manufacturing facilities are large and complex operations. These operations often spread across dozens of acres, and the facilities are generally located in rural areas with many nearby ponds, seasonal streams, ditches, wetlands and other natural features. Some of these natural features may already be regulated waters, but many are not. The proposed rule would convert many of these isolated, small water features into regulated waters and would require costly and time-consuming Section 402 and/or 404 permits to conduct everyday activities near those waters. In addition, the uncertainty of what water features would or would not be covered under the proposed rule would expose our facilities to citizen suit enforcement actions and costly fines and penalties.

Our manufacturing facilities typically involve a number of operations that generate a water discharge. We have large storm water collection systems with retention ponds and outfalls. Some mills have "wet log yards" where cut timber is stored and sprayed periodically with water to prevent decay before being utilized in the sawmill. Our lumber kilns generate condensation which may be channeled and discharged. And some of our saws use a water mixture for cooling where the resulting overspray can be collected in floor drains and discharged.

These are just a few examples of the types of activities at our facilities that can result in the discharge of water. We also store materials and operate heavy equipment in and around low-lying areas near wetlands, streams and ditches. Some of these activities are already regulated by the Clean Water Act, but under this proposed rule creative litigators could find a way to argue in the courts that virtually every aspect of our operations would be regulated.

Unfortunately, the impacts of this rule on our industry don't end at the sawmill. Our downstream customers such as homebuilders are also concerned with what this rule could mean for their businesses, further amplifying the concerns in our industry for this rule. When our industry looks at the potential impact of this rule from forest to end product, it is difficult for us to comprehend how the EPA could claim minimal economic impacts. In fact, we believe the EPA's economic

analysis of this rule has a multitude of fatal flaws and certainly does not take into account the creativity of those who look to regulatory ambiguities as an opportunity to file lawsuits.

Compliance with the law is very important to our industry. We respect the existing Clean Water Act and work closely with state and local agencies to ensure compliance. We have invested substantial time and money to make sure that our facilities operate lawfully with point source and non-point source permits when necessary. But the proposed rule would expose our facilities to significant uncertainty and risk. It will not be a simple process to determine whether a water is regulated, and the ambiguity will not work in our favor. It will expose us to lawsuits and will require a massive expenditure of time and money to ensure compliance.

The issues raised by the forestland owners, forest products manufacturers, farmers, ranchers, state governments and a long list of other stakeholders need to be addressed before a rule is finalized, and a reissuance of the proposed rule with a comment period is needed to be sure the concerns raised are properly handled. EPA Administrator McCarthy has made several public statements to indicate that there will be significant changes to the proposed rule to address many of the concerns raised in this testimony and by other stakeholders and state government officials. We appreciate her comments but would like to point out that her comments hold neither the weight of the law nor regulation and provide little reassurance to stakeholders whose businesses are at stake. Second, if the number of changes discussed by the Administrator – which are absolutely necessary to making this rule workable for rural America – are part of the plan moving forward, then an additional opportunity for public comment before the rule is finalized is not only appropriate, but needed. We hope Members on both sides of the aisle will appreciate that with so much at stake we simply cannot be asked to blindly trust the EPA to get it right this time. We respectfully request an opportunity to review changes and comment on a reissued rule before we are asked to comply with a new regulation.

Thank you again for the opportunity to provide testimony before the Committee on an issue of such great importance to the forest products industry. I look forward to answering your questions.

WATERS OF THE UNITED STATES:
STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF EPA'S PROPOSED RULE

HEARING BEFORE THE

U.S. SENATE COMMITTEE ON
AGRICULTURE, NUTRITION, AND FORESTRY

The Clean Water Act and Mosquito Control in Idaho

TESTIMONY
OF
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NORTHWEST MOSQUITO AND VECTOR CONTROL ASSOCIATION

REGIONAL DIRECTOR
NORTH PACIFIC REGION
AMERICAN MOSQUITO CONTROL ASSOCIATION

MARCH 24, 2015

Mr. Chairman, and Members of the Committee, my name is Jason Kinley. I am the director of the Gem County Mosquito Abatement District (GCMAD), a special purpose district established in Emmett, Idaho to control mosquitoes. I welcome the opportunity to provide a public health perspective to the deliberations of this committee concerning impacts of the U.S. Environmental Protection Agency's (EPA) proposed rule regarding definitions of Waters of the U.S. within the Clean Water Act (CWA) and will limit my testimony to impacts the EPA proposed rule will have on public health protection.

Over one million people die worldwide each year from mosquito transmitted diseases. While fatalities in the U.S. are relatively rare due to a long history of successful mosquito control programs, the costs associated with the treatment of mosquito-borne illness run into the millions of dollars each year. The human costs are far greater.

Alarmingly, the future of public health protection through mosquito abatement itself is in jeopardy due to increasing costs associated with pesticide registration, the reduction of epidemiology and laboratory capacity grants, and burdensome requirements of the CWA's National Pollutant Discharge Elimination System (NPDES) permits. These costs and the reduction of grant funding divert already scarce taxpayer dollars to regulatory compliance instead of using those funds to meet mandated missions and objectives. Indeed, the end result compromises both the quality and extent of protection mosquito control offers to the public and may result in the loss of protection for those constituencies who cannot afford to pay these increased costs.

The GCMAD serves a rural agricultural constituency. The size of the district's jurisdiction is approximately 120 square miles and is composed of ranches and farms that rely on flood irrigation for crop and pasture production. The district has a lattice of irrigation conveyance canals, supply ditches, and drain ditches. All canals and ditches initiate and return to the Payette River. The program was originally established in 1960, the first of its type in the State of Idaho. The primary reason for establishing the district was economic in scope. Cattle raised in the Emmett valley were twenty percent lighter in weight when taken to market when compared to cattle weight from surrounding areas. The district's primary objective at the beginning was to suppress mosquitoes so that cattle could keep weight on and generate a better return on investment for ranchers and producers.

The GCMAD fully endorses the CWA's intent of reducing pollutant load in the Nation's clean water while allowing productive use of that resource. To that end, mosquito control professionals have devoted a substantial amount of their expertise to the development of numerous mosquito abatement strategies that reduce the reliance upon public health insecticides. Provision of a safe and healthy environment is a core mission of my profession. Mosquito control professionals are dedicated to providing leadership, information, and education leading to the enhancement of health and quality of life through the suppression of mosquito and other vector transmitted diseases and the reduction of annoyance levels caused by mosquitoes and other vectors and pests of public health importance. This is accomplished through the use of integrated mosquito management procedures, which includes the use of duly registered public health pesticides, when warranted.

If the proposed rule is finalized consistent with its current form, the number of waters protected by the CWA will increase. EPA has stated that this increase in jurisdiction will aid in protecting the Nation's public health and aquatic resources. I certainly support the protection of our Nation's waterways and wetlands. However, I am also concerned that the expansion of Waters of the U.S. under the proposed rule will increase regulatory burdens to conduct necessary and prudent integrated mosquito management initiatives, and thus inhibit such work.

It is important to note that the NPDES permitting system for mosquito control under the CWA does not reduce the amount of insecticides applied to Waters of the U.S. In fact, the NPDES permitting system allows insecticides to be applied to Waters of the U.S. In Gem County, the amount of insecticide applied to Waters of the U.S. has indeed increased over time as the district identifies more sites that produce mosquitoes that are also identified as Waters of the U.S. Simply put, the NPDES permit does not, in any way, limit or reduce insecticide applications to Waters of the U.S.

Unfortunately, by requiring mosquito control programs to hold a NPDES permit to make applications, mosquito control districts are now subject to the full weight of the CWA. As you may know, the CWA 3rd Party Citizen Suit Provision allows for any third party to sue a government entity for violations, but also for allegations of violations. Many allegations are based on individual and personal interpretation and opinion. The cost of litigating these 3rd party citizen suits is enough to make any mosquito control program question whether or not necessary mosquito control product applications are worth the effort.

Mosquito control products are labeled under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Moreover, products used in mosquito control have specific labels that include application instructions and environmental considerations that must be adhered to. Product applications are governed by FIFRA and the processing of violations and enforcement is standardized and transparent. In contrast to the CWA, violations under FIFRA are based on sound science, EPA approved label language, and specific enforcement bench marks. Violations under FIFRA are not based on personal perceptions or personal opinion and only government agencies that have been empowered to process violations do so. Allegations of violations follow a clear and decisive process.

The GCMAD and Gem County, Idaho have real experience with 3rd party citizen suits filed under the auspices of the CWA. In 2002, before mosquito control applications were regulated under the CWA NPDES permitting system, the district was sued by a citizen for allegations of violations. The EPA, who has jurisdiction over Waters of the U.S. in Idaho, and the Idaho State Department of Agriculture found no violations whatsoever in the district's regular practices of mosquito abatement, and yet, the individual was able to file allegations and bring suit.

Over the subsequent 10 years, the GCMAD and Gem County were forced to defend themselves from the allegations and spent approximately $450,000 to address the law suit. To put that cost into perspective, the average annual budget for the GCMAD is $450,000.

In other words, **the district spent 10% of its annual budgets to defend itself from allegations of violations brought by a citizen** under the CWA's Citizen Suit Provision instead of spending

those funds on our mandated mission of protection of public health. To reiterate, the district was found to not be in any form of violation under FIFRA or the CWA whatsoever when making applications to Waters of the U.S.

In the interest of us or anyone else avoiding this type of legal jeopardy in the future, this committee has previously approved legislation to clarify that pesticide applications made in accordance with FIFRA shall not be doubly regulated under the CWA. EPA's Office of Pesticide Programs, in conducting its exhaustive review in deciding whether to register a product, adequately takes into account potential impacts to water and aquatic organisms. When it determines that additional requirements are necessary to provide protections, then supplementary restrictions are added to a product's label. Given this existing process, the CWA permit is redundant and provides no additional benefit.

We were hopeful that the Senate Agriculture, Nutrition and Forestry Committee would include that fix during the reauthorization of the most recent Farm Bill. Unfortunately, the necessary provision was dropped in conference and therefore the oversight costs and legal jeopardy still remain.

As more jurisdiction is added to the CWA under the EPA's proposed rule to expand definitions of Waters of the U.S., the burden to comply with local interpretation of what a Water of the U.S. is and it's additional required permit considerations becomes greater than the need to protect public health. It is far more costly to be sued under the CWA than it is to ignore the treatment of a water source where potentially disease carrying mosquitoes are developing.

One example of problematic expansions of Waters of the U.S. in this proposed rule is the proposed definition of "tributary," in 40 CFR 230.3(u)(5). Although the district sincerely appreciates the attempt to define a "tributary," the proposed definition could easily be interpreted to mean that many drainage or irrigation conveyances will now be jurisdictional. The inclusion of roadside, irrigation, and storm water ditches could have profound impacts and consequences. The potential far-reaching effect of the definition of "tributaries" includes all waters and wetlands adjacent to tributaries. The proposed language here could easily create uncertainty regarding pesticide applications to Waters of the U.S., which could in turn have very costly ramifications, as discussed previously in regards to 3rd party citizen suits.

If this new definition of "tributary" is accepted, it will become unduly burdensome to Gem County's mosquito control program to evaluate all drainage ditches and/or apply for EPA consultation based on current watershed functions. Not only will this impede the program's ability to quickly control mosquitoes and protect public health based on current conditions, but could potentially take years to clarify for the long term. It is widely accepted that most surface water eventually flows into a traditionally navigable waterway; however by providing many exceptions under the Tributaries section, the true role of many drainage ditches or waterways will become very ambiguous.

In the case of drainage and road way ditches that could, under the rule, be included as tributaries to a Water of the U.S., the result of such designation would now classify drainage and road way ditches as a "Water of the U.S." and would potentially reduce or eliminate mosquito control

districts from conducting maintenance on drainage ditches, such as excavating material for better drainage. Districts would have to seek permission to alter that ditch since it is a tributary to a Water of the U.S., which takes time, money, and personnel resources.

It would also be beneficial to include specific and concrete benchmarks as a way to determine what constitutes a "significant nexus." The proposed rule regarding "significant nexus" should include quantifiable standards and measures regarding what constitutes a "significant" effect that is "more than speculative or insubstantial" as laid out in proposed 40 CFR 230.3(u)(7).

Currently, due to the NPDES requirements our agency is subject to significant costs on a daily basis for compliance. The process of reporting activities conducted on Waters of the U.S. for a season takes time to process and tabulate. Currently, staff at the GCMAD spend approximately 15 business days per year tabulating and reporting activities for the season on Waters of the U.S. The district has had to invest in a geographic information system for accurate reporting of applications to Waters of the U.S. **The purchase of necessary hardware and software required an investment of 20% of the district's annual operating budget.** The district was forced to make this hardware and software investment to comply with the NPDES reporting requirements solely, as it was not necessary for FIFRA compliance. The costs associated with reporting compliance diverts funding away from the mission of protecting public health in Gem County. These costs would only increase with the expansion of defined regulated waters as there would be a larger number of water bodies where compliance is required. Again, all of these regulatory requirements would either require increase taxation of our citizens, or a diversion of resources away from our public health mission. Either way, neither the environment nor the public would be well-served.

It is important to note that the GCMAD's mosquito control season is only six months long. In other areas of the country where the mosquito control season is much longer or year round, the reporting component becomes never ending. Increase in defined waters would increase the work load for reporting compliance.

Regulated waters in my district must go through an evaluation to determine if they are compromised for any active ingredients that the district may use at any given time during the course of a mosquito control season. That requires water quality testing, and testing must be paid for by the agency seeking to determine whether or not the water body is compromised. Testing takes time and can be expensive. Since the irrigation season begins in April of every year, the opportunity to actually test water for compromise already puts mosquito control initiatives behind the mosquito production curve. Mosquito control is time sensitive, with the idea that controlling mosquitoes early in the season better establishes an initially low population that promotes a lower breeding population for the remainder of the season.

In conclusion, the public health community fears that a potential loss of mosquito and vector control capacity due to shrinking budgets, coupled with the costs attendant to unfunded NPDES compliance, mitigation measures, and compliance costs will have a demonstrably adverse impact on the citizenry and wildlife.

The current climate of mosquito control in the U.S. is dynamic. Recently, there has been an influx of invasive species of mosquitoes, such as *Aedes albopictus* and *Aedes japonicus*, in many parts of the country and new diseases like Chikungunya virus that are not endemic to North America. The costs associated with addressing influxes of invasive species and new diseases are exacerbated by redundant regulation and reporting requirements.

The increase in jurisdictional scope of the proposed rule compounds these costs, making a great many mosquito management programs potentially unsustainable. This will ultimately result in adverse impacts on communities, recreation, and both animal and human health.

Testimony of Mac McLennan
President and CEO
Minnkota Power Cooperative, Inc.
Before the Senate Committee on Agriculture, Nutrition and Forestry

Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule.

March 24, 2015

Introduction

Chairman Roberts, Ranking Member Stabenow, members of the Committee, thank you for inviting me to testify today on "Waters of the United States: Stakeholder Perspectives on the Impact of EPA's Proposed Rule." My name is Mac McLennan, and I am President and CEO of Minnkota Power Cooperative, Inc. Minnkota is a generation and transmission cooperative headquartered in Grand Forks, North Dakota, supplying wholesale electricity to 11 member distribution cooperatives, three in eastern North Dakota and eight in northwestern Minnesota. Minnkota serves nearly 128,000 residential, commercial and industrial consumers and also serves as operating agent for the Northern Municipal Power Agency (NMPA), an association of 12 municipal utilities. Combined, the Minnkota/NMPA Joint System serves about 140,000 consumers over a 34,500 square mile area.

Seventy-five years ago, rural residents in northwestern Minnesota and eastern North Dakota joined together to form Minnkota Power Cooperative. They realized the value of electricity and its ability to bring a better quality of life to homes and farms in the region. Since those early days, the use of electricity has grown far beyond what organizers could have ever imagined. But what has not changed in the passing decades is the foundation of Minnkota: its members. Minnkota would not exist today without the ongoing support and resiliency of its 11 member distribution cooperatives. Together, we have built power plants, thousands of miles of transmission line and one of the nation's best demand response programs. These accomplishments do not happen by chance. It starts with leadership from our elected board of directors and the commitment from Minnkota employees to meet challenges, seize opportunities and ensure that the consumer at the end of the line is receiving affordable and reliable electricity.

Throughout our history, our members have faced considerable challenges in bringing electricity to the countryside, raising the standard of living and providing the engine for rural development along the way. This challenge and our sense of obligation to the mission we serve is unwavering. However, numerous challenges stand in our path as we strive to meet the growing needs of our membership. As if delivering safe, reliable and affordable electricity to remote regions in North Dakota and Minnesota was not difficult enough, electric cooperatives have risen to the challenge of increasingly stringent state and federal environmental regulations over the years. Minnkota has, within the last decade, invested nearly $425 million into environmental upgrades at our lignite fired coal plant, the Young Station in Center, North Dakota, which serves to highlight our strong track record of environmental stewardship and solid foundation of environmental compliance. Nevertheless, federal environmental regulations continue to compound costs with significant impacts to Minnkota and the member-consumers we serve. And while much of our attention has been devoted to efforts to mitigate ever-tightening clean air

regulations, we maintain a watchful eye on the rule proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to revise the definition of Waters of the United States (WOTUS) under the federal Clean Water Act.

Minnkota's Concerns with the "Waters of the United States" Proposed Rule

Minnkota has substantial concerns with the WOTUS rule because it will dramatically expand the scope of jurisdiction of the Clean Water Act. Electric cooperatives engage in numerous activities that require us to obtain permits under the Clean Water Act. Minnkota provides service to areas marked by low consumer density which necessitates an expansive network of transmission facilities that safely and efficiently deliver electricity over long distances to reach the far corners of our territory. Power lines require regular maintenance, including necessary repair and replacement of poles and towers. In addition, these facilities require upgrades to make the system more resilient in the event of severe weather events.

I think everyone here will agree there is a strong national interest in a reliable and resilient electric grid. The White House Rapid Response Team for Transmission is tasked with the challenge of improving the overall quality and timeliness of electric transmission infrastructure permitting. Consistent with this objective, the Corps administers a nationwide permit (NWP 12) for utility line activities that allows for the construction and maintenance of power lines so long as each "single and complete" project does not result in the loss of more than one half acre of WOTUS. When configuring transmission facilities, engineers take into consideration the location of wetlands and streams in order to stay within the half acre limit. However, the broad definition of "tributary" and assertion that all water in floodplains and riparian areas are "adjacent" waters would capture many features commonly found on rural land spanned by cooperative power lines.

The EPA and Corp attempt to assert jurisdiction by using "tributaries" that directly or indirectly contribute flow to a navigable body of water. Yet the proposed rule fails to consider the frequency, duration, or amount of flow the tributary provides or the tributary's proximity to the navigable water. Further, a wider variety of wetlands and even man-made features are now included within this proposed definition of tributaries. Minnkota has seen borrow pits from substation construction in the past that have since been included in the National Wetland Inventory (NWI) which would likely be considered a tributary, and thus by significant nexus, a WOTUS. This proposed rule would result in numerous additional facilities and construction projects, including small projects to now be regulated. The resulting burden of time and resources on behalf of the regulated community would be substantial for a very minimal or non-existent environmental benefit. The economic impact would add to ever increasing costs to Minnkota and its members.

Additionally, the rule attempts to assert jurisdiction over "other waters" such as the waters of the Prairie Pothole Region. This terrain is common in our service territory and transmission delivery system. The assumption is made that the isolated wetlands, when aggregated, have a more than speculative or insubstantial effect on traditional navigable waters – even if the isolated wetland is miles from the traditionally navigable water. This assumption is based on an extremely tenuous

connection and should be abandoned in the proposed rule. Given the wide swaths of flat terrain that flood seasonally within our service territory, much of the Red River Valley in North Dakota and Minnesota could be designated as wetlands subject to this rule. If that scenario materialized, as referenced above, utilization of NWP 12 would become increasingly difficult and such a broad expansion of jurisdictional waters will interfere with our ability to stay within the nationwide permit limits. An increase in permit requirements will result in increased uncertainty, delay, and cost when it comes to constructing and maintaining power lines. In many cases, permitting delays and cost overruns can doom critical investments in infrastructure. The potential for the proposed rule to increase the cost of permitting with no appreciable environmental benefit is not my idea of good regulatory policy.

Under the proposed rule, our rights of way may be considered WOTUS, even though they are often simple ditches alongside roads that receive road run-off and infrequently hold water. EPA and the Corps have said that they are exempting ditches that drain only upland and are constructed in uplands, but the term "upland" is not defined. This gives the federal government the final say on whether or not ditches are eligible for the exemption. Minnkota diligently maintains its rights of way by controlling vegetation which may include the use of herbicides and we must control vegetation around generating facilities as well. Permits are required if herbicides are applied in jurisdictional waters, so the expansion of WOTUS set forth in the proposed rule will also increase the requirement for vegetation control permits. EPA and states have issued general permits for vegetation, but if you spray more than 20 linear miles, there are added burdens.

Minnkota has a diverse mix of baseload and intermittent generation resources. Two lignite coal-fired facilities – the Milton R. Young Station near Center, North Dakota, and the Coyote Station near Beulah, North Dakota, along with wind and hydro are the primary sources of generation for the Minnkota/NMPA Joint System. While Minnkota does not forecast a need for new generation for the next decade or so, when we do look to increase generating capacity to meet future demands of our members and invest in generation from other fuels including renewables, we will need to build new transmission facilities. Projects such as these often require miles of new transmission lines to connect to the grid, meaning both the generation resource and its transmission lines are likely to face increased costs and delays if the rule is finalized in its current form.

The proposed rule will impose significant costs on small businesses, including electric cooperatives. All distribution cooperatives, and all but three generation and transmission cooperatives, meet the Small Business Administration definition of a small business, including Minnkota . We agree with the findings of the Small Business Administration Office of Advocacy that the proposed rule may pose significant economic impact on a substantial number of small entities and that the EPA and the Army Corps of Engineers improperly certified the rule as not affecting small businesses. The agencies should have prepared and made available in the rulemaking record an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities. Furthermore, the EPA erred in not conducting a small business advocacy review (SBAR) panel in accordance with the requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA).

Conclusion

Affordable and reliable electricity is an interest of critical importance to our members and the nation. In the effort to maintain the critical infrastructure on which our member owners rely, Minnkota does not believe the substantial expansion of the delays and the added cost this proposed rule would create are appropriate in its current form. The increased costs and lengthy permitting for constructing and maintaining power lines and new generation – including renewables - imposed by the proposed rule would result in little – if any – enhanced protection for the nation's waters. The preamble to the rule claims that it will "enhance protection for the nation's public health and aquatic resources. . .by increasing clarity" regarding what is and what is not jurisdictional under the Clean Water Act. However, the proposal does little to resolve inconsistency and confusion surrounding the jurisdiction of the Clean Water Act. Rather, the broad categories and ambiguous definitions increase confusion and uncertainty. The proposed rule is not cost-effective and will impose significant economic impacts on a substantial number of small entities, including electric cooperatives.

In conclusion, it is our position that EPA and the Corps should withdraw the proposed rule and engage in a meaningful dialogue with all stakeholders, including small businesses, prior to the issuance of a subsequent proposal that will reflect those consultations. I appreciate the invitation to testify and would be happy to address questions from the Committee on this important issue.

Testimony of

Jeff Metz, Owner/Operator
Metz Land and Cattle Co.
Angora, NE

"Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule."

United States Senate

Committee on Agriculture, Nutrition and Forestry

March 24, 2015
Washington, DC

Good morning, my name is Jeff Metz. My family and I farm and ranch in the Western Nebraska Panhandle where we raise cattle, corn, wheat and other dry land crops. Thank you for allowing me to testify today to help provide a farmer, rancher and local government perspective on this proposed rule.

Let me begin by thanking the Chairman and Ranking Member of this Committee for holding a hearing on this tremendously important issue. The Environmental Protection Agency (EPA) and Army Corps of Engineers' (Corps) proposed Waters of the U.S. (WOTUS) rule represents a dramatic expansion of the federal government's reach into the everyday activities of farmers, ranchers, homebuilders, local county governments and virtually anyone who turns earth with a shovel.

Let me be very clear – everyone wants clean water. The proponents of this rule love to talk in very general terms about the importance of clean water for America's families. Farmers and ranchers rely on clean water not only for their operations, but also for their own families. However, this proposed rule isn't about clean water. This rule is clearly focused on expanding the role of federal regulatory agencies into the daily lives of people around the country.

In terms of the rule itself, trying to determine what water or even land feature was included within EPA and the Corps' jurisdiction was murky at best. Despite the agencies' assertion that jurisdictional water bodies are clearly defined by a bed, bank and ordinary high water mark, the rule explains "[a] water that otherwise qualifies as a tributary under the proposed 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 on or more natural breaks (such as debris piles, boulder fields, or a stream segment that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." How far would I have to look "upstream" in order to ensure I am not liable for applying fertilizer or pesticides into an area that may lack and bed, bank and high water mark yet is still considered jurisdictional by the EPA and Corps?

Throughout my land I have seasonal draws, valleys and canyons as well as ponds and other natural depressions that at times fill or flow with water. In fact, there are many examples in Nebraska of waterways that have what the rule defines as jurisdictional, a bed and bank and a high water mark, but only during precipitation events. And, unless there is a significant amount of precipitation, many of those examples are waters that flow only a short distance before evaporating or seeping into the ground. Many rarely, if ever, have flow that actually reaches a flowing stream even though a topographic map may show that it does. Yet, it appears that I will now need a federal permit in order to plow, apply fertilizer or pesticides, graze cattle or even build a fence in these areas or even around them. A federal permit that will cost me time, money and that the federal government is under no obligation to even give me.

In Nebraska, the Nebraska Department of Environmental Quality (NDEQ) has administered many of the federal CWA permitting programs using its unique "waters of the state" definition for nearly forty years. During those forty years, the NDEQ's decisions have been overseen by the EPA and have been in accordance with the Clean Water Act (CWA). For agriculture in Nebraska, there is an understanding of what a "water of the state" is and is not based on four

decades of interpretation by NDEQ. In administering §311, the EPA advises producers to decide if a spill could "reasonably be expected" to reach water. However, the imposition of the proposed rule would create uncertainty, expansion of jurisdiction, and exposure to new liability for Nebraska producers. In addition, the federal encroachment of what is now a state delegated program runs counter to the concept of "cooperative federalism" which is a tenet of federal environmental programs.

Currently, the §402 program most impacts Nebraska agriculture in permit requirements for certain livestock operations and pesticide applications on or near water. For livestock producers, the NDEQ first started regulating discharges to "waters of the state" in 1974. Thousands, if not tens of thousands, of livestock producers have been visited by the NDEQ since that time. The NDEQ's program is to observe an operation to determine if waste or runoff has the potential to impact waters of the state. If there is a potential to impact water quality then the producer must either change the operation to avoid the potential impact or control the waste and runoff such that it will not impact water quality. Many producers, especially small producers, have been able to modify their operation or construct mitigating landscape features (water diverting berms or waterways, for example) to avoid impacting waters of the state. Likewise, producers have been constructing livestock waste control facilities under state permits. These are state construction standards for engineered facilities to handle all waste and it is common to use land application of waste as part of the operation.

All decisions in these programs have relied on the state definition of regulated water bodies for forty years. In addition, many producers have gone through the NPDES permitting process and are currently operating under a General Permit or an Individual Permit. This regulatory structure has evolved at the state level in tandem with the federally delegated NPDES program since its inception. All determinations have been made under the state definition of regulated waters. If the proposed rule is adopted, the Nebraska regulatory scheme suddenly leaves the producer wondering if his or her operation is effectively permitted or exempted. This is because, with the broad categorical definition of tributaries and neighboring waters, it is possible that currently exempted operations may now be subject to federal CWA jurisdiction. What's worse is that a producer may have, in good faith, constructed a landscape feature to divert flow away from livestock operations and now those very features may themselves be a "tributary" or an "adjacent" water. This will cause confusion, increase costs and will expose producers to new liability to enforcement from the federal or state government or to citizen suits under the CWA. This federalization of a current state program also infringes states' rights and runs counter to the concept of "cooperative federalism".

As many of you know, the state of Nebraska sits on top of one of America's greatest natural resources, the Ogallala Aquifer. This vast underground water resource has helped Nebraska become one of the nation's most agriculturally productive states even though it was once labeled as part of the "Great American Desert." It is the importance of this resource that leads many of us to be concerned with potential for groundwater sources to be treated as "waters of the United States". EPA has said that this isn't so and the proposed rule itself contains an exclusion for groundwater. However, the definition of a number of terms within the proposed rule would include "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to jurisdictional water. There are many areas in Nebraska where there is a

hydrologic connection of surface and ground water. In fact, there are entire river basins where this occurs. Are all riparian and floodplain areas with a hydrologic connection of ground and surface water now going to be subject to CWA jurisdiction? What are the limits of this language? The CWA and the federal government as a whole has never had regulatory control over groundwater and any efforts to change that should be stopped.

Nebraska is also home to a unique ecosystem known as the Sandhills – the center of Nebraska's critical cow-calf industry. The Sandhills are a mixed-grass prairie that has grown on top of stabilized sand dunes. Cattle are used to manage this land to ensure it is protected and maintained rather than deteriorating and literally blowing away. This area is also home to low lying meadows that sit on top of a very shallow water table. These wet meadows will fill with water during the spring, but will dry out during the summer allowing ranchers to mow the grass for hay. Given the broad reach of this rule, would ranchers now be required to obtain a federal permit in order to utilize this precious resource? As the mowing of these areas are extremely time sensitive, a delay of a few days to obtain a federal permit could mean the loss of an entire year's worth of cattle feed. It is critical to the future of Nebraska's overall economy that this regulation be stopped to avoid the loss of this vital feed source.

As I said earlier, this rule's impact will reach much farther than just agriculture. As a County Commissioner in Morrill County Nebraska, we are charged with maintaining 900 miles of gravel and other minimal maintenance roads all of which have ditches that run along each side. The process of maintaining these roads is expensive and time consuming, yet it remains as one of the most important tasks of county government. We simply cannot afford to be required to obtain a federal permit each time we go out to maintain these roads because of the ditches that run alongside them.

Douglas County Nebraska, a mostly urban county which contains the city of Omaha, is home to a road ditch intended to protect of the adjacent roads from runoff from adjacent fields. The ditch is several feet deep and wide and is full of dryland weeds. If you dig through those weeds, you will see a rut approximately 6" to 8" wide and less than an inch deep. Presumably, this rut developed before any vegetation began to grow. There is no Ordinary High Water Mark associated with this "bed and bank" because when it rains; it is completely underwater. The Corps recently declared this rut to be a "water of the U.S." The redesign of this ditch is costing the county hundreds of thousands of dollars and has held up the project for another two years. This is merely an example of what we can expect if this proposed rule is finalized.

I also think it is important to discuss the process in which the EPA and Corps have proposed this rule. Following the release of the rule last year, EPA conducted a public relations campaign to try and sell this rule to the American public. They held meetings with farm groups and other industry stakeholders, a few farmers and even some of you I am sure. The problem however, is that EPA did a very poor job of talking to farmers and ranchers before this rule was ever proposed. Moving forward to today and we are being told that the EPA and Corps will be introducing a final rule in late spring or early summer. Rather than giving folks the opportunity to comment on an interim rule, they will be moving quickly to issue a final rule that will not offer the opportunity for comment. Even though roughly two-thirds of the 20,000 substantive

comments on the proposed rule were in opposition, it seems that the attitude of EPA is to ignore a clear outpouring of opposition and move ahead anyway.

This massive expansion of the federal CWA is being undertaken by the EPA and Corps because of what they describe as "confusion" surrounding a few U.S. Supreme Court cases. As I made a rough reading of the proposed rule as well as portions of the CWA, it has become very clear to me that the only ones who seemed to be confused as to where their regulatory limits lie is the EPA and Corps not farmers and ranchers. Congress clearly laid out exactly the extent of their regulatory authority by using the word "navigable" over and over again throughout the CWA. No one is advocating for the elimination of all federal water regulations. What we need is something far more focused on common sense rather than a document which grants the federal government blanket authority over all bodies of water everywhere.

Thanks you for your time today and I am more than happy to answer any questions you may have.

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Jackie McClaskey, Secretary

Governor Sam Brownback

Mr. Chairman, my name is Susan Metzger and I serve as an Assistant Secretary for the Kansas Department of Agriculture. Thank you for the opportunity to appear today and share Kansas' perspective on the impacts of the Federal rulemaking on Waters of the United States on Kansas agriculture and water management.

According to the EPA website on the Clean Water Rule, the rule is purported to help states protect their waters and will not broaden the coverage of the Clean Water Act. I am here today to testify that presumption is incorrect when describing the rule's application in Kansas.

We contend that, while certain tributaries are Waters of the U.S. under the existing regulation, the proposed rule gives a regulatory definition of "tributary" that covers waters to include all streams, with or without flow. There will be no need to make a significant nexus determination for dry streams or their adjacent waters because the rule automatically considers them Waters of the U.S.

Applying this blanket definition of tributary in Kansas will result in in nearly a 460% increase in the number of stream miles classified as Waters of the U.S., subject to all programs and provisions of the Clean Water Act. A nationally defined, "one size fits all," definition for terms like tributaries is not appropriate given the scarcity of flow in Western States such as Kansas, and the inherent variability of those streams to impact downstream waters. Rainfall across Kansas ranges from a low of less than 15 inches along our western border with Colorado to more than 40 inches in southeast Kansas. Low rainfall in the west combined with deep depths to the High Plains Aquifer make all but the major streams in the west, ephemeral, with their channel beds permanently above the water table. These streams, now and forever, only flow in response to localized rainfall. Yet, under the proposed rule, any order stream with a bed, bank and ordinary high water mark will be deemed a tributary, and as such, considered jurisdictional under the Act.

In 2001 the Kansas legislature defined a "classified stream" for purposes of applying Clean Water Act water quality standards and implementing programs. The statute and associated regulations directs protection of water quality to the state's significant waters while logically excluding ephemeral streams, grass, vegetative or other waterways, culverts or ditches.

Kansas has demonstrated great success in managing our water resources. Through the implementation of locally-driven water quality plans, Kansas has produced improvements in water quality including the removal of several water bodies from the state's list of impaired waters. These improvements are the result of appropriate positive coordination of state agencies with local jurisdictions and individual landowners. The proposed rule, and the intervention of the Federal agencies into management of marginal waters will degrade those productive relationships.

The distraction and diversion brought forth by this rule will incur additional expenditures at the state level for marginal environmental benefit and diminished success in water quality improvement in Kansas. The inevitable slow-down in permit reviews and increase in bureaucratic paperwork will unnecessarily delay and deter economic growth and impede the adoption of soil and water conservation practices by the farmers and ranchers of Kansas. As shared during the public comment period by many of the agriculture-related organizations and state agencies in Kansas, as well as Governor Sam Brownback, we request the proposed rule be withdrawn and any future discussions begin anew with the full consultation and advice of the State.

Mr. Chairman, as we saw with the now-withdrawn interpretive rule, Federal rulemaking without proper consultation with States, leads to unintended consequences. I believe that today's panel discussion restores state-level discussion towards development of a better, meaningful rulemaking under the Act. We hope that the states, as primary implementers of the Act, begin to have a significant role in crafting future rules by the Federal agencies. Thank you for the opportunity to share Kansas' perspective.

WRITTEN STATEMENT FOR THE RECORD

THE HONORABLE LYNN PADGETT
COMMISSIONER, OURAY COUNTY, COLORADO

ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

"WATERS OF THE UNITED STATES: STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF EPA'S PROPOSED RULE"

BEFORE THE U.S. SENATE COMMITTEE ON AGRICULTURE, NUTRITION AND FORESTRY

MARCH 24, 2015
WASHINGTON, D.C.

Thank you, Chairman Roberts, Ranking Member Stabenow and members of the Committee for the opportunity to testify on "Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule."

My name is Lynn Padgett, I am an elected county commissioner from Ouray County, Colorado, and today I am representing the National Association of Counties (NACo).

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 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, 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 70 percent are considered "rural," with populations less than 50,000, and 50 percent of these have populations below 25,000 residents.**

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 systems and public hospitals. Counties are also responsible for child welfare, consumer protection, economic development, employment/training, land use planning and 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, bridges, stormwater systems, green infrastructure construction and maintenance projects, drinking water facilities and infrastructure (not designed to meet CWA requirements) and water reuse and infrastructure projects.

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, road signage and major long-term construction projects.

Many of these road systems are in very rural areas. Any additional cost burdens are challenging to these smaller governments, especially since 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.

Regardless of size, counties nationwide continue to be challenged with fiscal constraints and tight budgets. According to a 2014 County Economic Tracker[1] report released by NACo in January, only 65 of the nation's

[1] Nat'l Ass'n of Counties, *County Tracker 2014: On the Path to Recovery*, NACo Trends Analysis Paper Series, (2014).

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 Ouray County, Colorado

As a county commissioner and small business owner, I interact with constituents and businesses on a daily basis. While Ouray County, Colorado is considered "rural," with a population of approximately 4,500 residents, our number swells to over 20,000 during the height of tourism season on the 4th of July. The county lies in southwestern Colorado and has a land mass of 542 square miles. Known as both the Switzerland of America and the Gateway to the San Juan Mountains, Ouray County is home to scenic ranch lands, historic mining districts, wildlands and trails. Approximately 45.7 percent of the county is comprised of federal public lands and 23.5 percent is agricultural. The county averages eight people per square mile and the median yearly salary for our residents is about $33,000.

While mining operations and agriculture remain a vital and active part of life in Ouray County, tourism now forms the basis of our economy. In the height of tourist season, the county receives 1.5 million visitor days a year. Visitors are drawn to the county for its history, natural beauty and variety of outdoor activities. Additionally, the county boasts numerous public and privately owned hot springs facilities. These mineral-rich natural hot springs have been developed for recreational use at municipal pool complexes such as Ouray Hot Springs Pool and vapor caves and soaking pools at a number of lodging and recreational establishments. It is estimated that these attractions generate over $38 million dollars per year within the county; 38 percent of the local jobs are derived from the tourism market.

In the summer months, Ouray County regularly has heavy monsoonal thunderstorms, marked by high intensity and destructive cloud bursts, which cause flash flooding and mud and debris flows. Ouray County must rescue stranded locals and tourists when flash floods wash out roads and bridges and the county must clean out and rebuild impacted infrastructure when the storms abate. Additionally, as water demands increase in the arid west, Ouray County is exploring avenues to increase water storage capabilities for multiple uses—agriculture, municipal, industrial, fire suppression, and dust control on roads and bridges—which will benefit both the business community and public safety efforts.

Many of the projects we are working on within the county—and 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).

The rule, as drafted, will have a significant impact on counties of all sizes, from rural to urban. **Therefore, we have urged the agencies to withdraw the proposed rule until further analysis of its potential impacts has been completed.** In fact, many 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 the on-the-ground impacts of this proposed rule on rural counties nationwide and why counties have called for the proposed rule to be withdrawn.

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, 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 for ensuring 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, maintaining public safety and promoting economic development. 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 support clean water and play a key role in protecting the environment. We 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.

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. In these regions, counties are using infrastructure to preserve water for future use.

In Ouray County, we safeguard our natural resources to keep our local economies strong. We use zoning and land use regulations to minimize or avoid development impacts to streams, lakes and springs. The county encourages preservation of productive agricultural land, wildlife mitigation corridors, scenic vistas, historical and archaeological sites and natural land characteristics.

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.

In Ouray County, we own 334 public road miles and almost half of the bridges in the county. The county spends approximately two million dollars a year for road and bridge improvement and maintenance projects, this accounts for over 20 percent of the county's annual budget. Most of Ouray County's roads are gravel—only 20 miles of our roads are paved—the county uses ditches, borrow pits and culverts to keep the roads functional.

Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining 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 police, sheriffs, firefighters and emergency personnel are the first on the scene. In the aftermath, counties focus on clean-up, recovery and rebuilding. For example, last March, a private plane crashed into the Ridgway Reservoir State Park in Ouray County during a heavy snowstorm. Hampered by bad weather, the county worked quickly with emergency responders to find the plane and passengers and to minimize any adverse environmental impacts from leaking fuel into the reservoir.

Additionally, 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 as to whether county infrastructure on tribal land triggers federal oversight, since the proposed rule states that any water that crosses interstate lines falls under federal jurisdiction.[2]

As of May 2013, 566 Native American tribes are legally recognized by the Bureau of Indian Affairs (BIA).[3] Approximately 56.2 million acres of land is held in trust for the tribes[4] and is often separate plots of land. While Native American tribes may oversee tribal roads and infrastructure on tribal lands, counties may also own and manage public safety infrastructure 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

[2] Definition of Waters of the U.S. Under the Clean Water Act, 79 *Fed. Reg.* 22188 (April 21, 2014) at 22200.

[3] U.S. Dept. of the Interior, Indian Affairs, *What We Do, available at* http://www.bia.gov/WhatWeDo/index.htm.

[4] *Id.*

infrastructure as interstate will require counties to go through the Section 404 permit process for any construction and maintenance projects on tribal lands.

Third, the proposed rule will have a broad impact beyond the agriculture industry. Today, we will hear from a group of state, local and business leaders about the impacts the proposed rule has on rural communities and the agricultural industry. This proposal, however, also has the potential to adversely impact additional—and equally important—economic drivers for rural communities, such as tourism.

Rural communities are challenged by finite economic bases which require them to leverage local assets and regional partnerships to attract visitors. The tourism industry thrives on this leveraging and is often the economic driver in the absence of a robust agricultural sector.

For example, in Ouray County we use our naturally flowing hot springs to attract tourists to our county. **During the height of the tourism season, Ouray County's population grows from 4,500 to over 20,000.** The City of Ouray's Hot Springs Pool recorded 135,000 visitors last year and generated $1.2 million in direct receipts. This figure does not include the indirect revenue derived from local restaurants, lodging and shopping, which benefits the county's economy. Additionally, the county collects a two percent sales tax, equally split between the county's general fund and the road and bridge fund, which generates roughly $530,000 annually for these two funds.

While the county is concerned that the proposed "waters of the U.S." definition would include these hot springs, we are also responsible for the infrastructure supporting the hot springs, including roads and roadside ditches, retention ponds and other public safety facilities. As with most economies driven by the tourism industry, the opportunity to conduct intensive maintenance and repair projects on the local infrastructure is limited—most tourism activities are seasonal, which often provides only small windows of opportunity for rural communities to complete such projects.

For example, in Ouray County, the popular Alpine Loop area in the San Juan Mountains is only open June through September, depending on snow pack. After the worst of the winter storms and prior to the summer opening of the road, the county must quickly plow and repair the roads leading to the Loop at an annual cost of $50,000-$70,000. If more public safety infrastructure, such as roads and ditches fall under federal permitting authority, it may hamper our ability to support the tourism economy within Ouray County.

By introducing additional and redundant regulatory burdens on an already strained process, the proposed rule would essentially dry-up our most effective economic driver by shortening the tourism season.

This is neither a 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 the entire rule-making process, state and local governments were not adequately consulted through the Regulatory Flexibility Act (RFA) and Executive Order 13132: Federalism (EO 13132). Since 2011, NACo has repeatedly requested a transparent process, as directed under the Administrative Procedures Act (APA), which calls for meaningful consultation with impacted state and local governments.

Under RFA and EO 13132, 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.

As part of the RFA process, the agencies must "certify" that the proposed rule does not have a Significant Economic Impact on a Substantial Number of Small Entities (SISNOSE). Small entities are defined as small businesses and organizations, cities, counties, school districts and special districts with a population below 50,000. To certify a proposed rule, federal agencies must provide a "factual basis" to determine 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, that there was "no SISNOSE"—and therefore did not provide the 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, Small Business Administration's Office of Advocacy (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..."[6] 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." **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's conclusions.**

Within the proposed rule, the agencies indicated that 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 but 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.

Further, because a thorough consultation process was not followed, the agencies released an incomplete and inaccurate economic analysis[7] that did not fully capture the potential impact on other Clean Water Act programs. We have expressed concerns 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. The analysis used CWA Section 404 permit applications from 2009-2010 as its baseline data to estimate the costs to all CWA programs, even

[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] 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).

though more recent data is available. **While 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 regarding the existing "waters of the U.S." definition, as there has been much confusion regarding this definition even after several Supreme Court decisions on this issue. 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 and this lack of clarity 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 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 which waters would or would not be covered under federal jurisdiction.

Second, the proposed rule could have a cascading impact on all state and local CWA programs, not just the Section 404 program. 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." 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, may have far-reaching and unintended consequences for ALL CWA programs, including Section 402 National Pollutant Discharge Elimination System (NPDES), Section 404 permits, total maximum daily load (TMDL) and other water quality standards programs, state water quality certification process and Spill Prevention, Control and Countermeasure (SPCC) programs.

While the EPA and the Corps have primary responsibility for water quality programs, everyday CWA implementation is shared with the states and local governments.[8] Under the CWA, states are required to identify polluted waters (also known as impaired waters) and set Water Quality Standards (WQS) for them. As part of the WQS process, states must set designated uses for the waterbody (e.g. recreation, drinkable, fishable) and institute TMDLs for impaired waters.

[8] Cong. Research Serv., Clean Water Act: A Summary of the Law (Report RL 30030, October 30, 2014), Copeland, Claudia.

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."[9] But, 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 and 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 and local responsibilities for 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.

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 on "waters of the U.S." on all CWA programs.

4. The Current Clean Water Act Section 404 Permit Process Already Presents Significant Challenges for Counties; the New Proposed Rule Only Complicates Matters

Under the CWA, counties serve as both the regulator and regulated entity and are responsible for ensuring that clean water goals are achieved and that their constituents are protected. In practical terms, many counties implement and enforce CWA programs, and also must meet CWA and other federal requirements themselves.

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.

The proposed rule, as currently written, only adds to this confusion and complicates already inconsistent definitions used in the field by local agencies in different jurisdictions across the country.

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. 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. If a project is deemed to be under federal jurisdiction, other federal requirements are triggered, such as environmental impact statements, under the National Environmental Policy Act (NEPA) 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 cost of projects. 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 ESA conditions attached to the permit for maintenance

[9] 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.

activities in public safety ditches. 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.

Several rural counties in the northern Midwest who collectively maintain county-owned culverts under railroad lines were recently required to go through the Section 404 permit process for maintenance work. As part of the approval process, the counties were required to complete historical assessments on all bridges and culverts along the 90 miles of freight rail lines. This review has added an additional two months to an already limited construction season and may push the project into next year, further staining county resources.

Another 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 negatively impacted 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 ditches that did not have a decision from the Corps were flooding.

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

Chairman Roberts, Ranking Member Stabenow and members of the Committee, 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 goal for a clear, concise and workable definition of "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 of "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. 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
- Ouray County, Colorado, letter submitted to EPA and the Corps on the "waters of the U.S." proposed rule on November 13, 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
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Stacey Jensen
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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

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[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%20U5%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%20U5%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**

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[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.

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[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
CEO and Executive Director
The U.S. Conference of Mayors

Clarence E. Anthony
Executive Director
National League of Cities

Matt Chase
Executive Director
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

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

COUNTY ATTORNEY

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November 13, 2014

RE: Docket ID No. EPA-HQ-OW-2011-0880

Water Docket
Environmental Protection Agency
Via email: ow-docket@epa.gov

Re: Proposed Definition of Waters Of the United States

These comments are submitted on behalf of Ouray County, Colorado. Ouray County is a rural mountain community located in the Southwest quadrant of Colorado. Headwaters of the Uncompahgre River, tributary to the Colorado River, are located within the County. The County also is the home of the Ridgway Reservoir, an important asset for agricultural, municipal and recreational use. The County's economy is focused on farming and ranching, mining, and tourism, including fishing and water recreation. We enjoy several natural hot springs in the area, some of which are important to the recreation and tourism industry.

Ouray County supports clean water and understands the need for protection of the quality of the water that is critical to all of our residents and visitors, as well as for wildlife and fishery uses. However, the County also believes that the proposed definition of Waters of the United States extends the jurisdiction of the EPA and Corps of Engineers beyond what was intended under the Commerce Clause of the U.S. Constitution, and therefore, is beyond the jurisdiction of the federal government, and will needlessly result in regulatory burdens with no justifying benefit.

The State of Colorado already has aggressive and thorough statutory authority and regulatory implementation to ensure that the quality of water in Colorado, particularly those waters not generally "navigable," is protected and improved. Even without the delegation of responsibilities from EPA under the Clean Water Act, the state has authority to protect water quality throughout Colorado. The state has enacted thorough regulations and water quality standards and numeric criteria to ensure protection of waters in the state. Additional regulation by the federal agencies is a "solution looking for a problem" and is unwarranted.

While EPA maintains that there is no expansion of its jurisdiction intended by the proposed definition, many commentators who have carefully reviewed and considered the

proposed definition have concluded otherwise. Ouray County adopts the comments submitted by the National Association of Counties, as well as those submitted by Moffat County, Colorado.

In particular, Ouray County is concerned that the proposed definition would include naturally flowing hot springs, ditches that carry water for both municipal and agricultural users, storm water retention ponds, storm water ditches, depressions and culverts, arroyos that flow intermittently, isolated ponds and water gathering depressions, and areas in which water collects during limited times of the year or after limited or seasonal weather events. To include these waters as "tributary" or otherwise connected to continually flowing streams and wetlands will result in additional permitting burdens, including Section 404 permitting for construction and road maintenance activities. Similarly, to require discharge permits for waters that naturally flow from the ground, including the various hot springs with their unique characteristics and natural constituents, in an unwarranted exercise of regulation that will alter the important place that these hot springs enjoy in our tourism economy. The burdens of additional federal permitting include undue delays as well as out-of-pocket costs affecting agricultural and municipal users, as well as the County in its normal course of business. We do not believe there is a corresponding benefit that justifies this additional regulatory burden and expense.

Colorado has a well-developed system of water rights and water law. The proposed regulatory extension may well inhibit the development of existing conditional water rights, or the future use of water rights, including the ability to maintain and construct necessary ditches, pipelines, and infrastructure. Any interference with the lawful exercise of water rights in Colorado would be in violation of Section 101(g) of the Clean Water Act which specifically provides that nothing in the Act shall impair the exercise of water rights.

Ouray County joins with countless other counties and entities in Colorado to request that EPA and the Corps of Engineers table this proposed definition expanding federal jurisdiction.

Respectfully,

Martha P. Whitmore

Martha P. Whitmore

RMFU Rocky Mountain Farmers Union

TESTIMONY OF KENT PEPPLER
PRESIDENT
ROCKY MOUNTAIN FARMERS UNION

SUBMITTED TO THE COMMITTEE ON AGRICULTURE, NUTRITION AND FORESTRY OF THE UNITED STATES SENATE

WATERS OF THE UNITED STATES: STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF EPA'S PROPOSED RULE

MARCH 24, 2015
WASHINGTON, D.C.

Submitted Testimony of Kent Peppler
President, Rocky Mountain Farmers Union
Before the Committee on Agriculture, Nutrition and Forestry
Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule
March 24, 2015

Introduction

On behalf of the family farmers, ranchers and rural members of Rocky Mountain Farmers Union (RMFU), thank you for the opportunity to testify regarding the Environmental Protection Agency and Army Corps of Engineers' proposed changes to the definition of "waters of the U.S." We are especially grateful for the chance to address the misconception that all farmers are completely opposed to the rule. Founded in 1907, RMFU has grown to represent agriculture in New Mexico and Wyoming as well as Colorado. Together with other state organizations, it is part of the 250,000 member National Farmers Union. In this broader context, RMFU stands as an advocate for American producers, consumers and rural communities. Specific priorities include achieving profitability for family farmers and ranchers, promoting stewardship of land and water resources, and delivering safe, healthy food to consumers.

Clean water is vital to the productivity and well-being of America's farms, ranches and rural communities. The Clean Water Act (CWA) seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] RMFU's members understand the importance of respecting clean water as a shared resource and believe the integrity of the nation's water can be protected without unnecessarily encumbering the activities of the regulated community.

There are ambiguities in the present regulatory landscape that many producers have found arbitrary and confusing. The EPA and Corps' (agencies) stated goal for the proposed rule is to improve protection of public health and water resources while increasing certainty for the regulated community and reducing troublesome and costly litigation. Protecting the nation's water resources is a complicated matter, and so by necessity are the CWA and any rule implementing it. This topic requires careful consideration and measured discourse over the legitimate concerns facing the regulated community. The inflammatory rhetoric that has been employed around this topic is counterproductive.

This proposed rule is so important because all discharges made to waters of the United States from point sources require a National Pollutant Discharge Elimination System (NPDES) Permit under the CWA. A discharge is any addition of a pollutant to a "water of the United States," including dredge or fill

[1] 33 USC §1241(a).

material. Although normal farming, silviculture and ranching activities are exempt from dredge and fill requirements under §404(f)(1)(A) of the CWA and certain activities pursuant to agriculture are exempted from NPDES permitting requirements under §402, the legal basis for the regulation of many construction and business activities rests on the definition of "waters of the United States."

RMFU's members recognize the agencies' rulemaking process on this matter as an opportunity to achieve their policy goals because the current regulatory landscape allows for inconsistent determinations that expand the CWA's definition of jurisdictional waters. The purpose of the following testimony is to provide the agencies with advice for drafting a final rule that confirms existing CWA jurisdiction and promotes consistent application of EPA policies, which aligns with the agencies' stated intent. This testimony will help the agencies avoid language that, even when drafted in good faith, could be taken out of context and used to stretch CWA jurisdiction in the future, while ensuring adequate protection for the 117 million people that rely on seasonal and rain-dependent streams for their drinking water.

The agencies' stated intent is to replace inconsistent practices with clear, bright-line tests through this proposed rule. If the testimony below is given proper consideration, the final rule will allow the regulated community the certainty it needs to conduct its business free from fear of undue regulatory interference and without sacrificing the agencies' ability to protect the United States' water resources. The proposed rule warrants comments on the agencies' changes to the definition of "waters of the United States" and the exclusions of certain waters from that definition.

I. Proposed Definition of "waters of the United States."

"Tributary"

The CWA establishes the agencies' permitting jurisdiction over specifically-listed waters. Paragraphs (a)(1)-(a)(5) of the proposed rule restate well-settled tenets of the agencies' jurisdiction under the CWA and do not warrant further comment. However, section (a)(5)'s inclusion of "All tributaries of waters identified in paragraphs (a)(1) through (4) of this section" warrants examination. This language has invoked significant concern in the regulated community that the proposed rule would increase the jurisdictional reach of the CWA. The agencies should address this concern and confirm this language does not increase jurisdiction by incorporating the following points in the final rule.

The preamble to the proposed rule notes that the proposed rule sets forth, for the first time, a regulatory definition of "tributary."[2] 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 identified in paragraphs (a)(1) through (4) of this section."[3] In order to provide more clarity to the regulated community, the agencies should note in the final rule that these features take years to form. This should mitigate concern that temporary accumulations directly related to isolated rain events will be considered jurisdictional. The agencies should add further clarifying language, including but not limited to descriptive examples of water and events that are not considered tributaries, in the final rule in order to ensure these distinctions are well-understood in the regulated community.

The preamble notes that existing Corps regulations define the ordinary high water mark (OHWM) "as the line on the shore established by 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(e)."[4] The agencies should incorporate this definition within the final rule so that the regulated community can refer to one place for as much of the information that is needed to maintain compliance as possible.

These points should ensure that the definition of "tributary" in the proposed rule will not bring any water into jurisdiction that would not be found jurisdictional under the "significant nexus" test that is applied to "other waters." If incorporated, they would create regulatory certainty and lessen administrative burden by settling jurisdiction for waters that would have been subject to a case-by-case determination but ultimately found jurisdictional.

Also, the proposed rule treats wetlands that are connected to tributaries as tributaries themselves, but the preamble requests comment on this approach and offers an alternative.[5] Wetlands should not be considered tributaries unless the wetland is in a flood plain. Treating wetlands as tributaries would negate the bed, bank and OHWM criteria the Corps uses for identifying tributaries. The agencies should enact the alternative proposed in the preamble and "clarify that wetlands that connect tributary segments are adjacent wetlands, and as such are jurisdictional waters of the United States under (a)(6)." This alternative creates a bright-line definition for "tributary" without relinquishing any opportunities to

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[2] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22198,(proposed April 21,2014) (amending 33 C.F.R. §328.3).
[3] *Id* at 22263.
[4] *Id.* at 22202.
[5] *Id.* at 22203.

protect water resources while protecting navigable waters from pollutants that may accumulate in wetlands within floodplains.

"Adjacent"

The proposed rule would change section (a)(6) from an articulation of the CWA's jurisdiction over wetlands adjacent to "waters of the United States" to an explanation of the CWA's jurisdiction over "All waters, including wetlands, adjacent to" waters identified in (a)(1) to (a)(5) as jurisdictional. As with the definition of "tributary" discussed above, this change is causing apprehension among the regulated community. The agencies should consider the following points in drafting the final rule to make clear that this change does not expand jurisdiction.

The proposed rule defines "adjacent" as "bordering, contiguous or neighboring" at (c)(1). It notes further that "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.'"

The jurisdictional reach of "adjacent waters," then, is largely dependent on the definition of "neighboring." This proposed rule defines "neighboring" for the first time. The preamble notes that the term is currently applied broadly, but the proposed rule defines "neighboring" as "waters located within the riparian area or floodplain of a water identified in (a)(1) through (5) of this section, or waters with a shallow subsurface hydrological connection or confined surface hydrologic connection to such a jurisdictional water."[6]

Waters located in the riparian area or floodplain of a jurisdictional water, or with a confined surface hydrologic connection to a jurisdictional water, would be found jurisdictional under the "significant nexus" test, even without the proposed rule's explanation of jurisdiction over adjacent waters. This inclusion of "adjacent waters" as per se jurisdictional increases certainty for the regulated community and alleviates administrative burden without increasing the CWA's jurisdictional reach.

The preamble explains that, to date, the agencies' professional judgment has been a factor in determining matters of adjacency. "The agencies recognize that this may result in some uncertainty as to whether a particular water connected through confined surface or shallow subsurface hydrology is an 'adjacent' water." The preamble then specifically requests comments on options for providing clarity and certainty on these matters.

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[6] *Id.* at 22207.

One of the proposed alternatives put forth by the agencies is "asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian area of a jurisdictional water."[7] This is the proper way to address these waters. It creates certainty for the regulated community since waters located a substantial distance from a jurisdictional water would not be subject to jurisdiction due to an insubstantial connection to the jurisdictional water. Even in the current regulatory framework, the agencies consider distance from a jurisdictional water when determining whether a water that is located outside the floodplain or riparian area of the jurisdictional water, but that is connected to the jurisdictional water by a shallow subsurface or confined surface hydrologic connection, is adjacent to that jurisdictional water.[8]

This alternative also reserves to the agencies the ability to address waters that could actually have a consequential impact on the quality of a water of the United States, since the water located outside the floodplain and riparian area of the jurisdictional water, unless otherwise excluded, would be subject to the "significant nexus" test. Holding the definition of "adjacent water" to waters within a jurisdictional water's floodplain or riparian area allows the regulated community maximum certainty without encumbering the agencies' ability to protect water resources.

The agencies also request comment on whether a water with only a small confined surface or shallow subsurface hydrologic connection to a jurisdictional water should be exempt if it is outside a specified distance from the jurisdictional water. For the same reasons why the best approach to "adjacent waters" is to limit the category to waters within the floodplain or riparian area of a jurisdictional water as discussed above, placing a cap on the distance from a jurisdictional water within which other waters may be considered "adjacent" is a second-best alternative. Under this approach, more waters that do not have the actual ability to affect the water quality of a jurisdictional water will be considered jurisdictional than the "floodplain and riparian area-only" alternative. This will result in greater administrative burden for the regulated community and the agencies. However, a bright-line rule limiting the area surrounding a jurisdictional water in which a water may be found "adjacent" could still be referenced, increasing certainty compared to the regulatory framework as it exists today.

The preamble also asks for specific comment "on whether the rule text should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water."[9] The agencies should uniformly use a 20 year flood interval zone when evaluating these waters. This will provide the regulated community with certainty without inhibiting the agencies' ability to protect waters of the United States, since waters not captured within this zone will still be

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[7] *Id.* at 22208.
[8] *Id.*
[9] *Id.* at 22209.

jurisdictional under the "significant nexus" test if they have the potential to impact a jurisdictional water.

The agencies should also provide clarity to the regulated community by stating in the final rule, "mere proximity to a jurisdictional water is not cause for a determination that a water is jurisdictional as 'neighboring' or 'adjacent,' and a scientifically-verifiable, substantial surface connection must be present for any water outside a floodplain or riparian zone to be found jurisdictional."

"Significant Nexus"

Other waters not covered by the above-discussed jurisdictional categories may fall within the CWA's jurisdiction if a case-by-case determination is made finding the water has a "significant nexus" with a water identified in sections (a)(1) through (3).

The proposed rule at section (c)(7) says "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(a)(1) through(3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section." The proposed rule also states "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 (a)(1) through(a)(3) of this section." The agencies intend that this language more precisely describes the scope of jurisdiction by explicitly leaving out waters that have a mere commercial connection to navigable waters and codifies the agencies' practice since the Supreme Court's decision in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001).

The term "similarly situated" must be examined, since it allows the agencies to consider multiple waters together in making "significant nexus" determinations. The prerequisite condition for "other waters" to be considered "similarly situated," before any assessment of geographic proximity to additional "other waters" or jurisdictional waters, is performance of similar functions. The preamble further explains that a "similarly situated" determination requires an evaluation of whether waters in a region "can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas," and whether waters are "sufficiently close" to each other or a jurisdictional water.[10]

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[10] *Id.* at 22213.

The description of "similarly situated" waters above includes so many variables that it would be difficult for the regulated community to accurately anticipate the outcome of such a determination, opening the door to increased uncertainty. To give the regulated community more clarity in anticipating the results of "similarly situated" evaluations, the agencies should provide a list of functions that a group of waters must perform together in order to be considered "similarly situated." These functions include affecting the reach and flow of a jurisdictional water and allowing or barring the movement of aquatic species, nutrients, pollutants or sediments to a jurisdictional water.

The agencies should also require "other waters" to have a confined surface connection to each other in order to be considered "similarly situated." This distinction would be helpful to the agencies and to the regulated community because "other waters" that are completely separate and distinct from a jurisdictional water will not be able to form a significant nexus with a jurisdictional water cumulatively unless they maintain such a nexus individually or with each other. The final rule should also strictly limit the distance allowed between separate waters that can be considered "similarly situated."

Otherwise, no "other waters" should be determined to be similarly situated, as the agencies put forth as an alternative in the preamble.[11] The limited environmental benefit of bringing waters that would not trigger jurisdiction by themselves into jurisdiction as "similarly situated" does not justify the uncertainty and administrative burden that would be created for the agencies and the regulated community. The "significant nexus" evaluation ensures that waters of genuine concern are jurisdictional.

The agencies request comment as to whether the agencies should evaluate all "other waters" in a single point of entry watershed as a single landscape unit for purposes of determining whether these "other waters" are jurisdictional.[12] This would create substantial negative economic impact by unduly imposing a regulatory burden on many waters that cannot affect the integrity of "waters of the United States." It would also increase the agencies' administrative load without a return of environmental benefit, since the agencies would have to perform more case-by-case jurisdictional determinations. Since this approach to evaluating "other waters" would create significant administrative burden for the agencies and the regulated community, and would not produce an environmental benefit, the agencies should not include this approach in the final rule.

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[11] *Id.* at 22215.
[12] *Id.* at 22217.

Additional Clarity

The agencies can alleviate agriculture's concerns by noting that waters not listed under section (b) of the proposed rule are not jurisdictional by default and will not be considered within CWA jurisdiction unless they fall into one of the categories listed in sections (a)(1) to (a)(7).

The agencies should also make clear in the final rule that any wetland determination made by the Department of Agriculture's Natural Resource Conservation Service (NRCS) will be considered final and ruling. While NRCS' wetlands determinations are not jurisdictional determinations, the ability to rely on NRCS' decisions regarding the presence of a wetland would increase clarity for the regulated community, reduce the agencies' administrative burden and prevent inconsistent wetland determination.

II. Excluded Waters and Exempted Activities

Ditches

In section (b) of the proposed rule, the agencies list several categories of waters that are explicitly excluded from the definition of "waters of the United States," placing them outside the jurisdiction of the CWA. The proposed rule specifically excludes two types of ditches that otherwise would have been subject to a case-by-case determination, increasing regulatory certainty and reducing the CWA's jurisdictional reach. The exclusion of these ditches increases certainty for the regulated community without impairing the agencies' ability to protect the nation's water resources.

Sections (b)(3) and (b)(4) explain the circumstances in which a "ditch" is not a "water of the United States." These sections exclude ditches that do not contribute flow, directly or through other waters, to a "water of the United States," and any ditches that are wholly within an upland and drain only uplands and are without perennial flow. These explicitly-stated exclusions do not interfere with the CWA's objective of protecting water resources because the ditches concerned are unlikely to impact the integrity of waters of the United States. The exclusions at (b)(3) and (b)(4) will give the regulated community added certainty, allowing them to conduct their business without fear of regulatory action.

With regards to section (b)(3), the preamble states "Ditches that are excavated wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water)."[13] The agencies should restate this description of "upland ditches" as a definition of "uplands" by writing, "an upland is any land that is not a wetland, floodplain, riparian area or water." This definition should be included in the final rule in order to provide clarity.

[13] *Id.* at 22219.

The agencies should provide further clarity to the regulated community by defining "perennial flow" in section (c) of the final rule. The description of "perennial flow" in the preamble[14] could be altered slightly to function as the definition, codifying that "perennial flow" is "the presence of water in a tributary year round when rainfall is normal." Including this definition in the final rule would reduce the administrative burden for members of the regulated community as they attempt to maintain compliance with the CWA.

The agencies request comment on whether perennial flow is the proper distinction to use in separating excluded ditches from ditches that may be jurisdictional under section (b)(3).[15] Given the agencies' stated goal of providing clarity to the regulated community, perennial flow is the proper distinction. The presence or absence of perennial flow is easily-verifiable. Using perennial flow as the distinction allows the regulated community to be confident in their own assessment of ditches, which encourages the normal course of business and reduces unexpected enforcement actions. It also checks the agencies' administrative burden, since the presence or absence of perennial flow would also be easier for the agencies to verify than intermittent flow.

Exemptions for Agricultural Activities

The preamble indicates that the proposed rule does not affect existing regulatory exemptions for agricultural activities.[16] There is nothing in the proposed rule that calls this assertion into question. Some of these exemptions are referenced in the Interpretive Rule Regarding Applicability of the Exemption from Permitting under section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices" (Interpretive Rule), which was published on the same day as the proposed rule.[17] The Interpretive Rule states the list of exempted practices is illustrative rather than exhaustive and the CWA exempts those, like other activities conducted in the normal course of agriculture production, including conservation activities, are also exempted from CWA permitting requirements. In order to provide the regulated community with increased certainty, the agencies should consider codifying the Interpretive Rule and adding language explicitly stating that engaging in these exempted activities does not invoke any reporting requirement or other obligation to the agencies, including when these activities take place on land newly brought into farming. The agencies should also explicitly note that conservation activities do not need to follow specific National Resource Conservation Service guidelines for cost-share or technical assistance eligibility when engaging in these activities in order for their actions to remain exempt from permitting requirements.

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[14] *Id.* at 22203.
[15] *Id.* at 22219.
[16] *Id.* at 22218.
[17] http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf

The proposed rule also specifically continues the exclusion of prior converted cropland from the definition of "waters of the United States" at section (b)(2). The proposed rule and preamble's direct confirmation of these matters provides clarity for the regulated community. The agencies should provide further clarity for the regulated community on this point by stating in the final rule, "This rule does not require a permit for any plowing and planting activity that was legally conducted without a permit before this rule was issued." This language captures the intent of the agencies and provides the regulated community with the certainty it needs to continue farming its existing planted acreage without threat of new interference.

III. Miscellaneous Matters

Shallow Subsurface Hydrologic Connections

The existing regulatory framework defining "waters of the United States" and the proposed rule assume that a shallow subsurface hydrologic connection is sufficient for finding that waters with this connection to a jurisdictional water are "neighboring" and so jurisdictional themselves as "adjacent waters." Hydrologic science does not support such a uniform determination. Shallow subsurface hydrologic connections should be carefully studied to assess their impacts on jurisdictional waters, and the perennial nature of many of these connections should be taken into account. Further research must be conducted before the agencies determine which, if any, subsurface hydrologic connections can be considered sufficient grounds for finding such waters "adjacent" to jurisdictional waters. Until more scientific evidence is provided, groundwater connections alone should not be used to find non-navigable waters jurisdictional.

Pesticide Applications

The proposed rule does not address pesticide applications other than applications directly to a jurisdictional water. Similarly, it is clear that the proposed rule does not specifically address fertilizer applications. This is not the proper venue for discussing these applications. Future opportunities will arise to work with EPA on these topics, especially the problem of redundant CWA and Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulations governing pesticide applications.

Army Corps' Engagement

Given the importance of this rule to the regulated community, the Corps' lack of participation in discussion of this proposed rule is frustrating. The Corps is ultimately tasked with jurisdictional determinations under the final rule. The Corps' refusal to provide any insight on how it plans to interpret and implement the proposed rule undermines the regulated community's confidence that our good

faith involvement in the rulemaking process will result in adequate consideration of our help when jurisdictional determinations will actually be made. The Corps must join this discussion immediately.

IV. Conclusion

RMFU understands the agencies' stated goal of enhancing protections for our nation's water resources while providing increased certainty to the regulated community. The testimony above reflect RMFU's understanding of the proposed rule and explain ways the proposed rule could be improved to more effectively accomplish the agencies' stated goal in the final rule while maintaining conformity with RMFU's policy. RMFU stands ready to offer further assistance in this regard as the agencies may find helpful. Thank you for your consideration of this testimony.

Sincerely,

Kent Peppler
President

THE ATTORNEY GENERAL
STATE OF ARKANSAS
LESLIE RUTLEDGE

Good Morning, Chairman Roberts, Ranking Member Stabenow, ladies and gentlemen of the Committee. My name is Leslie Rutledge, and I am the Attorney General of Arkansas. It is an honor to appear before this committee whose membership includes my own senator, Senator John Boozman.

On April 21, 2014, the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps") (collectively, "the agencies") published a proposed rule to amend the definition of "waters of the United States" under the federal Clean Water Act ("CWA"). 79 Fed. Reg. 22188 (April 21, 2014). The proposed rule purports to "clarify" the agencies' regulatory jurisdiction under the CWA based on rulings of the United States Supreme Court in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"), and *Rapanos v. United States*, 547 U.S. 715 (2006). The latest of these, *Rapanos,* was a plurality opinion and the agencies argue that the "significant nexus" test from Justice Kennedy's concurring opinion is the controlling interpretation of the law. Not only is this a questionable legal basis for the proposed rule, the rule, as proposed, does not follow Justice Kennedy's test and fails miserably at offering any clarity to the definition.

As the State's Chief Legal Officer, I must raise my concerns with the legality of this rule and the practical effects that unlawful expansion of federal jurisdiction under the CWA will have on

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our state. Despite the lengthy legal arguments cited in the proposed rule, it fails to meet the "significant nexus" standard articulated by Justice Anthony Kennedy in *Rapanos*. Likewise, the proposed rule is vague and ambiguous and violates the basic tenets of administrative law. And, perhaps most importantly, unlawful rules have consequences. This proposed rule threatens Arkansas's agricultural community, the largest sector of our economy.

The CWA achieves its regulatory goals through jurisdiction over "navigable waters." Navigable waters are defined as "waters of the United States, including the territorial seas." CWA § 502(7); 33 U.S.C. § 1362(7). The term "navigable waters" applies in several sections of the CWA, including the section 402 National Pollutant Discharge Elimination System ("NPDES") permit program for the discharge of pollutants from a point source, the section 404 permitting program for discharge of dredge and fill material, the section 303 water quality standards and total maximum daily load programs, and the section 401 state water quality certification process. The section 311 oil spill and prevention and response program uses the term, "navigable waters of the United States," which has been interpreted the same as "navigable waters."

The EPA and the Corps have interpreted the term "waters of the United States" through regulations found, *inter alia*, at 33 C.F.R. § 328.3 (Corps regulations for dredge and fill permits) and 40 C.F.R. § 122.2 (regulations for all CWA programs administered by the EPA). The proposed rule seeks to amend the regulations, which 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." *Id.*

In their attempt at "clarity," the agencies expand the definition of "waters of the United States" into three (3) parts, with multiple subparts, and add seven (7) new definitions. This certainly does not clarify the rule for the states and the regulated community. The proposed rule defines "waters of the United States" to mean:

> (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 [as traditionally navigable waters and tributaries to those waters][1]; (5) All tributaries of waters identified [as traditionally navigable waters, their tributaries and impoundments of such waters]; (6) All waters, including wetlands, adjacent to a water identified [as traditionally navigable waters, their tributaries, and impoundments of such waters]; 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 [as traditionally navigable waters]."

See Proposed Rule at 79 Fed. Reg. 22262-74 (the rule proposes to put this definition in several sections of the regulation). These proposed amendments would expand the authority of the agencies far beyond anything that Congress could have envisioned when enacting the CWA.

Over one million public comments were filed on the proposed rule, and extensive legal arguments have been made explaining how the rule is unlawful. I will not repeat those arguments at length but will focus on two of the most troubling aspects of the proposed language. One, the proposed definition of "tributary" does not comply with Justice Kennedy's "significant nexus" test in *Rapanos*. Two, the proposed "case-specific" determination of waters that possess a "significant nexus" to a traditionally navigable waterway is vague and ambiguous,

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[1] Parts 1 through 3 of the proposed definition of "waters of the United States" covers those waters that would be considered to fall under the traditional definition of "navigable waters," that is they are "'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723. For purposes of the narrative of this testimony, the term "traditionally navigable water" is substituted for references to Parts 1 through 3 of the definition.

not only violating basic tenets of administrative law but also causing confusion and expense for states and the regulated community.

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 identified as a [traditionally navigable waters, their tributaries, and impoundments of such waters]. 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 as a [traditionally navigable water, their tributaries, and impoundments of such waters]. 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 [under the proposed definition].

See Proposed Rule at 79 Fed. Reg. 22262-74 (the rule proposes to put this definition in several sections of the regulation). While the agencies claim to follow Justice Kennedy's "significant nexus" test, in actuality, they ignore important passages of his opinion.

Justice Kennedy specifically analyzed the breadth of the Corps' standard for tributaries. The Corps deems a water a tributary if it "feeds into a traditional navigable water (or tributary thereof) and possesses an ordinary high-water mark, defined as a 'line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics." *Rapanos*, 547 U.S. 715, 781. Justice Kennedy noted that this standard, if it were consistently applied, might "provide a rough measure of the volume and regularity of flow...and a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act." *Id.* However, he went on to state:

> Yet the breadth of this standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it – precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system compromising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*. *Id.*

Not only does the proposed rule ignore Justice Kennedy's assessment of using evidence of an ordinary high water mark as a standard of delineating a tributary, the agencies expand the definition to include waters without such evidence if they "contribute *flow, either directly or through another* water to a water identified as a [traditionally navigable water, their tributaries, and impoundments of such waters]." See Proposed Rule at 79 Fed. Reg. 22262-74 (the rule proposes to put this definition in several sections of the regulation). Even a trickle is flowing water. Every stream, no matter how small, would meet this standard. Justice Kennedy clearly drew a distinction between waters carrying "only minor water volumes" toward a navigable-in-fact water from waters that were under the jurisdiction of the CWA. The proposed rule fails to address such distinctions and as such, does not comport with Justice Kennedy's concurring opinion.

The proposed definition of "waters of the United States" also provides that, on a case-by-case basis, waters, including wetlands, either alone, or in combination with other similarly situated waters, that have a significant nexus to traditionally navigable waters will be considered under the jurisdiction of the CWA. See Proposed Rule at 79 Fed. Reg. 22262-74 (the rule proposes to put this definition in several sections of the regulation). The proposed rule goes on to define "significant nexus" as:

> [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 [as a traditionally navigable water]), significantly affects the chemical, physical, or biological integrity of a water identified [as a traditionally navigable water]. 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 traditionally navigable water].

See Proposed Rule at 79 Fed. Reg. 22262-74. The rule uses the term "significant nexus," but provides no clarity to the "significant nexus" test. The rule's inherent vagueness violates the basic tenets of administrative law and for that reason alone, the agencies should withdraw the proposal and find a solution that offers certainty to the states and the regulated community.

The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

A statute which is so vague that a "reasonable man" or "man of common intelligence" must guess at its meaning, and may differ as to its application, violates due process. *Connally v. General Construction Co.*, 269 U.S. 385, 391(1926). A statute can also be impermissibly vague if it fails to provide people a reasonable opportunity to understand what conduct it prohibits or authorizes. *Hill v. Colorado*, 530 U.S. 703 (2000). These rules also apply to administrative regulations. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952).

The agencies' definition of "significant nexus" contains so many vague terms that a reasonable person would be left guessing at its meaning. For example, someone reading the proposed rule would not be able to identify "speculative" or "insubstantial" effects, or how far is "sufficiently close." The regulated community should not have to wait until an enforcement action is initiated against it to know that the stream or wetland on their property has a "significant nexus" to a navigable water.

The vagueness and uncertainty surrounding the rule may be further exacerbated by the use of "interpretive rules." For example, simultaneously with the proposed change to the definition of "waters of the United States," the agencies released an "interpretive rule" that sought to "clarify" agricultural exemptions under the CWA by identifying 56 Natural Resources Conservation Service ("NRCS") Conservation Practice Standards ("CPSs") as "normal farming practices." The 56 CPSs listed did not include the entire list of CPSs established by NRCS, nor did they accurately reflect "normal" farming practices across the entire United States.

In my home state of Arkansas, the Delta Region is home to advanced row-crop agricultural practices. Many of these practices are considered cutting-edge technologies and would not be considered "normal" in other parts of the country. Arkansas farming practices such as precision land leveling, zero-grade leveling, grid soil sampling, variable rate fertilizer application, tailwater recovery, and the use of cover crops significantly improve water use efficiencies and optimize nutrient application. Such practices not only provide economic benefits for our farmers, they provide environmental benefits as well. These practices were not included in the list of 56 CPSs; thus, farmers in Arkansas are concerned that what is "normal" here would no longer be exempted from CWA permitting requirements.

After receiving comments from farmers across the country on this interpretive rule, the EPA has withdrawn the rule. However, a recent U.S. Supreme Court ruling held that administrative agencies do not have to submit interpretive rules to public notice and comment. *Perez v. Mortgage Bankers Ass'n.*, No. 13-1041, 2015 WL 998535 (U.S. Mar. 9, 2015). What is to prevent the agencies from issuing interpretive rules that claim to offer further clarity on "speculative" or "insubstantial" effects but do not afford the public a chance to comment or challenge the rule? The vague nature of the proposed rule makes it ripe for a myriad of interpretive rules dictating the ways the states and the regulated community must comply with the Clean Water Act but offering little recourse to challenge the agencies.

Beyond the legal arguments against the proposed rule, its scope will have significant, practical impacts on Arkansas. In 2012, agriculture added $20.1 billion to the Arkansas economy. See *Economic Contribution of Arkansas Agriculture*, University of Arkansas Division of Agriculture, Research and Extension (2014). Arkansas's agricultural industry's contribution accounts for almost eighteen (18) cents of every dollar of Value Added to the economy. *Id.* Agriculture also provides approximately one in every six jobs in Arkansas. *Id.* The State is first in rice production, third in cotton production, fifth in timber production and tenth in soybeans and grain. See *Arkansas Agricultural Profile, A Summary of Arkansas and County Agricultural Data*, Arkansas Farm Bureau (2014). A thriving agricultural community is essential to the State of Arkansas and overreaching administrative rules put that sector of our economy in jeopardy.

Given the overbreadth of the proposed definition of "tributaries," every activity on a farm would likely need a permit from the agencies. This does not just apply to row crops; the definition would apply to activities that the agencies consider "discharges" from animal production facilities. See *Alt v. EPA*, United States District Court for the Northern

District West Virginia, No. 2:12-cv-00042. Obtaining a permit is very costly and may be beyond the means of most farmers and ranchers. However, the alternative is even more costly – civil penalties for violation of the CWA can reach up to $37,500 per violation per day, with even higher criminal penalties.

Farmers and ranchers want to follow the law, and they are concerned about protecting the land and water. But more restrictive and confusing administrative rules will not achieve that goal. It will only drive the younger generation away from agriculture and, ultimately, impact the food supply of all Americans.

As I have stated many times, I am proud to come from the Natural State. Clean water is not only important to our state economy but to our state identity. As I saw for myself growing up on a cattle farm near Batesville, Arkansas, it is in our best interest to protect this precious resource. The rivers and streams near my home have been protected for years by the cooperative relationship of state and federal law. The proposed rule turns this relationship on its head and ignores the role that states play in protecting clean water. My office has urged the agencies to withdraw the rule and will pursue all legal challenges necessary to prevent an unlawful rule from impacting the State of Arkansas.

Thank you again, Mr. Chairman and Ranking Member, for the opportunity to appear before you today. This concludes my testimony, and I am happy to answer any questions you or the other members of the Committee may have.

Testimony before the U.S. Senate Committee on Agriculture, Nutrition and Forestry "Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule"

March 24, 2015

Donald R. van der Vaart, Ph.D, P.E., J.D.
North Carolina Department of Environment
and Natural Resources

Statement of
Donald R. van der Vaart, Ph.D., P.E., J.D.
North Carolina Department of Environment and Natural Resources
March 24, 2015

Chairman Roberts, Ranking Member Stabenow and members of the Committee, thank you for inviting me to testify this morning. As secretary of the North Carolina Department of Environment and Natural Resources (DENR), I am grateful for the opportunity to testify today and share my views on the topic of the definition of "waters of the United States" contained in the Administration's proposed rules, particularly as it affects the agricultural industry in North Carolina. Governor Pat McCrory and Agriculture Commissioner Steve Troxler appreciate the opportunity to highlight this important issue and its impact on our state.

The agricultural industry contributes approximately $78 billion to our state economy annually and employs 16% of the work force. North Carolina's 52,400 farmers grow more than 80 different commodities and utilize more than a quarter of state land to furnish consumers a dependable and affordable supply of food and fiber. We are greatly concerned that the proposed rule will cause this important industry – and other significant segments of our state's economy and infrastructure – to fall victim to ever-expanding federal overreach that will unnecessarily stifle economic growth and prosperity with little, if any, environmental benefit.

My remarks today are consistent with the positions taken in the timely comments submitted in November, 2014, by DENR and the North Carolina Department of Agriculture and Consumer Services on the joint Environmental Protection Agency (EPA)/ U.S. Army Corps of Engineers (the Corps) proposal for the definition of "waters of the United States."

The definition of "waters of the United States" is of vital interest to DENR, as the department works in partnership with the EPA and the Corps on projects, permitting programs and standards designed to protect the quality of aquatic resources, aquatic habitat and the environment in the State of North Carolina. North Carolina law authorizes DENR to implement a program, much like that provided in the Clean Water Act (CWA) and other federal legislation concerning water quality, to protect and enhance the quality of "waters of the State."

"Waters of the State" differs in many important and fundamental respects from "waters of the United States," because the program of regulation for waters of the state stems from authority contained in the N.C. Constitution and implementing state legislation. The authority for the CWA regulatory program derives from the Commerce Clause of the United States Constitution and has a more limited scope. In fact, the term used in the CWA is "navigable waters," which is defined in the CWA as "waters of the United States." As the U.S. Supreme Court has recognized in a series of recent cases concerning CWA jurisdiction, the term "navigable waters" has meaning, otherwise Congress would not have used it. Most recently, Justice Kennedy noted in his concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), the most recent U.S. Supreme Court case on the breadth of CWA jurisdiction, that "the word 'navigable' [in the Clean Water Act] must be given some effect," in determining the meaning of "waters of the United States." Expansion of federal CWA jurisdiction by redefining the regulatory definitions of the

"waters of the United States" and "navigable waters" has significant implications for the joint federal-state framework under the CWA as well as for our federal system of government.

Indeed, states were not included in a meaningful way in crafting the new definitions. The EPA and the Corps seemed determined to forge ahead, scheduling meetings with state agencies, and issuing statements reiterating their claim that the rule represented merely a clarification, only after the publication of the proposed rule. The numerous effective state law programs which already address water quality issues associated with protection of riparian areas, and control of nonpoint sources of pollution, were evidently ignored.

As it stands, notwithstanding the EPA's claims to the contrary, the recently proposed definition of the phrase "waters of the United States," and the definitions of terms related to the determination of "waters of the United States," would profoundly expand federal jurisdiction over activities in the State of North Carolina and would result in greater uncertainty, higher costs, and risk for our state's farmers and foresters. The EPA has characterized the new definition as a "clarification," but the only thing made clear is the EPA's objective to expand federal jurisdiction in ways that strain the meaning of the language in the Supreme Court decisions as a means to bring a potentially enormous amount of land within federal jurisdiction. The proposed rule also expands CWA jurisdiction by potentially pulling within that jurisdiction ephemeral drainages, ditches, ponds, and isolated wetlands, any of which may be located within farms in North Carolina, as well as in urban and rural across the state, with the potential to seriously add to the regulatory burden on both the private and public sectors, including, for example, the construction industry and highway construction. None of these features have previously been subject to federal regulation, except in specific fact-driven instances.

In preparing my testimony, DENR staff reviewed the comments submitted by stakeholders on the proposed definitions. Among those stakeholders was the N.C. Farm Bureau (the Farm Bureau). The comments of the Farm Bureau focused on the effect of the proposed definitions on farms in North Carolina. We independently assessed those comments to form our own opinion concerning such effects.

An example of how the EPA proposal will subject agricultural operations to more pervasive federal intrusion is the newly proposed definition of "adjacent," and the revision of the existing jurisdictional category of "adjacent wetlands" to become "adjacent waters." A new "adjacent waters" category would replace the "adjacent wetlands" category and include not only wetlands, but other "waterbodies" deemed to be "adjacent" or "neighboring." "Adjacent" is defined in the existing rules to mean "bordering, contiguous, or neighboring." However, the proposed rule addresses waters in addition to wetlands, and includes "waters" separated from other waters by man-made dikes, natural river berms and dunes. The proposed definition of the term "neighboring" expands adjacency to waters located in the "riparian area" or "floodplain" of an otherwise jurisdictional water, and waters with a surface or shallow subsurface hydrologic connection to such jurisdictional water. A "floodplain" is proposed to be defined as the area bordering inland or coastal waters formed by sediment deposition from those waters and inundated during periods of "moderate to high" water flows. A "riparian area" is proposed to mean an area "bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." In fact, under

existing state law programs in North Carolina, many activities in riparian areas and floodplains are already regulated, and those programs provide significant controls on nonpoint sources of pollution. Federal intrusion into these areas in unnecessary and counterproductive.

What the proposed definitions do not provide is guidance regarding whether the floodplain reflects areas inundated in an isolated flood, a 10-year flood, or a 100- year flood. Similarly, there is no suggestion as to a limit on the distance extending from a jurisdictional water for determining a riparian area. The result is that a "water" could potentially be determined to be "adjacent" to a jurisdictional water, and, thus, also subject to CWA jurisdiction if it was inundated during any one of the hurricanes that struck North Carolina in the recent past or stemming from any other such isolated and similar occurrence. The area riparian to an otherwise jurisdictional water can extend for 30 feet to several hundred feet or more, depending on a regulator's judgment. In areas of sandy soil composing much of the coastal plain of North Carolina, an apparently isolated wetland or pond might be found to have a shallow subsurface hydrologic connection to a jurisdictional water. The interpretation of how shallow such a connection has to be to fit the EPA's definition is left to the subjective judgment of the individual regulator. The proposed rule does not command such outcomes, but it allows them.

Eastern North Carolina has experienced extreme flooding with a series of hurricanes since the 1990s, many of which were extensively reported in the national media. Are those "high water flows" indicative of a floodplain? Sandy soils and high water tables are characteristic in eastern North Carolina, potentially providing "subsurface hydrologic connection" to a tributary to a navigable stream. How shallow does the water table have to be to be eligible? What season of the year would be considered, as water tables are seasonal in nature? The proposed rule also leaves the answers to these questions to the subjective judgment of the individual regulator.

Under the proposed definitions, farmers in North Carolina, and particularly in eastern North Carolina, might now find significant portions of their farms to be within "waters of the United States." Agricultural operations are particularly at risk with the degree of definitional latitude and uncertainty for several reasons. Farms typically do not have a wide topographic range. Areas of farms may not drain particularly well, and yet fall short of being properly characterized as a wetland. Under these definitions, those low, flat areas might potentially become jurisdictional waters due to "adjacency," depending on the judgment of the individual regulator.

In addition to the issues and uncertainty created by the ramifications of the definitions for "adjacency," and related terms, the proposed rule also expands the meaning of the term "tributary," and creates yet another area of uncertainty about what is and what is not federally jurisdictional. A "tributary" is proposed to be defined as a water characterized by the presence of a bed and banks, and an ordinary high water mark, which contributes flow, directly or through another water, to an otherwise jurisdictional water. This ignores the reality that the bed and banks can be "very low or may even disappear at times." Wetlands, lakes and ponds are also pulled into the definition of tributary, even if they lack a bed or banks or ordinary high water mark, provided they contribute flow, directly or remotely.

Perhaps the most problematic proposed modification for agriculture is the inclusion of ephemeral drainages and ditches within the proposed definitional scope of "tributary." An ephemeral

drainage conveys water only during and shortly after precipitation events. In past iterations of the rule, ephemeral drainages have not been characterized as "waters of the United States." Under the new definition, a regulator need only locate a bed and "very low" banks and a contribution of flow to another tributary regardless of how minimal that flow might be. Ditches that are not entirely constructed in uplands and exclusively draining uplands and that convey some amount of water to another tributary may now fall within the definition of "waters of the United States." In practical terms, for agricultural operations, virtually all ditches would be considered jurisdictional under this definition. This factor alone constitutes an enormous expansion of federal jurisdiction into water conveyances on farms. Ditches are commonly constructed in formerly ephemeral drainageways, owing to the nature and purpose of a ditch. Ephemeral drainages and the ditches associated with those drainages may now be subject to federal jurisdiction.

The consequence for farmers is that the proposed definitions not only significantly expand CWA jurisdiction, but also significantly expand uncertainty. Many more landscape features on a farm have the potential to become jurisdictional under the proposed rule. The presence of features on a farm that might result in a determination of jurisdiction reduces land values. Expanding federal jurisdiction and leaving federal regulators broad discretion exposes landowners to risk by reducing the amount of productive land, or increasing the cost of using of that land. A reduction in productive acreage will drive down farm values and make lenders less confident in their security, which will make them less likely to lend vital resources to our farmers.

The significance of the "nexus" between the features that confer jurisdiction under the proposed rule is debatable. The EPA and the Corps have essentially read the modifier "significant" out of the "significant nexus" test that Justice Kennedy set forth in his concurring opinion in *Rapanos*. His "significant nexus" test, with respect to the extent of the effect of a potential water of the United States on a downstream navigable-in-fact water, has become effectively the default test for determining CWA jurisdiction. In its November 2014 comments to the EPA and the Corps, DENR detailed how the rule's reliance on mere connectivity, surface or subsurface to establish a nexus between the subject feature and a navigable-in-fact water ignores the meaning of the modifying term "significant." As Justice Kennedy observed in *Rapanos*, "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." It is apparent that the EPA and the Corps did not find that aspect of Justice Kennedy's analysis particularly compelling.

From DENR's perspective, the effect of these proposed definitions will be akin to an unfunded mandate. Many more waters will be brought within CWA jurisdiction, and more permits under the CWA and under the North Carolina statutes will be required. The resulting increase in permit applications on the state level will further tax limited resources in the department, as will the increase in permit applications for federal permits, for which DENR is obligated, under Section 401 of the CWA, to issue certifications that water quality standards will not be compromised due to the issuance of the federal permit. Additionally, there are many other non-federal regulatory programs under North Carolina law for the protection of our surface and groundwater resources that will also be affected and consume significant amounts of additional staff time. These include riparian buffer programs, nonpoint source controls and post-construction stormwater programs.

The inclusion of many more features within the scope of waters of the United States will necessarily pull those features within the meaning of waters of the state, and trigger the applicability of these exclusively state law-based programs. DENR staff is already fully engaged. This additional burden will add significant costs and result in longer permit processing times. The expected increase in enforcement actions, third party challenges and citizen lawsuits will further exacerbate this burden.

Finally, there are legal concerns to consider. If the EPA, based on a claim of statutory ambiguity, moves forward with this new interpretation claiming that dry lands are navigable waters, it will constitute yet another example of the EPA abusing the public trust it was granted by the judiciary through Chevron. This raises the question of whether the EPA should be afforded any deference in interpreting statutory provisions.

The regulated community in North Carolina, and the agricultural sector in particular, would be significantly and adversely affected by the proposed rules redefining "waters of the United States." The proposed definitions go well beyond the authority initially intended and granted in the CWA, as described and limited in subsequent U.S. Supreme Court opinions.

Thank you for the opportunity to provide this testimony. I would be happy to answer any questions you may have.

DOCUMENTS SUBMITTED FOR THE RECORD

MARCH 24, 2015

STATE OF WASHINGTON

November 13, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington DC 20460

Attention: Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy:

Washington State agencies submit the following comments on the proposed rule from the United States Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), *Definition of Waters of the United States under the Clean Water Act*, EPA Docket ID No. EPA-HQ-OW-2011-0880. This letter represents the consensus comments of the state departments of Ecology, Transportation, Fish and Wildlife, and Agriculture on the proposed rule. We appreciate the Corps' and EPA's attempt to clarify the definition of "waters of the US."

Final implementation of the rule will affect each of these state agencies. The Washington State Department Ecology (Ecology) is the water quality authority for Washington State. Ecology implements the state's water pollution control act (RCW 90.48) and is delegated by EPA as the state water pollution control agency responsible for implementing all federal water pollution control laws and regulations. Ecology issues Section 401 water quality certifications on federal Section 404 permits. Ecology has enjoyed a cooperative working relationship with our federal partners and looks forward to supporting the implementation of the rule.

Jurisdiction is clarified

Washington appreciates the clarity the rule provides regarding the scope of federal jurisdiction over waters of the United States in the context of U.S. Supreme Court decisions including *Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers*[1], and *Rapanos v. United States*[2]. These two decisions addressed the extent of federal jurisdiction but did not provide a clear and comprehensive definition of jurisdiction. The plurality decision in *Rapanos*

[1] 531 U.S. 159 (2001)
[2] 547 U.S. 715 (2006)

in particular has resulted in uncertainty regarding the correct scope of federal jurisdiction, especially for wetlands.

The proposed rule provides more clarity on which waters are per se jurisdictional. It also provides some guidance on assessing a "significant nexus" when determining the jurisdictional status of other waters. The rule provides clarity for some waters such as tributaries, but it contains language that is in need of further clarification. "Floodplain," "riparian" and "contributing flow" are all terms whose definitions should be articulated more clearly on a regional basis, since their defining characteristics may vary in different parts of the country.

Additionally, the proposed rule applies to Section 404 permitting as well as other permitting programs such as Section 402. The rule should explain how these two programs compare and overlap. For example, the relationship between the rule and management of municipal separate storm sewer systems needs to be explicit.

Rule is Consistent with Existing Practices

Washington supports the inclusion of the types of "waters of the US" outlined in the proposed rule. These waters are consistent with the jurisdictional determinations that we have seen in Washington. In Washington State, both the Corps and Ecology consider the following waters jurisdictional:

- Perennial, intermittent and ephemeral streams (tributaries)
- Channelized streams in ditches (tributaries)
- Wetlands linked to a navigable water through shallow subsurface flows such as hyporheic flows (in the floodplain)
- Ditches excavated through wetlands or other "waters of the US" (tributary)

No Change for State Waters

Washington interprets the draft rule to not affect the way the state regulates its waters. Washington's definition of "waters of the state" in the state water pollution control act (RCW 90.48) protects additional waters not covered under the federal Clean Water Act such as prior converted croplands and isolated wetlands. Washington will continue to regulate all waters of the state regardless of federal jurisdiction. However, Washington appreciates that the rule more clearly identifies what types of waters would be considered jurisdictional under the federal Clean Water Act. This is important when proponents may need Section 404 permits from the Corps and related Section 401 certifications from the state.

These clarifications regarding "waters of the US" should help streamline permitting since those waters identified in the rule would not require individual jurisdictional determinations. While Washington protects its waters under state law, this uncertainty in federal jurisdiction has resulted in permitting delays when a jurisdictional determination is required. Although this

proposed rule may help streamline determination for some waters, such as tributaries, it may take longer to receive a jurisdictional call when using the significant nexus test since these will require case-by-case determinations.

Significant Nexus

Washington requests that the rule, preamble or guidance should be amended to provide more specificity on what is needed to document a significant nexus. Washington supports the use of remote sensing to identify similarly situated classes of waters when making significant nexus determinations as well as the use of single point of entry watersheds and ecoregions to identify "in the region" where waters are "similarly-situated." Using the watershed and ecoregion in significant nexus determinations will allow states and the Corps and EPA to accommodate the variety of landforms and systems across the country.

Given the broad nature of the rule and the diversity of waters across the United States, Washington recommends that the Corps and EPA work regionally with the states in identifying classes of "other waters" that have a significant effect on downstream waters. Identifying classes that have a significant nexus with downstream waters would reduce the number of individual determinations needed. As part of this work, Washington recommends that the Corps and EPA work with the state to identify appropriate regions in our state that may contain classes of similarly situated waters that provide a significant nexus to a "water of the US."

Permit streamlining could result from identifying classes of "other waters" as jurisdictional by reducing the number of individual significant nexus determinations necessary and; reducing the time needed to process permits. When an individual determination is necessary, we recommend that the Corps strive to meet a 180-day timeframe for a decision. A timeframe for individual determinations will provide a clear standard for regulatory staff and will help reassure applicants and the public that projects will be processed in a timely manner.

Support of Tributary Definition

Washington supports the inclusion of the presence of a bed and bank and evidence of flow in the definition of tributary. Regional manuals on determining the Ordinary High Water Mark on tributaries will be important to ensure clarity. We recommend that the Corps and EPA work with states to develop regionally appropriate methods and tools for delineating tributaries. In response to EPA's request, we feel it is appropriate to include wetlands as tributaries rather than just as adjacent waters when they are part of a tributary system.

The change from "adjacent wetlands" to "adjacent waters" to include other water features (such as oxbow lakes) is appropriate when they are adjacent to jurisdictional waters, bordering, contiguous or located in the riparian area or floodplain of a "water of the US."

Clarification on Floodplains, Riparian Areas, and Contributing Flow

Washington supports the inclusion of waters located in the floodplain of jurisdictional waters or in riparian areas along waters and tributaries as "neighboring" waters because of their importance in protecting the physical, chemical and biological integrity of the nation's waters.

Regulatory protection of these critical waters is important in our state. Washington has several federally listed salmonid species. Loss of in-water, floodplain and riparian habitats has been a key contributor to their decline. Washington floodplains support many wetlands that are used by salmonids for refuge and rearing. These wetlands are often connected to rivers via shallow subsurface hyporheic flows and overbank flooding. Wetlands in riparian areas provide critical functions such as nutrient cycling, flow attenuation, and habitat for invertebrates, amphibians, and fish. Wetlands in these areas directly affect the physical, chemical, and biological integrity of "waters of the US." Therefore, Washington agrees that wetlands located in floodplains and riparian areas are appropriately included as "waters of the US."

Washington also concluded that regional specificity is needed to refine these definitions. For example, we believe that a spatial extent is needed on a regional basis for determining which riparian and floodplain wetlands are de facto jurisdictional. These definitions and delineation guidance should be developed cooperatively with the state. It should also be noted that the ecological value of these resources in riparian and floodplains notwithstanding, federal jurisdiction in these waters may result in additional cost to applicants, federal and state permitting agencies, and for actions requiring federal Endangered Species Act consultation when federal permitting is needed. The Corps and EPA should consider potential added costs as the rule is finalized.

"Contributing flow" should be defined based on stream size and significance of the contribution. While the feasibility of doing this on a national basis may not be practical given the diversity of climatic conditions, ecoregions, and landforms among the states; regional guidance could be developed to determine what constitutes a significant contribution for different stream types.

Therefore, Washington recommends that Corps and EPA work with the State and tribes to develop regionally appropriate definitions of "floodplains," "riparian areas," and "contributing flow." In addition, methods for determining their physical extent are needed so that the state and federal agencies have a common understanding of how these terms apply in Washington.

Drainage and irrigation ditches in agricultural areas

Washington supports the existing Section 404 permitting exemptions for normal and ongoing farming, silviculture, and ranching activities as described in 33 CFR § 323.4(a)(1):

> *(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and*

forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in §323.4(a)(1)(iii).

In cases where farm ditches contain channelized streams, they should, under the proposed rule, be considered jurisdictional even if they only contain intermittent flow. However, under the existing exemption for ongoing agriculture, maintaining them in the course of normal farming, silviculture, and ranching continues to be exempt from Section 404. Under Washington State law, established and ongoing agricultural operations and activities such as ditch maintenance may continue without the need for a wetland authorization. As long as producers are using best management practices approved by Ecology, their ongoing farming activities are considered to be protective of water quality. However, new ditches and new or expanded drain tile systems draining a "water of the US" to convert it to a new use would require a Section 404 permit.

In Western Washington, farmers often construct shallow ditches (≤ 18") on actively farmed fields in the spring. The purpose is to drain surface water from their fields to allow planting. Washington is looking for clarification and affirmation by EPA that shallow, temporary ditches dug specifically for the purpose of draining surface waters from previously converted farmland within floodplains and adjacent to tributaries are not jurisdictional under the new definition.

Clarification Needed for Non-Agricultural Ditches

State agencies and local governments have expressed concern that the wording in the "water of the US" definition for excluding ditches from Section 328.3 (§ 328.3(b)(3) and (4)) is somewhat ambiguous. The exclusion should clearly identify that sections of roadside ditches and other drainage ditches excavated in uplands that drain only upland areas, are not jurisdictional upstream of the discharge point even if the ditch periodically "contributes flow" to a "water of the US." Clarifying these distinctions would eliminate much of the confusion.

Roadside or other drainage ditches containing a perennial and intermittent channelized stream would be jurisdictional if it meets the definition of a tributary, as proposed in the rule. The rule should be amended to specifically clarify that ditches that contain tributaries are jurisdictional, and are not excluded simply because they flow through a ditch.

Stormwater systems

It is not clear how Section 402 permitted facilities will be treated under the proposed rule. The proposed language could be interpreted to mean that any ditch system that discharges to a "water of the US" would be jurisdictional. Many roadside ditches and municipal separate storm sewer systems (MS4s) discharge to jurisdictional wetlands and streams. These systems are permitted and regulated under Section 402 and require periodic maintenance. Where they do not contain

streams, they should be able to be maintained without the need for permitting. Washington recommends that ditches in uplands and draining only uplands as part of an MS4 management system should be non-jurisdictional upstream of the discharge point to a wetland or tributary.

The proposed rule should also clarify that those constructed parts of stormwater management systems that often look and act like natural systems (for example, treatment swales and ponds, infiltration ponds, treatment wetlands, rain gardens, and compost filters) are exempt similar to the wastewater treatment exemption. Some of these treatment systems, permitted pursuant to Section 402, meet wetland criteria, especially if they were thoughtfully designed and implemented. However, when they are specifically constructed for stormwater conveyance and treatment those features should be excluded from the definition of "waters of the US". This clarification could be in the preamble or regulatory guidance letters for implementing the rule.

Regional Manuals

As previously noted, Washington strongly recommends that EPA, and the Corps work with their state partners to develop regional manuals, definitions, and guidance to implement the rule. We recognize the difficulty in providing clear definitions and standards nationwide due to the diversity of climate, landforms and ecosystems across the country. Because of this diversity, the rule is understandably vague which makes it imperative that the agencies develop regional definitions and guidance. With the states as co-regulators, the agencies should work directly with the states as they develop implementation guidance in their region.

Connectivity report

We recommend that the agencies wait to finalize and adopt the "waters of the US" rule until after the science advisory board review is completed and the report is finalized. Washington believes that the timing of the final report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it interacts with the proposed "waters of the US" rule process is important. Since the connectivity study will be used to provide the scientific basis for the determination of jurisdiction under the rule, it seems appropriate that the agencies wait to finalize the rule until after the Scientific Advisory Board has completed their review and the report is finalized. To adopt the rule prior to the final report being released would miss an opportunity to refine the rule based on the scientific findings of the final connectivity report.

Summary

Washington appreciates the opportunity to comment on the proposed rule, and hopes that our comments are helpful. Washington recognizes the challenges inherent in defining the extent of jurisdiction under the Clean Water Act. We commend EPA and the Corps for the thought and hard work that went into the development of the proposed rule. We appreciate EPA's outreach to the states and the number of calls with states that have been available where EPA has explained some of the rationale behind the rule language. The calls have been very helpful. In

closing, Washington would like to emphasize a repeated theme: the importance of EPA and the Corps working with states on a regional basis to develop guidance on the implementation of the rule.

Sincerely,

Maia D. Bellon, Director
Washington State Department of Ecology

Philip Anderson, Director
Washington State Department of Fish & Wildlife

Lynn A. Peterson, Secretary
Washington State Department of Transportation

Don R. "Bud" Hover, Director
Washington State Department of Agriculture

Dear Senator Bennet,

As elected officials across Colorado, we write you to urge you to declare your support for the Clean Water Rule proposed by U.S. EPA and the Army Corps of Engineers to restore Clean Water Act protection to thousands of waterways here in Colorado and across the country.

As elected officials, we know how critically important clean water is to the health and economic livelihood of people across our state. Our constituents need clean water for drinking, fishing, swimming, agriculture, recreation, and the wellbeing of their communities. Waterways like the Colorado River are part of what make Colorado beautiful, thriving, and prosperous. But our waters' health is in crisis. Beginning in 1972, the Clean Water Act protected all of the nation's waters, from small, unnamed streams to the cherished Boulder Creek. But now, because of two bitterly divided Supreme Court decisions (SWANCC in 2001 and Rapanos in 2006), many of our waterways are threatened with unregulated pollution, including the streams that feed our lakes and rivers, and wetlands that help keep them clean.

Here in Colorado the threat is enormous. Until this loophole is closed, 68 percent of our state's streams lack clear protection of our nation's bedrock environmental law. According to EPA data, these waters help provide drinking water to more than 3 million Coloradoans. To protect our cherished waters like the Arkansas River we urge you to take a public stand in support of the proposed rule to restore critical protections to these waters under the Clean Water Act. Only by restoring Clean Water Act protections can we put all of Colorado's waters back on track to becoming safe for swimming, fishing, and drinking.

We appreciate your commitment to protecting Colorado's waterways, and we hope you will move quickly to ensure they are protected for years to come.

Sincerely,

Matt Appelbaum Mayor of Boulder Boulder, Colorado	Macon Cowles Boulder City Councilor Boulder, Colorado	Mary Young Boulder City Councilor Boulder, Colorado
Christine Berg Mayor of Lafayette Lafayette Colorado	Tom Dowling Lafayette City Councilor Lafayette, Colorado	Tim Mauck Clear County Commissioner D1 Clear County, Colorado
Christina Rinderle Durango City Council Durango, Colorado	Adam Frisch Aspen City Councilor Aspen, Colorado	Jaime Stueyer Mayor of Leadville Leadville, Colorado

Jill Ryan
Eagle County Commissioner D1
Eagle County, Colorado

Karn Stiegelmeier
Summit County Commissioner D3
Summit County, Colorado

Rachel Richards
Pitkin County Commissioner D2
Pitkin County, Colorado

Joan May
San Miguel County Commissioner D2
Telluride, Colorado

Elise Jones
Boulder County Commissioner D1
Boulder, CO

Deb Gardner
Boulder County Commissioner D2
Longmont, CO

Cindy Domenico
Boulder County Commissioner D3
Lafayette, CO

Sweetie Marbury
Mayor of Durango
Durango, CO

Dick White
Durango City Councilor
Durango, CO

Robin Knicch
Denver City Councilor at Large
Denver, CO

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

HEARING BEFORE THE

U.S. SENATE COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY

ON

WATERS OF THE UNITED STATES: STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF EPA'S PROPOSED RULE

TESTIMONY OF

HONORABLE DONALD ROSIER, CHAIR, JEFFERSON COUNTY COMMISSIONER
HONORABLE ROGER PARTRIDGE, VICE-CHAIR, DOUGLAS COUNTY COMMISSIONER

COLORADO CLEAN WATER COALITION

MARCH 24, 2015

Chairman Roberts and Ranking Member Stabenow my name is Donald Rosier and I am a Commissioner with Jefferson County, Colorado, but also serve as Chairman of the Colorado Clean Water Coalition. On behalf of the Coalition partners, our constituents and businesses, I want to submit the following comments for the record.

The Colorado Clean Water Coalition (COALITION) is a bipartisan coalition which represents over four million Colorado residents comprised of Municipal, County, Business and Special District stakeholders who strongly support the goals of the Clean Water Act (CWA) and have demonstrated a strong and unwavering commitment to water quality and environmental stewardship in Colorado. The members of the COALITION have invested tremendous amounts of resources into stormwater quality programs, many of which we believe are successful models of multi-jurisdictional collaboration that result in the development of appropriate and cost-effective approaches to help solve regionally-specific stormwater concerns. The COALITION has taken an active role with stormwater programs and proposals presented by regulatory agencies. This testimony for the U.S. Senate Committee on Agriculture, Nutrition, and Forestry is our comments with respect to the most recent proposed ruling of Definitions of "Waters of the United States" Under the CWA (USEPA-HQ-OW-2011-0880), referred herein as the Proposed Rule. The Proposed Rule, as written, will interfere with current CWA regulatory innovations being practiced in our state. We have been active in the ruling process and submitted comments to the United States Environmental Protection Agency (USEPA) and the United States Army Corps of Engineers (USACE) on November 4, 2014.

The COALITION is concerned with the Proposed Rule as written by the agency and the potential impacts the rule will have on other CWA programs that affect stormwater, such as the National Pollutant Discharge Elimination System (NPDES), Spill Prevention Control and Countermeasures (SPCC) and Total Maximum Daily Loads (TMDL). Due to the complexity of the Proposed Rule, the unexplored impacts on CWA programs, and the incomplete scientific study and economic analysis, the COALITION is asking for the USEPA to rescind the Proposed Rule. If that is not possible, the COALITION is asking that our comments be considered in redrafting the Proposed Rule through a formal negotiated rulemaking process with stakeholders like our COALITION.

We have many questions and considerations for the proposed rule and we ask the U.S. Senate Committee on Agriculture, Nutrition, and Forestry to assist the coalition with communicating the local impacts related to the proposed rule.

The testimony presented herein is focused on areas that are most relevant to local government impacts of the Proposed Rule in Colorado and should not be construed to be a comprehensive assessment of the Proposed Rule.

Colorado is a headwaters state, and members in our state are dedicated to protecting the state's water resources through the implementation of thoroughly vetted, flexible, cost effective, and

regionally appropriate stormwater regulations and programs. However, while waters of the U.S. could be better defined, the recently Proposed Rule definition creates uncertainty, and it potentially changes other CWA programs that demonstrate current innovative solutions to protect our waters within Colorado's semi-arid geographic areas. As like our member, Douglas County, local governments have expended many fiscal resources to comment on the Proposed Rule.

The process USEPA developed removed local innovation by not conducting a formal negotiated stakeholder process after the Science Advisory Board (SAB) peer review of the scientific analysis used to develop the Proposed Rule outlined in the Douglas County comments. To our understanding, the peer review of the scientific basis was not finalized before the Proposed Rule was released for public comment and prevented stakeholders from reviewing a Proposed Rule based on the revised scientific basis. The formal negotiated stakeholder process would have been very beneficial in developing an innovative draft rule and saved local budgets in preparing such detailed onerous comment submittals. A solution for this is for USEPA to conduct the formal Negotiated Rulemaking Process, which encourages local innovation currently being implemented in our drainage basins to protect water supply.

Under the rulemaking process used by USEPA under the Administrative Procedures Act, agencies wrote the rule, published the rule, accepted comments from the public, and then will adopt the rule as they see fit. Rules produced in this way often lack the support of concerned parties, which can hamper their effectiveness. The negotiated rulemaking process is a realistic alternative to this adversarial administrative process. The negotiated rulemaking process allows affected interests to have greater control over the content of agency rules while ensuring fairness and balanced participation to all involved. The negotiated process also permits agencies to obtain a more accurate understanding of the impacts to interested parties, costs and benefits of rule, and alternatives than if the agencies are left to digest voluminous records of testimonial and documentary evidence presented in adversarial hearings.

The economic study relative to programs that protect our waters like the Municipal Separate Storm Sewer System Permit (MS4's) and the fact that these current regulations exercising innovations today that protect waters were not accounted for in the Proposed Rule. Executive Order 13563 (EO 13563) includes several key instructions to Federal Agencies, including requirements that they should propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs and should tailor regulation to impose the least burden on society. In doing so, EO 13563 requires that the Agencies use the best available techniques to quantify costs and benefits as accurately as possible. We appreciate the willingness of the USEPA offices to participate in teleconference calls to discuss the Proposed Rule, we must stress that information sharing does not equate to meaningful consultation. The Agencies should pursue an authentic partnership with the states representatives and local communities.

Clean water is accounted for many residential and commercial projects with existing innovative CWA programs. An example business impact from the Proposed Rule permitting requirements for counties with strong economic growth such as Douglas County can be highlighted in the following two examples.

From the Douglas County evaluation, the Proposed Rule will likely expand jurisdictional waters of the U.S. and create an onerous amount of permitting work for local businesses, USEPA, and USACE. This influx of permitting will likely increase the permitting time and cause planning and construction delays. These permitting delays may impact business decisions, if the Proposed Rule is implemented without consideration of regional development. The increase in time will delay the ability for the infrastructure to be installed or designed to account for the Proposed Rule and the increased jurisdiction. Assuming the Proposed Rule is promulgated in April 2015, and a single family housing development with 100 units is planned to start construction in the same year under Current Guidance, what would the economic impact be to that development? Based on the Douglas County Waters Evaluation, potential expansions of jurisdiction will result in additional 404 permitting. The delay resulting from the requirement to obtain a federal permit could result in missing a construction season, resulting in a possible loss of business revenue. In an example of 100 single family housing units finally designed after the Proposed Rule is promulgated, implementation of the Rule could result in a 404 permitting issuance delay transferring the delay to delay of construction of approximately one year. Assuming current growth in Douglas County remains at an increase of $23,298 per unit for 2015 but is reduced in 2016 by possible economic change could result in a loss for this 100 unit development of approximately $2.4 million. This example can also be demonstrated using inflationary cost of construction materials in any infrastructure project requiring typical construction of bridge replacements, waterlines, reservoir water supply, water treatment, and other transportation infrastructure needs.

The second example relates to existing public roadway and development owned infrastructure maintenance. It is the responsibility of MS4 permittees to ensure long term operational and maintenance of permittee owned and private owned water quality/detention facilities to the maximum extent practical. MS4s at times develop manmade wetlands for water quality features and at other time, may need to remove such wetlands, along with sediment for purposes of protecting the infrastructures functional purpose, such as storage volume and controlled release for water quality and downstream stormwater conveyance in roadside ditches that outfall into tributary waters. Maintenance of water quality/detention facilities and ditches both inside the boundaries of the MS4 and within public right-of-way will require a 404 permit never before required for this type of maintenance. The additional constraint from the Proposed Rule is the time it will take a MS4 to obtain a 404 permit. The increase in time will delay the ability to conduct the required maintenance activities for the infrastructure to function as intended such as protecting public life, property, and the environment. While waiting for a 404 permit or jurisdictional determinations, the owners will be delayed in construction, resulting in penalties and fines associated with such delays. These 404 permits or jurisdictional determinations

impede local governments and private land owners from completing their currently permitted operational and maintenance responsibilities resulting in tens of thousands of dollars in USEPA and Colorado Department of Health and Environment daily accumulated fines. Nonetheless, these violations have civil and criminal imprisonment terms. If the owners maintained these facilities without a 404 permit, similar violations and penalties could be imposed on the owners of the facilities. This is a 100% increase in fiscal costs and unforeseen increase to public life, property, and the environment if permitting obstructs required maintenance.

Finally, we thank you for the opportunity to submit these comments for the record and should you or any member of the Subcommittee have any comments I would be happy to meet in person or talk via phone with you or them to discuss these issues and other economic impacts in greater detail. Colorado is proud of its environmental record and existing programs it has in place and believes the Senate should look at Colorado as a model of what can be done to protect the environment if our hands aren't tied by burdensome regulations forced upon us as a one size fits all approach. I can be reached at 303-660-7365 or your staff may contact our Administrator Tom Repp via email trepp@douglas.co.us.

Sincerely,

Donald Rosier, CCWC Chair
Jefferson County Commissioner

Roger A. Partridge, CCWC Vice-Chair
Douglas County Commissioner

The attached testimony reflects the COALITIONS position on the submitted comments of Water Docket ID No. EPA-HQ-OW-2011-0880. Our members supporting the comments as one Colorado Clean Water Coalition voice for those comments are as follows:

Business and Industry
Castle Rock Economic Development Council
Colorado Apartment Association
Colorado Association of Commerce & Industry
Colorado Contractors Association
Associated General Contractors of Colorado
Douglas County Business Alliance

Counties
Adams County
Arapahoe County
Cheyenne County
Douglas County
Elbert County
El Paso County
Jefferson County
Mesa County
Weld County

Municipalities
City of Arvada
City of Aurora
City of Commerce City
City and County of Denver
City of Englewood
City of Greenwood Village
City of Littleton
City of Lakewood
City of Loveland
City of Lone Tree
City of Thornton
City of Wheat Ridge
Town of Castle Rock
Town of Parker

Special District
Highlands Ranch Metropolitan District
Southeast Metro Stormwater Authority

MICHAEL F. BENNET
COLORADO

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
FINANCE
HEALTH, EDUCATION, LABOR, AND PENSIONS

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http://www.bennet.senate.gov

January 12, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

The Honorable John M. McHugh
Secretary
U.S. Department of the Army
The Pentagon, Room 3E700
Washington, DC 20310

The Honorable Thomas J. Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Ave, SW
Washington, DC 20250

Dear Administrator McCarthy, Secretary McHugh, and Secretary Vilsack:

I write to relay suggestions from Colorado's water community regarding the Administration's proposed rule to clarify the Clean Water Act. As you know, we must have a clear understanding of where the Act applies in order to protect the nation's water. The rulemaking has the potential to provide greater certainty while making important improvements to water quality and aquatic wildlife habitat.

Coloradans value clean water and understand its importance to our economy, environment and well-being. The Colorado River, with its headwaters in Rocky Mountain National Park, serves 30 million people across the West. Many farmers, ranchers, business people, government leaders, hunters, anglers, and other constituents from across Colorado have voiced their support for the Clean Water Act and the need for the additional clarity that a revised rule could provide.

As a member of the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, I appreciate your thoughtful responses last fall to the Committee's letter relaying concerns raised by agricultural producers. It is encouraging to hear that the Administration will clarify the definitions of key terms in the final rule.

Below are additional suggestions that I have heard from both the public and private sector in Colorado. It is my hope that the Administration will consider these commonly expressed concerns in its final rulemaking:

1. Ditches are critical to meeting agriculture and municipal water needs across the West. Because most of these ditches begin or end in a waterbody, they are not excavated wholly in uplands. My office has received reassurance that the current agricultural exemptions will be retained and perennial ditches will likely not become jurisdictional. Similar clarity is needed for our municipal water providers.

2. Forest fires and floods are becoming increasingly common across the West. Local governments must respond quickly during and after these events to manage storm water and restore infrastructure to maintain public health and safety. These response actions serve to protect and enhance waterways, though they sometimes have proceeded in a fashion that has resulted in adverse effects on fish and wildlife habitat. I encourage the Administration to evaluate the possibility of extending limited exemptions for stormwater and debris management in the case of natural disasters, while maintaining needed safeguards for habitat.

3. Dry drainages such as arroyos and washes are common across the arid West. Water only flows through these features after large, infrequent rainfall events. The proposed rule would classify ephemeral drainages as jurisdictional, which could place significant regulatory burdens on infrastructure projects without associated water quality benefits. I urge the Administration to consider the unique characteristics of the arid West in its final rule and consider the merits of a case-by-case jurisdictional determination of ephemeral features.

4. Several municipalities have raised concerns that parts of their drinking water treatment systems or water recharge and reuse facilities could become jurisdictional under the proposed rule. These facilities include lined reservoirs that are potentially adjacent to waters of the U.S. The jurisdictional status of these water treatment facilities should be clarified in the final rule.

Thank you for your consideration of these sentiments from Colorado and for your efforts to protect water quality across the country.

Sincerely,

Michael F. Bennet
U.S. Senator

Capitol Building
Room 241 South
Topeka, KS 66612

Kansas
Office of the Governor

Phone: (785) 296-3232
Fax: 785-368-8710
governor@ks.gov

Sam Brownback, Governor

October 23, 2014

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave. N.W. (1101A)
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Sent Via: Electronic Mail and U.S. Post

Re: Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "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, on behalf of the citizens of the State of Kansas, conveys our concerns over the proposed rule by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers ("Federal agencies") defining "Waters of the United States," (WOTUS). The rule, as proposed, not only has significant impact on Kansas landowners and land managers in their ability to make land use decisions, but also places a burden upon, and impacts the state's ability to manage and regulate the water resources under Kansas jurisdiction.

Kansas appreciates the Federal agencies heeding past comments on guidance regarding WOTUS, and subsequently pursuing rulemaking to clarify the application of the Clean Water Act ("the Act") on waters found in the Nation. However, the hue and cry of commentary and criticism from multiple sectors, including states, indicates the Federal agencies have fallen short in their responsibility to exercise proper Federalism by failing to consult with the states that would be tasked to administer the Clean Water Act under the new definition of what constitutes jurisdictional waters. Kansas has seen improvements in water quality in recent years and corresponding removal of streams from the impaired 303d list. These improvements are the result of appropriate positive coordination of federal and state agencies with individual landowners. The proposed rule changes that balance to lessen the burden on the federal government marginally, while creating significant additional unnecessary requirements for both state agencies and individual landowners. If implemented, Kansas' citizens' motivation to participate in practices that improve the environment will dry up faster than an ephemeral stream after a thunderstorm. The net effect of this rule will be additional expenditures at the state level and a decrease in water quality from our current path.

This is particularly troubling for states, which are recognized by the Act, as the co-regulators with the Federal agencies of the Act. For states to be relegated to the status of interested party, indistinguishable from the myriad of environmental, agricultural and development commenters on the rule, effectively undermines the states' role and discretion for effective administration under the Act. It dilutes their input on the repercussions and consequences of the proposed rule. This is particularly true for Kansas, which believes the rule is not necessary and represents an actual expansion of waters subject to the jurisdiction of the Clean Water Act triggering consequences, unintended or not, that limit the state's and individual landowner's ability to effectively manage waters that are truly significant in value and contribution. For a detailed analysis on the expansive nature of the proposed rule in Kansas, please refer to Appendix A of this letter.

Kansas ranks third in the nation in terms of acres of land devoted to farming. Agriculture comprises 90% of the land use in the State and 99% of our land is held in the private sector. Agriculture and related food and food processing industries contribute an estimated $53 billion to the state's economy, 39% of the state's GDP. These lands are dissected by a historic stream network created by conditions totally unlike those seen today. Rainfall across Kansas ranges from 40 inches in the southeast to 15 inches in western Kansas. That low western rainfall and resulting runoff along with depths to water from the land surface ranging from 150 – 200 feet to the High Plains Aquifer makes all but the major streams in the west ephemeral, with their channel beds permanently above the water table. These streams, now and forever, only flow in response to localized rainfall. Yet, under the proposed rule, any smaller order streams with a bed, bank and ordinary high water mark may be classed as tributaries, and as such, are considered jurisdictional under the Clean Water Act.

Kansas Surface Water Quality Standards apply the full extent of the Clean Water Act on identified classified waters. These waters include perennial and intermittent streams, but not ephemeral streams, ditches, grass or vegetated waterways or culverts, per State law (K.S.A. 82a-2001(a)(2)). Kansas classified streams are WOTUS, with designated uses established and numeric water quality criteria used to assess and protect those uses. As inventoried on our Surface Water Register, those classified streams comprise 30,620 miles of perennial and intermittent streams. The latest iteration of the National Hydrographic Database identifies numerous smaller order streams in Kansas, most of which are ephemeral, and increases the stream mileage to over 174,000 miles. Hence, if the NHD represents the distribution of tributaries in Kansas, the proposed rule, with its blanket declaration that all tributaries are jurisdictional, cannot be viewed as anything but an expansion in the number of waters under the purview of the Clean Water Act. The current statutory exclusion of ephemeral streams is incorporated in Kansas' Surface Water Quality Standards and has, heretofore, been approved by EPA. Therefore, not only does the proposed rule's treatment of tributaries conflict with State law, but it contradicts previous EPA positions supporting the exclusion of ephemeral streams from all aspects of the Clean Water Act.

The irony here is such an expansion of Federal oversight is not necessary because Kansas has sufficient authorities to protect unclassified streams, including ephemeral streams. While such streams may not be WOTUS, they are waters of the State. This very comprehensive list

includes rivers, creeks, brooks, sloughs, draws, arroyos, canals, springs, seeps, cavern streams, associated alluvial aquifers, natural lakes, oxbows, man-made reservoirs, lakes and ponds, and wetlands (K.A.R. 28-16-28b(ggg)). Despite the lack of designated uses or specific numeric criteria applied to such waters, they are protected by Kansas' narrative criteria (K.A.R. 28-16-28e (b)), keeping those waters free from toxic, harmful and undesirable substances and conditions. State law (K.S.A. 821-2001(a)(1)) allows unclassified waters to become classified, thereby protected as WOTUS, in cases where threatened and endangered species are present, where the stream segments provide important refuge and permit recolonization despite low flows or where such streams are below new or existing NPDES permitted discharges.
If Kansas is already effectively protecting these waters, what benefit is there for the expansion of EPA authority? To continuously change the rules hampers growth and limits economic development. In short the proposed regulation is duplicative, costly, and creates an environment of uncertainty.

Kansas has a track record of progressive and innovative protection of its waters, whether WOTUS or otherwise. Our TMDLs are established on a watershed basis and direct corrective action to whatever tributaries contribute to the impairment seen at the outlet of the watershed. We aggressively apply our antidegradation policy of the Water Quality Standards to limit new discharges into previously unimpacted streams. Kansas essentially bans any discharges into wetlands. Our state livestock waste management program has effectively minimized impacts from facilities below the Federal threshold of 1000 animal units since 1977. Wastewater reuse has become a typical management technique, particularly in the semi-arid western regions of the State, eliminating the discharge of associated pollutants to waterways. Again, these protections are applied to waters of the State which are more comprehensive in their sweep than even the proposed definitions of WOTUS. The need for Federal oversight in these matters is dubious, but would become the norm should the proposed rule be adopted.

Where we draw the line in regulation is over land use decisions. That has always been the purview of local government and the rights of individual landowners. Because of the dominance of agricultural land use in Kansas, our citizens' interaction with the Clean Water Act should be minimal, as deigned by the Act itself. Section 404(f)(1)(A) exempts "normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products or upland soil and water conservation practices from the provisions of Section 404." Farm and stock ponds, irrigation ditches, the maintenance of drainage ditches and farm roads are all exempt from Section 404 requirements.

Furthermore, the Act's other regulatory program, the NPDES permitting program authorized under Section 402, controls and limits the discharge of pollutants into waters by point sources. But point sources as defined by Section 502(14) do not include agricultural stormwater discharges nor return flows from irrigated agriculture. Clearly, the Act did not intend to impose itself on the practice and routine of farming.

The inclusion of an "interpretive rule" outlining exempt conservation practices is both redundant and limiting. Such a list invites unnecessary Federal scrutiny and requirements on any practice designed to conserve soil and water, but which may not fit neatly among the 56 practices the Federal agencies deem permissible. For example, gradient terraces are employed to reduce

runoff over sloped land, thereby retaining soil and enhancing water conservation in many Kansas farm fields. In fact, EPA cites such terraces among their list of urban stormwater best management practices. Yet, this practice is not included among the 56 "exempt" practices. Is it EPA's position that installation of gradient terraces requires 404 permitting? Kansas has an estimated 290,000 miles of terraces protecting over 9 million acres, this ranks second in the nation. At today's costs this represents over $1.9 billion in conservation investment by landowners and government agencies. Requiring permits on new and even rebuilt terraces will hinder the implementation of this widely accepted best management practice. The clarification sought by the proposed rule as to its application has, in fact, introduced more questions than answers. We are concerned that the interpretive rule, in concert with the proposed rule, will quell the desire of many agricultural producers to employ conservation practices, leading to a net increase in pollutant loading from our lands. We already have reports those voluntary conservation efforts to protect playa lakes in western Kansas are diminishing for fear of Federal interference.

It is clear to Kansas that the Federal agencies intend the proposed rule to facilitate the issuance of Section 404 permits while reducing staff workloads by eliminating the need for site-specific determinations on jurisdiction. By claiming broad categories such as tributaries are jurisdictional; all determinations may be made from the desktop of Federal staff through maps and aerial photography. With the inclusion of adjacent waters to the coverage provided by tributaries, positive jurisdiction determinations will become automatic, without consideration of site-specific conditions. The Federal agencies believe all tributaries contain a bed, a bank and an ordinary high water mark and channels with those three characteristics are jurisdictional, regardless of flow conditions. Kansas refutes that, noting especially in the case of western Kansas streams, that the location of the channel above the regional water table, the frequency of flow occurring in the channel and the longitudinal distance between the channel site and actual downstream perennial or seasonal water warrant equal consideration. The latter factors play to the concept of "significant nexus" and connectivity among streams, and more closely embrace Justice Kennedy's insistence that mere hydrologic connection does not bestow ecological significance to certain waters.

The Federal agencies believe that all tributaries should be jurisdictional because they are connected to the stream system and are poised to contribute flow and material to downstream waters, thereby influencing the physical, chemical and biological nature of those waters. Kansas believes connectivity in the western stream networks is tenuous and episodic, at best. As an example, Kansas cites recent flow conditions seen on an intermittent stream, the Smoky Hill River above Cedar Bluff Reservoir in Gove and Trego counties (see Appendix B to this letter). While the Smoky Hill River is a classified water under Kansas Water Quality Standards, and therefore, a WOTUS, it nonetheless is illustrative of the typical flow conditions seen in western Kansas that contradict the belief that upstream-downstream connections should automatically be assumed.

Rains in August 2013 induced runoff in Gove County as noted by the rise in flow seen at the U.S. Geological Survey gaging station at Elkader, Kansas. The corresponding flow seen 50 miles downstream at the USGS station near Arnold, Kansas is attenuated and much reduced in volume and peak. Subsequent rains later in August triggered a rise in flow at Arnold, but because of the localized nature of the rains, no response was seen upstream at Elkader.

Challenging the proposed rule's principle that all tributaries make expected contributions to downstream waters, the relative change in pool elevation in Cedar Bluff Reservoir, downstream

from the Arnold station, is negligible and insignificant. Stream connectivity on the Smoky Hill River reflects the findings of EPA's Scientific Advisory Board, who cautioned the Federal agencies that connectivity is not a binary attribute, but instead has a wide continuum of significance. Our concern here is not with a larger stream such as the Smoky Hill River, but instead where the proposed rule will take us, i.e., the tributary to the tributary to the tributary of the Smoky Hill River. Those small order streams will be, in fact, ephemeral and the significance of their impacts very marginal, if even measurable. Flow movement in Kansas ephemeral streams is more likely to move vertically downward by deep percolation than longitudinally along the channel in the downstream direction.

This federal expansion decreases the competitiveness of businesses and increases costs for all residents of the state. Sweeping application of clean water programs on such marginal waters will force private landowners, industries and local government to expend resources to protect those waters with little environmental benefit. They will see additional vulnerability to third party litigation and citizen suits that will have standing through broader jurisdiction under the Act. Mitigation for impacts on ephemeral channels and adjacent waters will escalate the costs of projects intended to improve water supply and conservation. State pesticide programs and regulations will need to be revised as the line between applications to terrestrial and aquatic resources becomes blurred by the proposed rule. Counties will become restrained in routine ditch maintenance or control of noxious weeds for fear of running afoul of the Act. New permitting conditions and limitations for land applications of livestock waste or wastewater sludge that affect minor drainages add operational costs to agricultural and municipal waste water management.

Because of the sweeping scope of the proposed rule to all aspects of the Clean Water Act, the quest by the Federal agencies to reduce the burden of their staffs' workload in making jurisdictional determinations will shift other workload burdens to Kansas agency staff. Application of the Clean Water Act through water quality standards, total maximum daily loads, 305b assessments, or certain permitting, e.g., general NPDES permits for pesticide applications on, over or near waters that see flow only on the occasion of localized rain, will divert and distract State resources away from the more pressing priority of protecting the established surface waters of the State. It cost Kansas over $300,000 annually (in 2004 dollars) to conduct 500 simplified, expedited Use Attainability Analyses (UAAs) on Kansas streams. Should the proposed rule come into force, Kansas can expect to expend significantly greater amounts over a number of years re-doing those UAAs and performing new UAAs as our universe of classified streams expands many times over with the inclusion of ephemeral tributaries.
The impetus for the proposed rule was clarification of Clean Water Act jurisdiction after the Supreme Court's *SWANCC* and *Rapanos* decisions, decisions that narrowed the scope of Federal authority when protecting wetlands from impacts of solid waste disposal and commercial development through the Section 404 program. Two tests for jurisdiction arose from the *Rapanos* decision. The first test came from the plurality of the Supreme Court as expressed by Justice Scalia that jurisdiction applied to relatively permanent waters, i.e., not ordinarily dry channels. The second test came from Justice Kennedy's introduction of finding a significant nexus of waters having an ecologic interconnection (but not a speculative or insubstantial connection). The proposed rule overrides the Scalia test and parses the Kennedy test to equate connectivity to significant ecological function, thereby promoting a near boundless view of Federal authority. Furthermore, the sweep of the rule applies all Clean Water Act

programs to an expanded population of waters, resulting in extension to agricultural activities that the Act has historically viewed as exempt. The resulting overreach by the Federal agencies complicates matters better suited for State resource management. Proclamations from the Federal agencies that the proposed rule represents no expansion in jurisdiction under the Clean Water Act contradicts recent statements from EPA that 60% of waters in the Nation need Federal protection. And yet, historical positions and documents of the Federal agencies clearly establish that ephemeral channels were not viewed automatically as WOTUS.

Kansas acknowledges that some ephemeral streams may actually be significant contributors affecting the conditions of downstream waters. Therefore, we believe such streams should not be dealt as tributaries as outlined in the proposed rule but viewed by the Federal agencies as "other waters".. That approach requires case-by-case determinations, which is an appropriate evaluation for ephemeral streams. This analysis does add to the work burden of Federal staff, but correct jurisdictional determinations demand such an investment. Under the proposed rule, Federal expenditure of resources and energy will be forthcoming as necessary in rebutting appeals of the automatic inclusion of all tributaries as jurisdictional. Kansas believes the citizens of the State are better served when determinations are done upfront in light of all available data pertinent to the issue at hand. State agency personnel have the knowledge, background and experience in assisting the Federal agencies in jurisdictional determinations with these specific "other waters". The interaction of Federal and State personnel better advances cooperative Federalism than the blanket application of the Clean Water Act envisioned under the proposed rule. As a backstop, many of the waters found not to be jurisdictional are protected, where warranted, by State authorities applied to waters of the State. As stated previously, the watershed orientation of programs, such as the Kansas TMDL program, applies corrective actions to any contributing sources within that watershed, regardless if they lie on classified or unclassified waters.

In summary, we urge retraction of the proposed rule and associated interpretive rule in their current state, in order for the Federal agencies to properly clarify jurisdiction of the Clean Water Act, particularly regarding Section 404 protection of wetlands without trampling current State authorities. In its current form, the proposed rule will create an expanded universe of Waters of the United States in Kansas, many of which will be ephemeral in nature and all beholden to the full suite of Clean Water Act programs. Kansas ephemeral streams do not automatically possess a significant nexus and more often than not, do not impose impacts on the downstream waters actually used by the citizens of Kansas. Tributaries in western Kansas need more than a bed, bank and high water mark to delineate significance. The frequency of flow supported by regional ground water is equally important and will determine the degree that such channels actually make downstream contributions.

Application of enhanced Federal oversight is not necessary, given the definition of "waters of the State" within the Kansas Water Quality Standards and the protective narrative provisions provided to such waters by State authority. The proposed rule will result in unnecessary expenditure of finite resources by State, local and private agencies and interests on matters of marginal environmental significance. The proposed rule will chill any voluntary investment and application of protective conservation practices by our citizens who eschew interacting with the Federal agencies, while directing other programs of the Clean Water Act away from real areas of real need.

The next steps taken by the Federal agencies must adhere more closely to cooperative Federalism and not render lip service to consultation with the States as required by Executive Order 13132. Whatever shape the proposed rule takes will have profound impact on the State

agencies tasked with applying and administering the Clean Water Act on Kansas waters. Those implementing the rule should have a say in the scope of the rule. If the Federal agencies believe there are gaps in the protective coverage provided by State of Kansas authority, they need to express their concerns and intentions of solving those shortcomings with any proposed rule. Failing to do so leaves only speculative and insubstantial concerns, precisely contradicting Justice Kennedy's caution in establishing "significant nexus" for waters.

Kansas stands ready to address any challenges to protecting our natural resources and maintaining water quality at levels supportive of the uses designated for our streams, lakes and wetlands. The proposed rule places an undue burden on the agriculture and energy industries, two of the most important contributors to the Kansas economy. It does nothing to help us protect our natural resources and, in fact, the proposed rule introduces more challenges into the process of environmental protection and will likely reduce voluntary participation in land stewardship. This rule needs to be withdrawn and any future discussions should begin with the full consultation and advice of the States.

Sincerely,

Sam Brownback, Governor

Jackie McClaskey, Secretary of Agriculture

Dr. Robert Moser,
Secretary of Health and Environment

Robin Jennison, Secretary of Wildife
Parks and Tourism

Mike King, Secretary of Transportation

Tracy Streeter, Director Kansas Water
Office

Appendix A: Expansion of Jurisdictional Waters in Kansas under the Proposed Rule: An Analysis

While the EPA/ACOE economic analysis states the Rule will expand the jurisdictional scope of the CWA by only 2.7%[1], Kansas analyses show the expansion is significantly larger – over 400%. The basis for the expansion lies in the treatment of ephemeral waters and ditches. The preamble to the Rule states:

> *"As discussed in this preamble and Appendix A, tributaries as proposed to be defined perform the requisite functions for them to be considered "waters of the United States" by rule..... All tributary streams, including perennial, intermittent, and ephemeral streams, are physically and chemically connected to downstream traditional navigable waters, interstate waters, and the territorial seas via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported."*

We believe this statement and statements made by EPA and the ACOE during numerous webcasts and conference calls indicates all ephemeral waters would be presumptively determined to be "tributaries" and thus, Waters of the United States (WOTUS). In Kansas we have identified approximately 31,000 miles of perennial and intermittent waters that have been treated as WOTUS for several decades. While the number has fluctuated slightly, 31,000 miles is a good approximation. The National Hydrography Dataset (NHD), which the USGS states is "...used to portray surface water on The National Map..."[2] claims Kansas has 174,410 miles of streams. Thus, NHD apparently identifies approximately 133,000 additional miles of ephemeral streams. As per the preamble to the Rule and EPA/ACOE statements, the additional 133,000 miles would result in a 460% increase in the number of Kansas waters presumed to be jurisdictional under the Rule. A far cry from the 2.7% increase predicted in the EPA/COE economic analysis.

Although not documented in the preamble, EPA and the ACOE have asserted on calls and webcasts with stakeholders that ephemeral waters were *always* considered WOTUS, thus including them in the definition of tributaries was not an expansion. We do not believe ephemeral waters have *always* been considered *de facto* tributaries for CWA jurisdictional purposes. We base our belief on four specific items:

1. **Approved Kansas State Water Quality Standards (WQS)**. By copy of a November 2, 2003 letter from Mr. Leo J. Alderman, Director of the Water, Wetlands, and Pesticide Division at EPA's Region 7 Office to Roderick L. Bremby, Secretary of KDHE, EPA approved Kansas Water Quality Standards submitted to EPA on September 26, 2003. An approved provision in those WQS stated that *"Classified streams segments other than those described in subsection (a)(1(E) shall not include ephemeral streams, grass, vegetative, or other waterways; culverts; or ditches."*

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[1]Economic Analysis of Proposed Revised Definition of Waters of the United States. March 2014. U.S. Environmental Protection Agency. Retrieved September 12, 2014. http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf

[2] U.S. Geological Survey - National Hydrography Dataset. U.S. Geological Survey, 2014. Retrieved September 15, 2014. http://nhd.usgs.gov/

"Classified streams" are those streams in Kansas that are assigned designated uses, and the designated uses are supported by water quality criteria (K .A.R. 28-16-28d). That provision of the Kansas WQS was also approved by EPA.

Kansas WQS are developed pursuant to 40 CFR §131. 40 CFR §131.2 states in part *"A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act)."*

Therefore, Kansas considers the classified streams to be WOTUS within Kansas' borders since they have designated uses and criteria and serve the purposes of the Clean Water Act. Further, since EPA approved Kansas WQS that unconditionally exclude ephemeral waters; we have to conclude EPA has not always considered ephemeral waters to be considered jurisdictional under the CWA.

Similarly, we do not believe ditches were ever intended to be included in the definition of WOTUS. Our EPA-approved WQS specifically excluded ditches. Thus, to bring *any* ditches under the regulatory umbrella of the CWA would clearly be an expansion, and an expansion well beyond the 2.7% estimated by EPA and ACOE.

2. **EPA/ACOE Memorandum date June 5, 2007, titled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*[3].** The memorandum provided guidance on implementing jurisdictional water determinations based on the Supreme Court cases referenced in the title of the memorandum. The format of the guidance was to describe waters where EPA and the ACOE would:
    a. Assert jurisdiction,
    b. Not exert jurisdiction, and
    c. Exert jurisdiction based on a *"fact-specific analysis to determine whether they have a significant nexus with a non-navigable water"*

    Item c, above, is the key to Kansas argument regarding automatic inclusion of ephemeral waters into WOTUS. The document introduces the term "non-navigable tributaries that are not relatively permanent". Those waters are further defined to mean *"...waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months)."* Clearly this definition describes ephemeral waters. Thus, as late as 2007, EPA and the ACOE did not include ephemeral waters in the subset of tributaries. They were unmistakably considered "other" waters requiring a site-specific jurisdictional determination. Clearly, this document supports the Kansas contention that the Rule is greatly expanding its reach.

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[3] Memorandum on Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States & Carabell v. United States. US Environmental Protection Agency, June 5, 2007. Retrieved September 12, 2014. http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_wetlands_RapanosGuidance6507.pdf

In addition, the document (with emphasis added) states:

> *"...ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.* ***Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water.***"

The guidance clearly acknowledges that ditches may contribute flow downstream (usually the purpose of a ditch) but is still not jurisdictional. The proposed Rule, however seems to ignore the previous guidance by not only including ditches in the rule, but sweeping them into the definition of a "tributary" based on the following Rule language:

> *"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 (2)(iii) or (iv) of this definition."*

This definition precludes EPA or the ACOE from mandatory site-specific evaluations of ditches to determine significant nexus. Again, the sweeping of numerous ditches (including roadside ditches) into the definition of a "tributary" is a significant expansion of CWA jurisdiction.

3. **ACOE guidance dated June 5, 2007 titled *Questions and Answers for Rapanos and Carabell Decision*[4]**. The Question and Answer (Q&A) was published concurrently with EPA/ACOE memorandum referenced in item 2, above but published only as ACOE guidance. Q&A 19 specifically addresses ephemeral waters and states:

> *"19. How does the Rapanos guidance address ephemeral waters?*
>
> *A. CWA jurisdiction over an ephemeral water body, and its adjacent wetlands, if any, will be assessed using the significant nexus standard. An ephemeral water body is jurisdictional under the CWA if the agencies can demonstrate that the ephemeral water body, in combination with its adjacent wetlands, if any, will have a significant effect (more than speculative or insubstantial) on the chemical, physical, and biological integrity of traditional navigable water."*

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[4] Questions and Answers for Rapanos and Carabell Decision. US Corps of Engineers, June 5, 2007. Retrieved September 12, 2014.
http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_qa_06-05-07.pdf

The guidance clearly states that ephemeral waters will be subject to a significant nexus test. This implies a case-by-case analysis.

However, the preamble (with emphasis added) to the proposed Rule states:

> *"In addition, the agencies propose that **"other waters"** (those not fitting in any of the above categories) **could be determined** to be "waters of the United States" **through a case-specific showing** that, either alone or in combination with similarly situated "other waters" in the region, **they have a "significant nexus" to a traditional navigable water**, interstate water, or the territorial seas."*

In the context of the proposed Rule, ephemeral waters would be properly placed in the "other waters" category to comport with the ACOE. As discussed above, however, the Rule sweeps ephemeral waters into the "tributary" category where a site-specific evaluation and significant nexus need not be evaluated. This again supports Kansas contention the Rule has broadly swept ephemeral waters into the "tributary" category as opposed to the "other waters" category and greatly expanding the scope of jurisdictional waters.

With respect to ditches, the ACOE guidance addressed ditches in Q&A 18 by stating (with emphasis added):

> *"18. How does the guidance address swales, erosional features, and small washes?*
>
> A. *Swales and erosional features (e.g., gullies, small washes characterized by low volume, infrequent, and short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. **Likewise, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States, because they are not tributaries or they do not have a significant nexus** to downstream traditional navigable waters."*

The Q&A states significant nexus is necessary to determine if a ditch is jurisdictional. As indicated in item 2 above, ditches are presumed to be "tributaries" which would not require any type of nexus testing. Again, we see this as an unequivocal expansion of CWA jurisdiction.

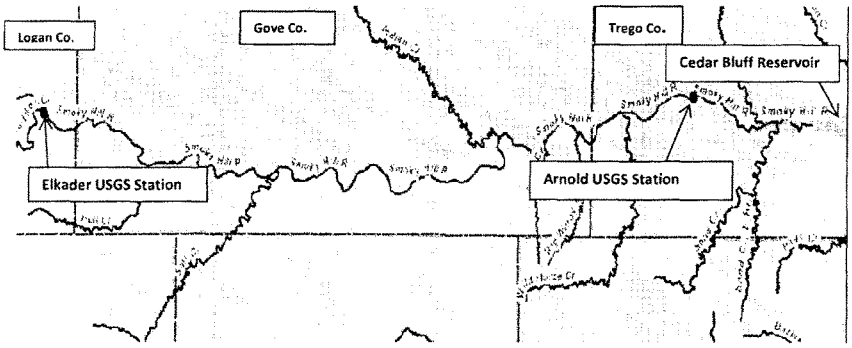
4. **Recent editorial, speech, and blog comments made by Administrator McCarthy.**[5] In those remarks, the Administrator stated *"Unfortunately, 60 percent of our nation's streams and millions of acres of wetlands currently lack clear protection from pollution under the Clean Water Act."* Those statements leave the clear impression that the majority of US waters do not currently have clear protection under the CWA. Thus, if those 60 percent that "lack clear protection" are brought under the umbrella of the CWA, a significantly larger expansion than estimated in the economic analysis for the Rule.

[5] http://www.huffingtonpost.com/gina-mccarthy/clean-water-act_b_5900734.html

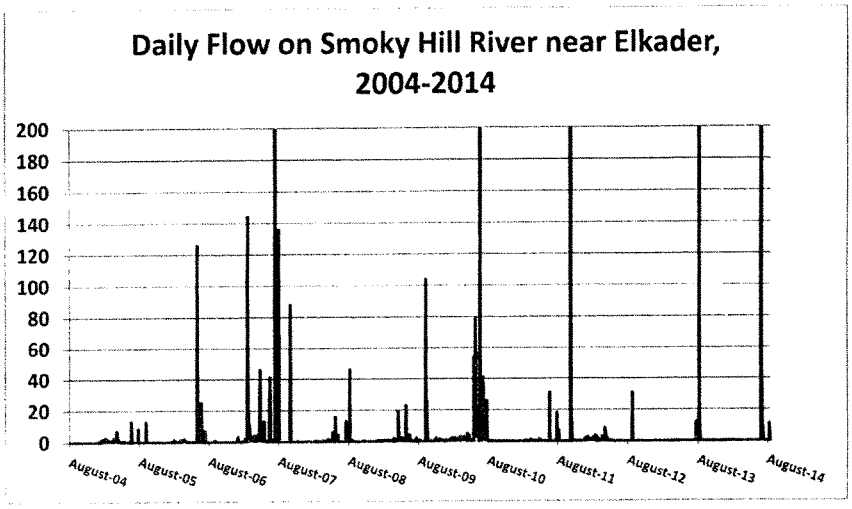
To reiterate, we believe the evidence is clear that by including ephemeral waters and ditches in the definition of "tributary", EPA and ACOE would significantly expand the scope of CWA jurisdiction – much more so than the 2.7% estimated in the EPA/ACOE economic analysis. As such, the economic analysis of the rule is flawed, and does not provide the public with an accurate accounting of the impact of the proposed Rule. For that reason alone, the Rule should be withdrawn.

Appendix B: Analysis of Streamflow Movement along the Smoky Hill River

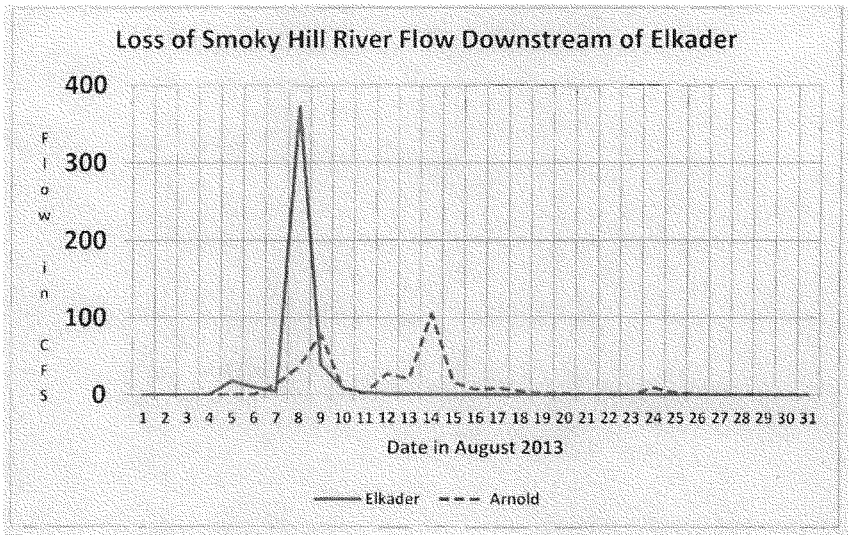
The Smoky Hill River above Cedar Bluff Reservoir is an intermittent, classified stream identified in the Kansas Surface Water Register comprising numerous stream segments with varying designated uses.



U.S. Geological Survey has been measuring flow on the Smoky Hill River at Elkader since 1939 and 50 miles downstream near Arnold since 1950. Seasonal peaks in streamflow are seen on the river separated by extended periods of low or no flow. The flow patterns are typical of an intermittent stream in Kansas.



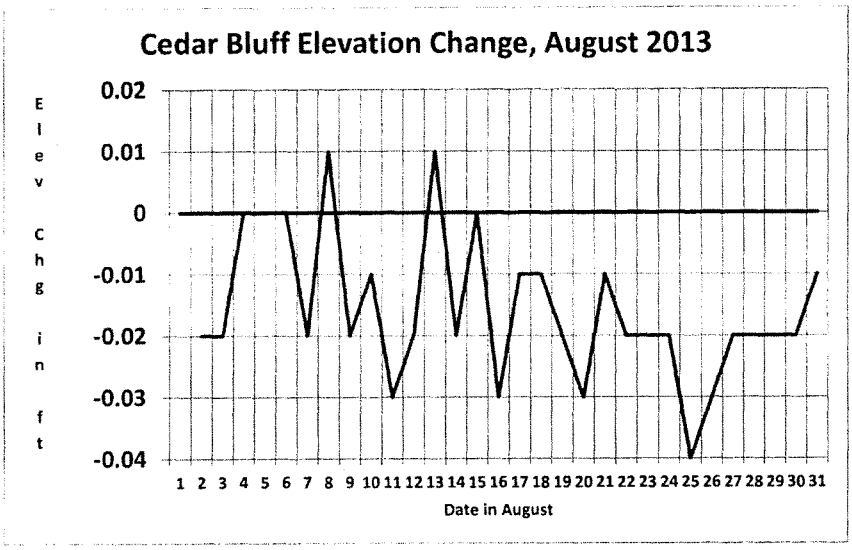
In August 2013, above average rains fell in Logan County (4.6"), near normal rains fell in Gove County (2.4") and below average precipitation fell in Trego County (1.25"). Flows on the Smoky Hill River at Elkader responded to rains falling the first 10 days of the month, particularly in Logan County. Less rain fell to the east in Gove and Trego counties. A second period of rainfall occurred between August 13-15, with more rain falling in eastern Gove and western Trego counties. That rainfall induced a rise in flow at the downstream Arnold station.



The first rain generated over 900 acre-feet of streamflow at Elkader during the first 12 days of August. Flows at Arnold only totaled 369 acre-feet during the same period. The second rain spurred 315 acre-feet of flow at Arnold from the 13th to the end of the month. Only 5 acre-feet of flow occurred at the upstream Elkader station during the same timeframe.

The flow patterns indicate the nature of flow along stream channels of western Kansas that see streamflow only a portion of the time. Flows from upstream are often induced vertically downward via percolation through the channel bed rather than moving in the downstream direction. The result is a losing stream. Conversely, flows seen at the downstream station, Arnold, may or may not be related to flow conditions seen upstream. More often, those flows are direct result of localized rainfall generating runoff to the Smoky Hill River. There is a degree of separation among the stream segments between the two USGS stations which contradicts the constant connectivity presupposed by the tributary provision of the proposed rule of the Federal agencies.

Meanwhile, the most significant water resource in the region, Cedar Bluff Reservoir seemed oblivious to flows in the major tributary leading to it in August of 2013. The relative change in pool elevation registered by the Bureau of Reclamation at the reservoir indicates the most inconsequential increase during the two flow periods. Otherwise, the pool consistently lost volume to the pervasive evapotranspiration forces that limit the availability of surface water in western Kansas. The lack of response belies the notion of significant contribution to the lake from the upstream watershed during these runoff events. Again, flows are more than likely to be drawn downward into the underlying unconsolidated deposits of western Kansas streams than to move longitudinally and contribute flow and loads to downstream reaches.



Even this phenomenon is not constant along the Smoky Hill River. For example, rains at the end of June generated sufficient runoff at both USGS stations to create notable hydrographs and by the Fourth of July Cedar Bluff Reservoir had seen a jump in elevation of over 2.5 feet. There was still volumetric loss of flow in the downstream direction and the primary driver for the conditions was a heavy pattern of daily rain during the last weekend of June. Once rains ceased, the typical disjointed, upstream-downstream relationship in flow conveyance and loss returned to the Smoky Hill River.

These observations lend credence to the admonition of EPA's Scientific Advisory Board that stream connectivity is not a binary principle; there are varying degrees of significance to the levels of connectivity among streams, especially when surface water is limited and renders streamflow to an intermittent or ephemeral regime.

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STATEMENT OF THE

NATIONAL ASSOCIATION OF REALTORS®

SUBMITTED FOR THE RECORD TO

THE UNITED STATES SENATE COMMITTEE ON AGRICULTURE, NUTRITION AND FORESTRY

HEARING TITLED

EPA PROPOSED WATERS RULE IMPACT

MARCH 24, 2015

INTRODUCTION

On April 21, 2014, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) proposed to reduce the amount of scientific analysis needed in order to declare a "water of the U.S." including wetlands on private property across the country. On behalf of 1-million members involved in all aspects of commercial and residential real estate, the National Association of REALTORS® (NAR) thanks you for holding this oversight hearing and for the opportunity to submit these written comments for the record. If enacted, this rule could force many homeowners across America to obtain a federal construction permit for the first time which could have significant multiplier effects on home sales, values as well as the communities' tax base. We urge the Congress to take immediate action to reign in and prevent this EPA overreach of congressional authority.

Currently before declaring a water of the U.S., the agencies must first conduct a "significant nexus" analysis for each stream or wetland to determine that regulation could prevent significant pollution from reaching an ocean, lake or river that is "navigable," the focus of the Clean Water Act. Because, in the agency's view, a full-blown scientific analysis for each water or wetland is "so time consuming and costly," the agencies are proposing instead to satisfy this requirement with a more generic and less resource intensive "synthesis" of academic research showing "connectivity" between streams, wetlands and downstream water bodies. On this basis, the agencies believe that they can waive the full analysis before regulating most of streams and wetlands, and reduce the analysis for any "other water" that has more than a "speculative or insubstantial" impact. We disagree.

NAR opposes this vague and misguided "waters of the U.S." proposed regulation. While perhaps an administrative inconvenience, site-specific data and analysis forces the agencies to justify their decision to issue wetland determinations on private property and focus on significant impacts to navigable water. By removing the analytical requirement for regulation, the agencies will make it easier not only to issue more determinations but also force these property owners to go through a lengthy federal negotiation and broken permit process to make certain improvements to their land.

At the same time, the proposal does not 1) delineate which improvements require a federal permit, 2) offer any reforms or improvements to bring clarity or consistency to these permit requirements, or 3) define any kind of a process for property owners to appeal U.S. water determinations based on "insubstantial" or "speculative" impacts. The resulting lack of certainty and consistency for permits, or how to appeal "wetland determinations," will likely complicate real estate transactions such that buyers will walk away from the closing table or demand price reductions to compensate for the hassle and possible transaction costs associated with these permits. We urge Congress to stop these agencies from moving forward with this proposal until they provide a sound scientific basis for the regulatory changes and also streamline the permitting process to bring certainty to home- and small-business owners where wetlands are declared.

PROPOSED RULE ELIMINATES THE SOUND SCIENCE BASIS FOR U.S. WATER DETERMINATIONS

Today, the EPA and Army Corps may not regulate most "waters of the U.S.," including wetlands, without first showing a significant nexus to an ocean, lake or river that is navigable, the focus of the Clean Water Act. "Significant nexus" is a policy and legal determination based on a scientific site-specific investigation, data collection and analysis of factors including soil, plants, and hydrology.

The agencies point to this significant nexus analysis as the reason they are not able to enforce the Clean Water Act in more places like Arizona and Georgia.[1] On its website, EPA supplies these "representative cases" where it's currently "so time consuming and costly to prove the Clean Water Act protects these rivers." EPA also documents the "enforcement savings" from the proposal in its economic analysis.[2] None of these major-polluter examples involve home or small business owners, which typically do not own significant acreage (the typical lot size is a ¼ acre)[3], let alone disturb that amount of wetland with a typical home project.

Under this proposal, the agencies would waive the site-specific, data-based analysis before regulating land use on or near most streams and wetlands in the United States (see table 1). The proposal:

- Creates two new categories of water – i.e., "all tributaries" and "adjacent waters."
- Adds most streams, ponds, lakes, and wetlands to these categories. "Tributary" is anything with a bed, bank and "ordinary high water mark," including some "ditches." "Adjacent" means within the "floodplain" of the tributary, but the details of what constitutes a floodplain, like how large an area (e.g., the 5-year or 500 year floodplain), are left to the unspecified "best professional judgment" and discretion of agency permit writers.
- Moves both categories from column B (analysis required for regulation) to column A (regulated without site specific data and analysis).

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[1] http://www2.epa.gov/uswaters --for links to the examples, click "Enforcement of the law has been challenging."
[2] http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf
[3] American Housing Survey, 2009.

Table 1. Proposed changes to "Waters of the U.S." regulatory definition

Column A (Regulated without analysis)	Column B (Analysis required for regulation)
Navigable or Interstate • The Ocean • Most Lakes • Most Rivers Non-Navigable and Intrastate • **All** ~~**Some**~~ Tributaries (Streams, Lakes, Ponds) o Perennial o Seasonal o **Ephemeral** • **Most** ~~**Some**~~ Wetlands o Adjacent to navigable water o **Adjacent to** ~~**Directly Abutting**~~ covered stream	Non-Navigable and Intrastate • ~~**Rest of the Tributaries**~~ o ~~**Ephemeral**~~ • Rest of Wetlands o ~~**Adjacent to tributary**~~ o Not adjacent • Any other water o ~~**Adjacent to navigable water**~~ o ~~**Adjacent to tributaries**~~ o Not-adjacent

For any remaining or "other water," the agencies would continue regulating case-by-case using a significant nexus analysis. However, the amount of analysis is dramatically reduced. Under this proposal, all agency staff would have to show is more than a "speculative or insubstantial" impact to navigable water. If, for instance, there were many wetlands within the watershed of a major river, no further analysis would be required to categorically regulate land use within any particular wetland with that river's watershed. Also, the data and analysis from already regulated water bodies could be used to justify jurisdiction over any other "similarly situated" water without first having to visit the site and collect some scientific data.

Contrary to agency assertions, this proposal does not narrow the current definition of "waters of U.S."

- While technically not adding "playa lakes," "prairie potholes," or "mudflats" to the definition, the proposal does remove the analytical barrier which, according to EPA, is preventing both agencies from issuing U.S. waters determinations on private property in more places including Arizona and Georgia.
- Codifying longstanding exemptions (prior converted crop land and waste treatment) does not reduce the current scope of definition; it simply writes into regulation what the agencies have already been excluding for many years.
- Giving up jurisdiction over "ornamental" (bird baths), "reflecting or swimming pools" is not a meaningful gesture, as it's doubtful that any court would have let them regulate these, anyway.
- It is not clear that many ditches would meet ALL of the following conditions – i.e., wholly excavated in uplands AND drains only uplands AND flows less than year-round -- or never ever connects to any navigable water or a tributary in order to qualify for the variance. Also, the term "uplands" is not defined in the proposal so what's "in or out" is likely to be litigated in court, which does not provide certainty to the regulated community.

LITERATURE REVIEW AND SYNTHESIS DOES NOT SUPPORT THE PROPOSED RULE

In lieu of site-specific, data-based analysis, the EPA and the Corps are proposing to satisfy the significant nexus requirement with a less resource intensive "synthesis" of academic studies. The agencies believe these studies show "connectivity" between wetlands, streams and downstream water bodies, and that's sufficient in their view to justify and waive the full analysis for land-use regulations on or within the floodplain of one of these waters.

However, this synthesis is nothing more than a glorified literature review.[4] EPA merely compiles, summarizes and categorizes other studies, and labels them a "synthesis." EPA conducts no new or original science to support or link these studies to its regulatory decisions. Three quarters of the citations included were published before the Supreme Court's decision in Rapanos v. U.S. (2006), and the rest appear to be more of the same. It breaks no new ground. The Supreme Court did not find this body of research to be a compelling basis for prior regulatory decisions, either in Rapanos or SWANCC v. the Army Corp (2001). Putting a new spin on old science does not amount to new science.

[4] For EPA's synthesis: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345

In addition, scientists with GEI Consultants[5] reviewed the literature synthesis and concluded that these studies do not even attempt to measure, let alone support a significant nexus finding. According to GEI,

> "Most of the science on connectivity … has been focused on measuring the flow of resources (matter and energy) from upstream to downstream. …[T]hese studies have not focused on *quantifying the ecological significance* of the input of specific tributaries or headwaters, alone or in the aggregate, and ultimately whether such effects could be linked directly and causally to impairment of downstream waters." [6]

Knowing how many rocks downstream came from upstream won't tell you what the Supreme Court determined needs to be known, which is how many times rocks can be added before downstream water becomes "impaired" under the Clean Water Act. Asking the Science Advisory Board if the synthesis supports the first conclusion (i.e., some rocks come from upstream) doesn't answer the second (how many times can rocks be added downstream before significantly impacting the water's integrity?). EPA is asking entirely the wrong set of policy questions. As GEI puts it,

> "The Science Advisory Board (SAB) charge questions were of such limited scope that they will do little to direct the Synthesis Report toward a more useful exploration of the science needed to inform policy … The questions will not provide the SAB panel with needed directive to require substantive revisions to the report such that it … inform(s) policy with regard to Clean Water Act jurisdiction."[7]

THERE IS NO SUBSTITUTE FOR SITE-SPECIFIC DATA & ANALYSIS TO DETERMINE U.S. WATERS

Here's how EPA's synthesis of generic studies stacks up against a more targeted study specific to and based on data for each stream or wetland.

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[5] For GEI's credentials, see: http://www.geiconsultants.com/about-gei-1

[6] For NAR's summary and link to GEI's comments: http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report

[7] For NAR's summary and link to GEI's comments: http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report

Table 2. EPA synthesis of research versus significant nexus analysis

Significant Nexus	Synthesis of Research
Proves that regulation of a stream or wetland will prevent pollution to an ocean, lake or river	Shows *presence* of a connection between streams, wetlands, and downstream, and not *significance*
Shows how much matter/energy can be added to a tributary or wetland before the Act applies	Shows how much of the matter/energy moved from upstream to downstream
Based on site specific data and analysis of soil, plants, hydrology, and other relevant factors	Dependent upon whatever data and analysis academics have used for their connectivity study
Requires an original scientific investigation, data and analysis for each water body to be regulated	Includes no new or original science by agencies; it's a literature review
Relies on timely and water-body-specific facts, data and analysis	Relies on substantially the same body of research which the Supreme Court didn't find compelling

The EPA may not want to "walk the nexus" and collect data on soil, plants and hydrology, but it's forced the Agency to justify their regulatory decisions, according to the staffs' own interviews with the Inspector General:[8]

- "Rapanos has raised the bar on establishing jurisdiction."
- "…lost one case … because no one walked the property…"
- "…have to assemble a considerable amount of data to prove significant nexus."
- "…many streams have no U.S. Geological Survey gauging data."
- "…need several years of biotic observations…."
- "…there is currently no standard stream flow assessment methodology."

[8] Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation, Report No. 09-N-0149 (April 30, 2009). For a link: http://www.epa.gov/oig/reports/reportsByTopic/Enforcement_Reports.html

- "…biggest impact is out in the arid West, where it is comparably difficult to prove significant nexus."

As a result, many U.S. water determinations (which would not previously have been questioned) are now being reviewed and are not holding up to either EPA or Justice Department scrutiny. Again, from the EPA interviews:

- "Of the 654 jurisdictional determinations [in EPA region 5] … 449 were found to be non-jurisdictional."
- "An estimated total of 489 enforcement cases … [were] not pursued … case priority was lowered … or lack of jurisdiction was asserted as an affirmative defense…"
- "In the past, everyone *just assumed* that these areas are jurisdictional" (emphasis added).

"Walking the nexus" may be an administrative inconvenience, but the data don't support an approach based on 'just assuming.' The main reason for the site-specific, data-based analysis is that it provides a sound scientific basis for agency regulatory decisions. Analysis also raises the cost of unjustified U.S. water determinations. It forces the agencies to do what Congress intended, which is to focus on waters which are either a) in fact navigable or b) significantly impact navigable water. It also prevents agencies from regulating small businesses or homeowners that are not major contributors to navigable water quality impairment.

PROPOSED RULE WILL OVERCOMPLICATE ALREADY COMPLEX REAL ESTATE TRANSACTIONS

Small-business and homeowners are not the problem. Few own enough property to be able to disturb a 1/2-acre of wetland, which is how the Nationwide 404 Permit Program defines *de minimis* impact to the environment. The typical lot size is a ¼ acre with three-quarters having less than an acre.[9] None of the big polluter examples EPA presents involves a homeowner or small business. Yet, by removing the analytical barrier to regulation, agencies will be able to issue more U.S. water determinations on private properties in more places like Arizona, Georgia or wherever else it's now "too time consuming and costly to prove the Clean Water Act protect these rivers," according to the EPA.[10]

The home buying process[11] will not work unless there is sufficient property information to make informed decisions. This is why buyers are provided with good faith estimates and disclosures about

[9] American Housing Survey, 2009.
[10] http://www2.epa.gov/uswaters -- for the examples, click on "Enforcement of the law has been challenging"
[11] In previous comments, the International Council of Shopping Centers, National Association of Homebuilders, NAR and others have thoroughly documented the commercial and homebuilding impacts of the U.S. waters proposed rule. In this statement, NAR focuses on the impact to existing homeowners which have not been documented.

material defects and environmental hazards. It is why they are entitled to request a home inspection by a professional before making decisions. It is also why there's such a thing as owner's title insurance. Contracts and legal documents have to be signed to ensure that buyers receive full information and understand it. Later, you can sue if the property isn't as advertised or there are misrepresentations.

The "waters of the U.S." proposal introduces yet another variable – letters declaring wetlands on private property – into an already complicated home buying process. By removing the analytical requirement before issuing one of these letters, the agencies will make it easier to issue more of them and in more places. The problem is each letter requires the property owner to get a federal permit in order to make certain improvements to their land. But they don't know which improvements require a permit. Those aren't delineated anywhere in the proposal. If on the other hand, they take their chances and don't initiate a potentially lengthy federal negotiation as part of a broken permit process, they could face civil fines amounting to tens of thousands of dollars each day and possibly even criminal penalties.

Also, what's required can vary widely across permits – even within the same district of the Corps. No one will inform you where the goal posts are; just that it's up to you and they'll let you know when you get there. Often, applicants will go through this year-long negotiation only to submit the permit application, find that staff has turned over and they have to start over with a new staffer who has completely different ideas about how to rewrite the permit.

While more U.S. waters letters could be issued under this proposal, the agencies do not provide the detailed information needed for citizens to make informed decisions about these letters. The letter could state for instance: "the parcel is a matrix of streams, wetlands, and uplands" and "when you plan to develop the lot, a more comprehensive delineation would be recommended." Real estate agents will work with sellers to disclose this information, but buyers won't know which portion of the lot can be developed, what types of developments are regulated, or how to obtain the permit. They may consult an attorney about this but will most likely be advised to hire an engineer to "delineate" the wetlands without being told what that means. And even if this step is taken, there is no assurance that this analysis will be accepted by the agency or that a permit will ever be issued.

The potential for land-use restrictions and the need for costly permits will increase the cost of home ownership and make regulated properties less attractive to buyers. Of two homes, all else equal (lot size, number of rooms, etc.), the one with fewer restrictions should have higher property value.[12]

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[12] There is strong empirical data to support this proposition, although economists may disagree. For instance:

- E.L. Glaeser, and B.A. Ward, The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston. Journal of Urban Economics 65 (2009) 265-278.

However, before buying, the buyer will want to know in exactly which ways the property could be restricted as well as how much those restrictions could cost (time, effort, money). They will need this information when weighing whether to come to the closing table and deciding how much to ask in reducing listing price in order to compensate for the hassle of a potential federal negotiation for each unspecified improvement on the property they're considering purchasing.

To illustrate the point, after Congress revised the flood insurance law, many buyers refused to consider floodplain properties not due to the actual insurance cost but because they read in a newspaper about $30,000 flood insurance premiums. Others negotiated reduced sales prices because they feared the property was "grandfathered", and they could potentially see their rates skyrocket, even when, in fact, the home was not grandfathered and the provision of concern had not taken effect and would not for several years. While it may be entirely true that the proposed rule will not cover all homes in a floodplain (only those where a U.S. water is filled) nor regulate such normal home projects as mowing grass and planting flower beds, the takeaway from the flood insurance experience is that buyers make decisions based on fear and uncertainty, both real and *imagined.*

In the case of wetlands, buyers have legitimate reason for concern. Many will have heard the horror story of the Sacketts in Priest Lake, Idaho, who were denied their day in court when they questioned a wetlands determination.[13] Others just south of here in Hampton Roads, Virginia, will read the cautionary tales of buyers suing sellers over lack of wetlands disclosures[14] or neighbor-on-neighbor water wars for mowing grass or planting seedlings.[15] Some might even have a neighbor to two who've been sued over the years for tree removals or grading (e.g., Catchpole v Wagner[16]). This all reinforces the need for the EPA and the Corps to provide more information rather than less about the rule, what it does and does not do, and provide as much detail as possible all upfront.

So far the agencies have responded by breaking up the rulemaking process into two parts, and putting forward only the first. This proposal, which clarifies "waters of the U.S.," determines "who is regulated." The issue here is whether site-specific data and analysis is required before a wetlands letter is issued. "What is regulated" is not a part of this proposal. Nor does the proposal lay out the full range of home projects that trigger a permit. The wetland permitting process itself is an entirely separate rulemaking. The issue there is what exactly I must do when I get one of these letters and how to appeal it.

- K.R. Ihlanfeldt, The Effect of Land Use Regulation on Housing and Land Prices. Journal of Urban Economics 61 (2007) 420-435.

[13] For the chilling facts of case, see: http://www.pacificlegal.org/Sackett

[14] http://hamptonroads.com/2010/05/cautionary-tale-wetlands-violations-will-cost-you

[15] http://hamptonroads.com/2012/05/newport-news-gets-swamped-wetlands-dispute

[16] 210 US Dist LEXIS 53729, at *1 (W.D. Wash. 2010)

Based on a report by the Environmental Law Institute (ELI),[17] that permitting process is broken and needs reform and streamlining to provide some consistency, timeliness, and predictability. But any comments or suggestions about this have been deemed non-germane and will not be considered by the agencies in the context of a "waters of the US" proposal. Because the agencies have decided to play a regulatory shell game with the "who" vs. the "what," property owners have been put in an untenable position of commenting on a regulation without knowing its full impact. Those who own a small business will be denied the opportunity under another law to offer significant alternatives that could clarify or minimize the proposed "waters of U.S." impact while still achieving the Clean Water Act's objectives.[18]

These are some property buyer questions which are not answered by the immediate proposed rule:

- What is the full range of projects that will require a federal permit?
- What can I do on my property without first having to get a permit?
- What do I have to do to get one of these permits?
- What's involved in the federal application process?
- What information do I have to provide and when?
- How long will the permit application take?
- How will my project and application be evaluated?
- What are the yardsticks for avoiding or minimizing wetlands loss?
- What are the full set of permit requirements and conditions?
- Are there changes I can make in advance to my project and increase my chances of approval?
- Can I be forced to redesign my home project?
- What kinds of redesigns could be considered?
- What if I disagree with the agency's decision, can I appeal?
- What exactly is involved in that appeal?
- What do I have to prove in order to win?
- Will I need an attorney? An engineer? Who do I consult?
- And how much will all this cost me (time, efforts, money)?

The "Waters of the U.S." proposal creates these uncertainties into the property buying process.

Uncertainty #1: The "waters of the U.S." proposal does not tell me what I can and cannot do on my own property without a federal permit.

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[17] http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience

[18] For EPA's justification against conducting a small business review panel under the Regulatory Flexibility Act, see: 79 Fed. Reg. 22220 (April 21, 2014).

Not all property owners in the floodplain will be regulated, only those who conduct regulated activities. Again, that information is not found in the "waters of U.S." proposal, and there is not much more in the decision documents from the previous regulation for the "nationwide" (general) permit program (2012). The general permit for commercial real estate (#39) is separate from residential (#29), but both include a similarly vague and uber-general statement about what's regulated:

> "Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development)."[19]

However, construction projects are not the only ones that may require a permit. For example, home owners have been sued for not obtaining one to perform these activities:

- Landscaping a backyard (Remington v. Matheson [neighbor on neighbor])
- Use of an "outdated" septic system (Grine v. Coombs)
- Grooming a private beach (U.S. v. Marion L. Kincaid Trust)
- Building a dam in a creek (U.S. v. Brink)
- Cleaning up debris and tires (U.S. v. Fabian)
- Building a fruit stand (U.S. v. Donovan)[20]
- Stabilizing a river bank (U.S. v. Lambert)
- Removing small saplings and grading the deeded access easement (Catchpole v. Wagner)[21]

Also, the proposal includes exemptions for specific activities performed by farmers and ranchers, but not homeowners or small businesses. The agencies would not have exempted these activities from permits unless they believed these activities could trigger them. Yet, none of these "normal

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[19] http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_29_2012.pdf

[20] Note: The defendant lost because he couldn't finance an expert witness to refute the Corps' wetlands determination; under this proposed rule, the Corps would no longer have to provide any data and analysis at all to support its future determinations; the burden would be entirely on the property owner to come up with that data and analysis on their own.

[21] There is an extended history between Catchpole and Wagner over activity on this easement, and the Corps has been repeatedly drawn into the dispute. In one instance the Sheriff was called, and the Corps had to step in and referee that "normal mowing activity" was not a violation that the Corps would pursue under the Clean Water Act. NAR would expect more of these kinds of disputes to arise, should the proposed rule be finalized.

farming" practices appear to be uniquely agricultural, opening up the non-farmers to regulation. Here are a couple of the listed exemptions but the full set can be found on EPA's website.[22]

- Fencing (USDA practice #383)
- Brush removal (#314)
- Weed removal (#315)
- Stream crossing (#578)
- Mulching (#484)
- Tree/Shrub Planting (#422)
- Tree Pruning (#666)

While the proposal could open up more properties to wetlands letters, permits and lawsuits, it does not in any way limit who can sue over which kinds of activities for lack of permits. It does, on the other hand, reduce the amount of data and analysis the Corps or EPA need in order to declare U.S. waters on these properties, and shifts the entire burden to the property owner to prove one these waters do not exist on their property before they can win or get a frivolous case dismissed.

Uncertainty #2: The proposal doesn't tell me how to get a permit, what's required and how long it will take.

Again, the permitting process is not a part of the 'waters of the U.S.' proposal, denying home owners and small businesses an opportunity to comment on the proposed rule's full impact or offer reasonable alternatives that could minimize the impact while protecting navigable and significant nexus waters. EPA's economic analysis on page 16 does provide an estimate of the average cost for a general permit ($13,000 each).

Costs go up from there. The estimate of $13,000 is only for a general permit and for the application alone; it doesn't include re-designing a project to obtain permit approval or the conditions and requirements which can vary widely across permits. While not providing an estimate of the time it takes to get one of these permit, U.C. Berkeley Professor David Sunding found based on a survey that the "[general] permits in our sample took an average of 313 days to obtain."[23] Individual permits can take even longer and be significantly more expensive.

The reason that general permits have the lowest price tag is because they are intended to reduce the amount of paper work and time to start minor home construction projects that "result in minimal adverse environmental effects, individually or cumulatively." One of the conditions for the permit is

[22] http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_404_exempt.pdf
[23] http://areweb.berkeley.edu/~sunding/Economics%20of%20Environmental%20Regulation.pdf

a project may not disturb more than a ½ -acre of wetlands or 300 linear feet of streambed, the Corp's definition of *de minimis*. However, transaction costs and requirements may vary.

The Environmental Law Institute studied the process, and found very little consistency, predictability or timeliness across permits.[24] The process begins with a letter from the agency declaring U.S. water on the property. Home owners may be given a copy of the law, told to submit any "plans to develop the lot", and be reminded that the burden of proof is entirely on them. No examples of how to comply are offered. There might be a check list (which is widely frowned upon) but there is no single definition or yard stick or practical guidance of any sort for the key compliance terms "avoidance," "minimization" and "practicable."

If you ask "which part of my property can I develop?", the answer is "hire an engineer and delineate it." "What if I make these changes to my project before applying?", the answer may be "I'll know it when we see it." There is no standard approach that the Corps follows to evaluate the project. According to the ELI's interviews, it is common for applicants to go through an entire negotiation and upon submitting an application, find staff turned over and the new individual has a completely different concept of what's most important to avoid and the best way to minimize.

The following are more actual quotes by regulators documented in the ELI report:

- "The question is, how much is enough? It's all judgment. It depends on the person's mood and is extremely variable."
- "We ask them to document plans and show how they get to where they are. If I think you can do more, I'm going to show you. The burden is on the applicant to show me where they've been in the journey."
- "I like to be a rule maker with regard to work I've done, but the more I standardize, the more I restrict myself with regard to find possible solutions."
- "[B]ecause judgments on which impacts are more avoidable or more important exists in a grey area, a lot of the decision making within the Corps depends on professional judgment, causing a lot of variability."
- "There are times when the agency will pressure the applicant to do more avoidance or minimization during the permitting process."
- "There are times when they won't sign off because they want a certain thing. That's the subjective aspect and I think that is the way it ought to work."

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[24] For ELI's report, http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience

Permit decisions appear completely subjective, iterative and not uniform across individual applicants. It seems that whatever the agency assumes is necessary to avoid or minimize wetlands loss, goes. If you refuse to provide a single piece of information or don't go along 100% with a proposed design modification, your permit is summarily denied. In at least one example (Schmidt v. the Corps), the agency denied the permit to build a single family home on a lot in part because the Corps identified other lots the land owner owned and his neighbors didn't seem to be objecting to construction on those lots (yet).

For these reasons, the ELI recommended several reforms to the wetlands permit process, including developing guidelines identifying common approaches and quantifiable standards. But at this time, the agencies don't appear interested in sensible recommendations like these, even if it brings some consistency, certainty or reduces the burden on small business or homeowners while still protecting the environment. "Nationwide permits do not assert jurisdiction over waters and wetlands .... Likewise, identifying navigable waters ... is a different process than the NWP authorization process," according to the Corps.[25]

Uncertainty #3: The proposal doesn't tell me what to do if I disagree with an agency decision, or how to prove the Clean Water Act does not apply to my property.

The proposal asserts jurisdiction over any U.S. water or wetland with more than a "speculative or insubstantial" impact on navigable water. Yet, nowhere does this proposal define those terms or a process for how a homeowner may appeal a U.S. water determination based on "insubstantial or speculative" impacts.

The proposal will eliminate the need for agencies to collect data and perform analysis to justify regulation for most water bodies. Before, it was up to the agencies to prove the Clean Water Act applies, but under this proposal, the burden would shift 100% to the property owners to prove the reverse. And the cost will be higher for property owners because (1) they don't have the expertise needed, (2) there is no guidance for delineating "insubstantial/speculative" impacts, and (3) they have not been learning-by-doing these analyses as the agencies have for decades.

Ironically, the rationale for the proposed rule is these agencies cannot justify the taxpayer expense of site specific data and analysis, yet the proposal is forcing individual taxpayers to hire an engineer and pay for the very same analysis themselves or else go through a broken permit process.

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[25] 77 Fed. Reg. 10190 (Feb. 21, 2012)

Administrative inconvenience is not a good excuse. If it's too hard for the federal government to do some site visits, data collection and analysis in order to justify their regulations, then perhaps it's simply not worth doing.

Conclusion

Based on the forgoing, NAR respectfully requests that Congress step in and stop these agencies from moving forward with a proposed rule that removes the scientific basis for "waters of U.S." regulatory decisions. It does not provide certainty to taxpayers who own the impacted properties and will complicate property and home sales upon which the economy depends.

Thank you for the opportunity to submit these comments. NAR looks forward to working with committee members and the rest of Congress to find workable solutions that protect navigable water quality while minimizing unnecessary cost and uncertainty for the Nation's property owners and buyers.

Statement for the Hearing Record of the Association of American Railroads

Senate Committee on Agriculture, Nutrition & Forestry

"Waters of the United States: Stakeholder Perspectives"

March 24, 2015

The Association of American Railroads (AAR) appreciates the opportunity to submit a statement for the hearing record on the proposal of the Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACE) to define "Waters of the United States" under the Clean Water Act (CWA).

Railroads are a critical part of our Nation's transportation system, providing for the safe movement of freight and passengers throughout the continental United States and Alaska. Railroads operate more than 140,000 miles of right-of-way. In the nearly 200-year history of railroad activity in the United States, rail has become established as one of the most efficient and environmentally friendly forms of transportation. Since a train can move one ton of freight almost 500 miles on a single gallon of fuel, railroads substantially reduce greenhouse gas emissions by lowering fuel consumption. As the economy grows, railroads will continue to provide a foundation on which U.S. industry relies.

The adverse effects of the proposed rule on railroad operations and rail construction -- and as a result on both the economy and our environment -- could be substantial. In particular, the proposed rule defines ditches with any "presence" of water, even during above-normal rain years, as "perennial tributaries." The proposed rule also uses other terms it does not define, such as "upland," "waters," "floodplain" and "riparian." While those terms are not defined, it appears that the proposed rule would make ditches "waters of the US," expanding the scope of CWA in an extraordinary way. This dramatic expansion of the scope of the CWA would adversely impact the railroad industry very directly.

Due to safety and engineering requirements for flat terrain, many of today's rail transportation corridors were placed near or along waterways, well before Congress enacted the CWA. The expanded definition of waters of the United States apparently would include many areas where rail corridors are located. Rail operations and maintenance, including federal requirements for rail safety, require that railroads construct and maintain access roads, signals, and other operating equipment within rail right-of-ways. Designating those areas as subject to CWA permitting, mitigation and enforcement requirements would substantially disrupt and interfere with that work, which is so critical to the safety and efficiency of our operations.

Ditches have been an integral part of rail construction since the start of the rail industry in the 1800s. Ditches play a critical role in rail safety by ensuring proper drainage, thus preventing the undermining of railroad bed material and potential sloughing, shifting, and

uneven trackage. Ditches also avoid washouts and ensure safe travel at speed. Rail drainage is required under federal regulations and is subject to detailed industry specifications. *See* 49 C.F.R. Part 213. Given the ubiquitous presence of ditches along railroad rights-of-way, well over 100,000 miles of rail ditches may potentially be affected by the proposed rule and may be considered waters of the United States for purposes of permitting, mitigation, and enforcement.

If most railroad ditches become waters of the U.S., ACE would have to issue a substantial number of new and revised/modified NPDES permits; Stormwater Pollution Prevention Plans would have to be revised at substantial costs; there would be extensive costs to mitigate any time any of the nation's hundreds of thousands of miles of road, railway and other drainage ditches newly considered waters of the U.S. require relocation, expansion or in some cases maintenance; and associated regulatory burdens on both the regulated community and governmental agencies would rise substantially because historic resource, protected species and other consultation would be required before moving or constructing any rail ditch.

There is no evidence in the record that railroad ditches cause environmental harm. Subjecting hundreds of thousands of miles of ditches to NPDES permitting would be burdensome for the agency, prohibitively costly for industry, and ultimately unnecessary to meet the goals of the CWA. The proposed rule purports to provide mitigation measures that would exempt ditches from the definition of waters of the U.S.; however, such measures are difficult to achieve and cost prohibitive. Applying EPA's estimate of $177 to $265 per linear foot, the potential costs for industry to avail itself of the exemptions provided under the proposed rule could exceed $100 billion. This would be in addition to the costs of additional permitting and consultation.

Expanding the scope of waters of the U.S. in these ways would create regulatory hurdles that would make it difficult for railroads to perform prompt maintenance, leading to less safe rail transportation. Construction would become far more complex and costly, as permits may be required in uplands, floodplains, and riparian areas. Few –if any- environmental benefits would result. We urge the Committee to ensure that the agencies' proposal is withdrawn.

NATIONAL CATTLEMEN'S BEEF ASSOCIATION
1301 Pennsylvania Ave., NW, Suite #300 • Washington, DC 20004 • 202-347-0228 • Fax 202-638-0607

March 23, 2015

The Honorable Pat Roberts (R-KS)
Chairman
Committee on Agriculture, Nutrition & Forestry
U.S. Senate
328A Russell Senate Office Building
Washington, DC 20510

The Honorable Debbie Stabenow (D-MI)
Ranking Member
Committee on Agriculture, Nutrition & Forestry
U.S. Senate
328A Russell Senate Office Building
Washington, DC 20510

Dear Chairman Roberts and Ranking Member Stabenow:

First and foremost, I want to thank you for your interest in this issue and for including language in the omnibus package that led to the withdrawal of EPA's WOTUS Interpretive Rule. I am thankful that Congress continues to be engaged on this because EPA intends to finalize the underlying rule, the WOTUS rule, at some point this year.

Animal agriculture producers pride themselves on being good stewards of our country's natural resources. We maintain open spaces, healthy rangelands, provide wildlife habitat and feed the world. But to provide all these important functions, we must be able to operate without excessive federal burdens, like the one we are discussing today. I am extremely concerned about the devastating impact this proposed rule could have on me and other ranchers and farmers. As a livestock producer, I can tell you that after reading the proposed rule it has the potential to impact every aspect of my operation and others like it by regulating potentially every tributary, stream, pond, and dry streambed on my land. What's worse is the ambiguity in the proposed rule that makes it difficult, if not impossible, to determine ***just how much*** my farm will be affected. This ambiguity over key definitions will result in disparate interpretation by bureaucrats in different regions of the country and place all landowners in a position of uncertainty and inequity. Because of this, I ask that the EPA and the Army Corps of Engineers withdraw the proposed rule and sit down with farmers and ranchers to discuss our concerns and viable solutions, ***before*** any additional action.

Let's be clear - everyone wants clean water. Farmers and ranchers rely on clean water to be successful. But, expanding the federal regulatory reach of the EPA and Army Corps does ***not*** equal clean water. After reading the proposed rule, I can say that only one thing ***is*** clear, the proposed definitions are ambiguous. If the agencies' goal was actually to provide clarity they have missed the mark completely. Despite the agencies' assertion that a tributary is clearly defined by a bed, bank, and ordinary high water mark, confusion and ambiguity is introduced when the rule explains "[a] water that otherwise qualifies as a tributary under the proposed 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 debris piles, boulder fields, or a stream segment that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." How far will I have to look "upstream" to ensure I am not breaking the law for applying fertilizer or pesticide

into an area that may lack a bed and a bank and an ordinary high water mark yet is still considered a jurisdictional water?

Although the proposed rule provides exemptions for ditches, they are ambiguous and are of little or no value to agricultural operations. For example, the proposed rule excludes "ditches that are excavated wholly in uplands, drain only uplands and have less than the perennial flow." Unfortunately, the term, "uplands" was not explained or clarified in the proposed rule.

Similarly, the proposed rule also excludes "ditches that do not contribute flow either directly or through another water" to navigable waters or tributaries. To qualify for this exclusion a ditch must contribute zero flow (even indirectly) to any navigable water or tributaries. Because most ditches convey at least small flow indirectly to minor tributaries, this exclusion provides no benefit to agricultural operations.

The proposal would also make everything within a floodplain and a riparian area a federal water by considering them "adjacent waters." While this alone is concerning, the extent of this authority is equally ambiguous. The proposed rule provides no clarification on how far a riparian area extends away from the water body nor does it delineate the flood frequency that would determine jurisdictional boundaries. Using "best professional judgment" to answer this on a case-by-case basis, as is suggested in the proposed rule, provides no meaningful guidance to agricultural operations and once again highlights the proposed rule's lack of clarity.

Farmers and ranchers often rely on working and shaping the land to make it productive. This includes installing practices to control and utilize stormwater for the benefit of growing crops and forage and also sustaining and protecting livestock. Regardless of the agencies' claims to the contrary, the new jurisdictional framework crafted from the proposed rule would require me to obtain federal permits to plow certain fields, apply fertilizer, graze cattle in the pasture, or build a fence.

Not only could I be required to obtain a 404 permit for grazing my cows in the pasture or a 402 permit for my feeder cattle, but by making it a federal water there are now considerations under the National Environmental Policy Act and the Endangered Species Act due to the federal decision-making in granting or denying a permit. There is also the citizen suit provision under Section 505 of the Clean Water Act that would expose my operation and my family to frivolous legal action and unnecessary expense. For the price of a postage stamp someone who disagrees with eating red meat could throw me into court where I will have to spend time and money proving that I am not violating the Clean Water Act. This is not what anyone had in mind when Congress passed the Clean Water Act forty-three years ago.

I'm fearful the proposed rule, if finalized without substantial change, will result in cattle grazing becoming a discharge activity subject to legal liability under the Clean Water Act. To my knowledge, the federal government has not considered cattle, raised on pastures, to be a point source or require dredge and fill permits to operate. Unfortunately, the proposed rule seems to be the mechanism that will initiate these changes. This did not have to be the result; all the agencies had to do was engage agriculture early on in the process, incorporate our suggestions and we

would be much farther along in crafting a rule that actually would clarify the scope of Clean Water Act jurisdiction.

We are particularly concerned with the lack of outreach with the small business community, contrary to the Regulatory Flexibility Act. As a family-owned business and knowing the detrimental impact this regulation will have on my operation, it is appalling the agencies could assert that it will not have a "significant economic impact on a substantial number of small entities." It is clear to me that the rule's primary impact will be on small landowners across the country. The agencies should have conducted a robust and thorough analysis of the impact, but it is clear from the certification that they have not completed this important step in developing the regulation. There was also zero outreach to us in the agriculture community before the rule was proposed. Despite what the EPA and Army Corps are saying, they did not have a meaningful dialogue with the small business community as a whole. Even when cattle producers asked the head of EPA's Office of Water a year ago about the proposal, all we were told was to "wait and see what the proposal says." What we got was a proposal that doesn't work for small businesses, doesn't work for animal agriculture, and doesn't work for the environment. If you give us the tools to achieve improved water quality, we will be receptive to that and work together.

We want to continue to do our part for the environment, but this ambiguous and expansive proposed rule does not help us achieve that. This is why the animal agriculture community has joined with land owners across the country asking the EPA and Army Corps to withdraw the current WOTUS Proposed Rule. Then EPA and Army Corp must have serious and meaningful dialogue with the agricultural community to find the necessary solution that will provide the clarity and certainty we require. We look forward to working with the Committee on Agriculture, Nutrition & Forestry to ensure that we have the ability to do what we do best – produce the world's safest, most nutritious, abundant and affordable protein while giving consumers the choice they deserve.

Sincerely,

Phillip Ellis
President, National Cattlemen's Beef Association

Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States

PREPARED FOR

The Waters Advocacy Coalition

PREPARED BY

David Sunding, Ph.D.

May 15, 2014

THE Brattle GROUP

This report was prepared for the Waters Advocacy Coalition. All results and any errors are the responsibility of the authors and do not represent the opinion of The Brattle Group, Inc. or its clients.

Acknowledgement: We acknowledge the valuable contributions of many individuals to this report and to the underlying analysis, including members of The Brattle Group for peer review.

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Executive Summary

The Environmental Protection Agency's (EPA) March 2014 *Economic Analysis of Proposed Revised Definition of Waters of the United States* (EPA analysis) presents the agency's estimates of the probable costs and benefits associated with a definitional change to the term "waters of the United States" used throughout Clean Water Act (CWA) programs. EPA is proposing an expansion of the definition of the term "waters of the United States" to include categories of waters that were previously never regulated as waters of the United States, such as all waters in floodplains, riparian areas, and certain ditches. The inclusion of these waters will broaden the scope of the CWA and will increase the costs associated with each program. Unfortunately, the EPA analysis relies on a flawed methodology for estimating the extent of newly jurisdictional waters that systematically underestimates the impact of the definitional changes. This is compounded by the exclusion of several important types of costs and the use of a flawed benefits transfer methodology, which EPA uses to estimate the benefits of expanding jurisdiction. The errors, omissions, and lack of transparency in EPA's study are so severe as to render it virtually meaningless. The agency should withdraw the economic analysis and prepare an adequate study of this major change in the implementation of the CWA.

I. Introduction

The March 2014 *Economic Analysis of Proposed Revised Definition of Waters of the United States* represents EPA's estimate of the economic impacts associated with a change in the scope of the waters regulated under the CWA. The analysis centers of the meaning of the term "waters of the United States," which determines whether the requirements of the federal CWA apply. After several landmark Supreme Court decisions rejected expansive federal jurisdiction, EPA produced several guidance documents explaining how the agency would proceed in making jurisdictional determinations in the CWA section 404 program. The guidance documents were not legally binding and created additional uncertainties about the scope of CWA jurisdiction.

Recently, EPA proposed a rule to revise the "waters of the United States" definition for all CWA programs (402, 401, 311, etc.). The draft rule, for the first time, includes a regulatory definition of "tributary" that explicitly includes many kinds of irrigation, storm water, roadside and other ditches. The draft rule also extends jurisdiction to "adjacent waters," which includes, for the first time, adjacent non-wetlands. It also defines a new component of the "adjacent" definition—"neighboring." The term "neighboring," for the purposes of defining the term "adjacent" in the new rule, includes waters located within riparian and floodplain areas. The draft rule also defines "riparian areas" and "floodplain" for the first time. The new rule would also regulate all "other waters" if they have significant nexus, which would be determined on a case by case basis. EPA asserts that these changes would improve the clarity of the CWA and would expand environmental benefits by requiring additional compensatory mitigation for discharges of dredged or fill material into such waters. It also recognizes the possibility of increased costs to permit seekers and regulatory agencies, albeit for a very narrow range of potential actions. EPA's economic analysis, which is required by law for a proposed rule change, outlines the economic impacts associated with a change in the definition of "waters of the United States."

A threshold problem with EPA's analysis is that it deals only with the "other waters" category of CWA jurisdiction. The economic analysis focuses on how jurisdiction might change for "isolated waters" that are not jurisdictional under the current CWA framework as a result of *SWANCC*, but are likely to become jurisdictional under an expanded definition of "other waters". This would allow for jurisdiction over isolated areas that, when aggregated, are found to have a significant nexus to traditional navigable waters.

According to EPA's analysis, "'other waters' is a regulatory term for wetlands and non-wetlands waters that do not fall into the category of waters susceptible to interstate commerce (e.g., 'traditional navigable waters' or TNWs), interstate waters, the territorial seas, tributaries, or waters adjacent to waters in one of the first four categories on this list." As discussed in more detail below, to determine how jurisdiction would change for the "other waters" category, the U.S. Army Corps of Engineers (Corps) performed a sample review of 262 project files from the Corps' ORM2 database "isolated waters" category. All of these 262 records are considered outside

the scope of CWA jurisdiction under current regulatory policies, but the agencies predicted that approximately 17% of these records would be subject to CWA jurisdiction under the new rule.[1] The agencies did not do a similar sample review to determine how jurisdiction might change for other jurisdictional categories of waters (i.e., tributaries and adjacent waters, as newly defined). EPA's Economic Analysis simply assumes that the small percentage of FY 2009-2010 ORM2 streams and wetlands records that are not jurisdictional under current regulatory policies (2% of streams and 1.5% of wetlands) would become jurisdictional under the new rule.

But the agencies' draft rule does much more than just expand the scope of the "other waters" category. As previously explained, it also includes several new categories of jurisdiction and new definitions for regulatory terms, which will result in regulation of new features and areas that are not jurisdictional or considered waters of the United States under the current CWA framework. These changes will sweep in many new areas yet EPA's analysis does not quantify or address this change.

This report provides an analysis of the calculations employed by EPA. In many cases, the lack of transparency and supporting documentation in EPA's analysis made the replication of calculations difficult. The following sections address the methodology behind the incremental acreage determination, the program cost calculations, and the benefit calculations.

II. EPA Cannot Accurately Quantify Increases in Jurisdiction by Using the Corps' ORM2 Database

To quantify the increased extent to which EPA and the Corps will assert CWA jurisdiction as a result of the draft waters of the U.S. rule, EPA evaluated data records from FY 2009-2010 in the Corps' ORM2 (Operation and Maintenance Business Information Link, Regulatory Module) database. Although records from the Corps' internal ORM2 database are not available to the

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[1] Given the existing confusion regarding 404 jurisdiction that has been well documented, see GAO-04-297, it is questionable whether the assertion of jurisdiction by the Corps was consistent or accurate. Indeed, many have questioned existing assertions as overbroad.

public, we obtained a portion of the underlying ORM2 data used for these calculations through a Freedom of Information Act request. EPA's use of the ORM2 numbers to calculate how much the draft rule will increase CWA jurisdiction is problematic because the ORM2 database was not designed for this purpose and its data do not fit this exercise.

EPA cannot accurately quantify increases in jurisdiction by relying solely on the Corps' ORM2 database for several reasons. As is explained more fully below, the categories of ORM2 records do not marry up with the draft rule's categories of jurisdictional waters. In addition, the ORM2 data fail to capture the entire universe of areas that are jurisdictional under the current CWA framework because it only accounts for situations in which regulated entities engage in the section 404 jurisdictional determination or permitting process. Even for those instances where regulated entities engage in that process, the ORM2 database does not capture all aquatic resources on the subject parcel because the Corps focuses only on impacted areas and mitigation sites. Finally, because Corps staff is not required to fill in the "aquatic resource type" field in the ORM2 database, EPA failed to account for a large portion of records in its calculations of the increase in jurisdiction.

The categories of records available on the ORM2 database do not match up with the categories of jurisdictional waters provided in the proposed "waters of the US" rule. The ORM2 records are categorized according to "aquatic resource types" based on EPA's and the Corps' 2008 Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.* Therefore, the ORM2 database records are categorized based on concepts developed by the agencies after *Rapanos* and *SWANCC*, such as "traditional navigable waters,"

"relatively permanent waters," "wetlands adjacent to relatively permanent waters," and "isolated waters."[2]

In the draft rule, the agencies introduce new categories of jurisdictional waters and new definitions for important terms. The draft rule provides, for the first time, a regulatory definition of "tributaries," which explicitly includes ditches. It also includes an "adjacent waters" category that includes both wetlands and non-wetlands. As it did previously, the draft rule defines "adjacent" as "bordering, contiguous or neighboring." But the rule, for the first time, defines "neighboring" to include riparian areas and floodplains, and provides new, broad definitions of "riparian area" and "floodplain." The rule also, for the first time, provides a regulatory definition for "significant nexus," and provides that "other waters" may be jurisdictional on a case-specific basis if they, individually or when aggregated with other similarly situated waters, have a significant nexus with other jurisdictional waters.

Importantly, the ORM2 database does not track information on these new terms and categories of jurisdiction. For example, EPA's analysis recognizes that the ORM2 "isolated waters" category does not take into account the rule's new aggregation principle and explains that EPA could not assess the potential impacts of aggregation of other waters within a watershed without "actual field experience." Indeed, EPA's analysis also acknowledges that there will be additional costs to the Corps to update the ORM2 system to "reflect needed data elements" as a result of the rule's new jurisdictional categories. But EPA does not alter its analysis to account for this major deficiency. As a result, numbers extrapolated from the ORM2 records, which do not marry up

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[2] When inputting records into the ORM2 database, a Corps field officer can select any one of the following aquatic resource types: (1) traditional navigable waters (TNWs); (2) wetlands adjacent to TNWs; (3) relatively permanent waters (RPWs) that flow directly or indirectly into TNWs; (4) wetlands directly abutting RPWs that flow directly or indirectly into TNWs; (5) wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs; (6) non-RPWs that flow directly or indirectly into TNWs; (7) wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs; (8) tributary consisting of both RPWs and non-RPWs; (9) isolated (interstate or intrastate waters), including isolated wetlands; (10) uplands; (11) wetlands assessed for delineation purposes only (and not for jurisdictional purposes); and (12) impoundments. Alternatively, as discussed below, the Corps field officer may input records without completing the "aquatic resource type" field.

with the draft rule's categories of jurisdiction, are not useful for approximating the percentage of increase in jurisdiction or the increase in jurisdictional acreage.

The ORM2 data does not capture the entire universe of jurisdictional areas under the current CWA framework. First, the Corps records account only for situations in which regulated entities seek a section 404 permit, approved jurisdictional determination (AJD), or wetland delineation. The ORM2 database does not include records for preliminary jurisdictional determinations (PJDs), which allow for a party to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site, usually in the interest of allowing the landowner to move ahead expeditiously to obtain a Corps permit. With a PJD, the landowner agrees to treat all waters and wetlands that would be affected in any way by the permitted activity on the site as if they are jurisdictional waters of the U.S.[3] Thus, EPA's Economic Analysis fails to account for large numbers of acres across the country that may be impacted by the regulations. Indeed, most regulated entities in the 404 program have relied on PJDs after 2008 due to the uncertainty of jurisdiction stemming from inconsistency across agency policies. Waters for which jurisdiction is unclear is precisely the group of waters that the agencies are purporting to address in this draft rule. Accordingly, EPA's claim that these waters are irrelevant for analyzing the draft rule's economic impacts is incorrect.

Second, EPA purports to account for its failure to capture the entire universe of jurisdictional areas by explaining,

> Landowners and developers may assume that some waters are non-jurisdictional and not request a determination or engage in the permitting process. These waters would not be represented in the ORM2 FY2009-2010 database. However, these waters are also likely to be the most isolated and the least connected to

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[3] *See* U.S. Army Corps of Engineers, Regulatory Guidance Letter 08-02 (June 26, 2006).

> other waters and therefore the least likely to have their status changed under this proposed rule.

In other words, EPA is saying that the waters for which a reasonable person is likely to have never needed a JD are only those so isolated that they would not be jurisdictional anyway. But the new rule, by capturing ditches, intermittent streams, streams that are connected only underground, adjacent waters, and waters that have been disconnected from downstream waters by barriers, includes many waters that no reasonable person every would have thought of as jurisdictional.

In relying on the Corps' ORM2 database, EPA's Economic Analysis does not recognize the instances in which landowners have not engaged in the section 404 permitting process because they have not sought to fill areas of their land or because their property is not jurisdictional under the current regulatory framework. This situation is not limited to areas with isolated waters. The draft rule brings in many features (*e.g.*, adjacent waters, ditches) that were not previously jurisdictional and would not be included in the Corps' ORM2 records.

Third, even for those instances where landowners engage in the jurisdictional determination or permitting process, the ORM2 database does not capture all aquatic resources on the subject parcel. Rather, the Corps records focus on *impacted* areas and mitigation sites. For example, if an applicant seeks a permit to impact .25 acres on a 5-acre parcel of land, only the aquatic resources on the .25 acres that would be impacted are captured in the ORM2 database. Aquatic resources on the remainder of the parcel would not be captured.

Fourth, "aquatic resource type" is not a required field for Corps staff to fill out in the ORM2 database. As a result, of the 196,208 ORM2 FY2009-2010 records used by EPA in its calculations, 36,063 (18.4%) did not have an associated aquatic resource type selected. This "water type null" category was not accounted for in EPA's calculation of the 2.7% increase in jurisdictional waters under the new rule or any other calculations in the economic analysis.

Finally, by relying on only ORM2 data, EPA fails to evaluate the extent to which the expansion of jurisdiction could have consequences for activities other than the discharge of dredged or fill material. EPA's analysis simply assumes that the distribution of water body types and the relative distribution of jurisdictional vs. non-jurisdictional waters will be the same, regardless of whether the activity in question is the discharge of dredged or fill material, the discharge of wastewater or stormwater, or an activity subject to CWA section 311 or similar spill control requirement. EPA did not make any attempt to evaluate whether the numbers and types of water affected by these activities were the same as those affected by activities subject to 404.

For all these reasons, EPA's use of ORM2 data throughout its economic analysis to quantify the increase in jurisdiction is highly suspect and results in woefully inaccurate projections.[4]

III. Errors with EPA's Incremental Acreage Calculations

Calculations of costs and benefits in EPA's analysis rely on an estimate of the acreage that would become jurisdictional under a definitional change. The Corps estimates this incremental acreage by examining their ORM2 database of CWA permit applications. Corps staff reviewed a sample of 262 old project files relating to section 404 using the new jurisdictional criteria. Of these files, 67% pertained to streams, 27% to wetlands, and 6% to "other waters." The Corps found that 98% of the streams, 98.5% of the wetlands, and 0% of the other waters were jurisdictional under existing guidance. Under the new criteria, it found that 100% of the streams and wetlands and 17% of the other waters would become jurisdictional.[5] Corps staff concluded that an expanded definition of "waters of the United States" would result in 2.7% more jurisdictional waters than under the current definition. These calculations are summarized in Table 1.

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[4] As explained more fully below, EPA's sensitivity analysis does not adequately make up for this deficiency because the 2.7% percentage increase figure used throughout the economic analysis is based on ORM2 data without sensitivity analysis calculations.

[5] EPA reviewed a subset of 50 project files for "other waters" and determined 15% would be jurisdictional.

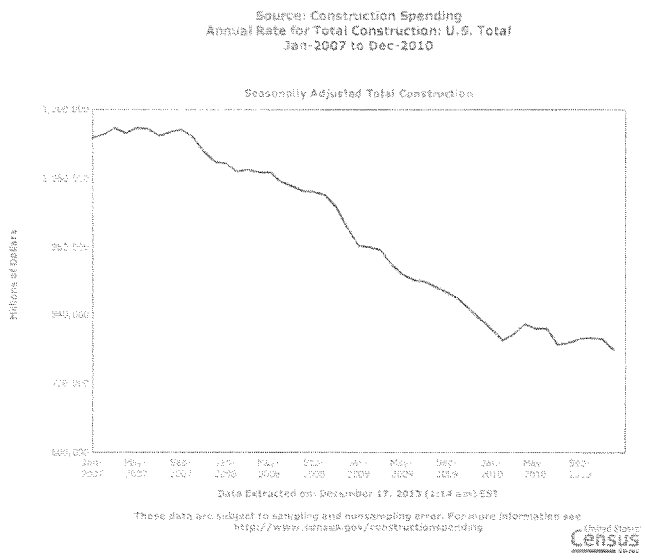
Table 1: Calculation of Increased Jurisdiction

	No. ORM Records	No. Positive Juris.	Proj. Positive Juris.	% Total ORM2 Records	% Positive Juris.	Proj. Positive Juris.
Streams	95,476	93,538	95,476	67%	98.0%	100.0%
Wetlands	38,280	37,709	38,280	27%	98.5%	100.0%
Other Waters	8,209	0	1,396	6%	0.0%	17.0%
Total	141,965	131,247	135,152	100%	92.5%	95.2%

EPA's analysis arrives at the conclusion that the new rule will result in a total of 1,332 acres of added impacts from additional permits under section 404 alone. This incremental acreage represents a 2.7% increase in the number of permits multiplied by the average impact per permit (see Table 3). Although EPA argues that it has used upper bound estimates of costs for many of the cost categories, its analysis is flawed in at least four major ways. This leads to a significant underestimation of total added impacts.

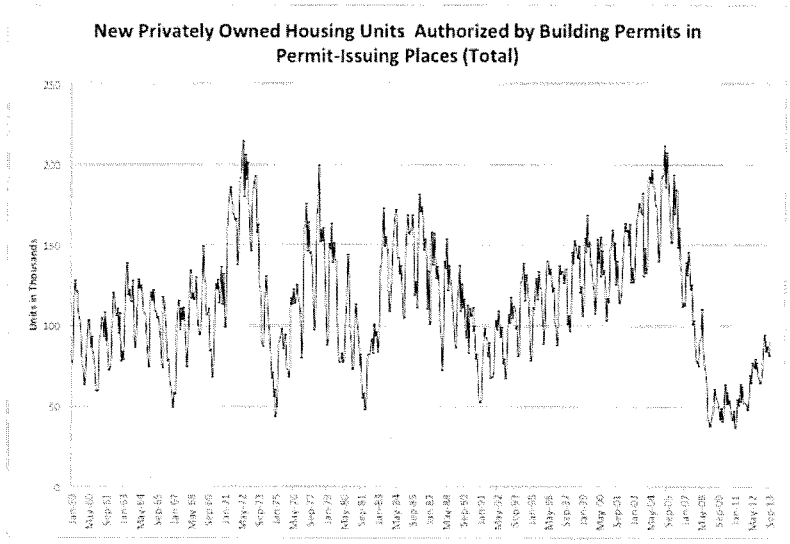
The analysis uses FY 2009/2010 as the baseline year to estimate impacts. FY 2009/2010 was a period of significant contraction in the housing market due to the financial crisis. As Figure 1 indicates, construction spending during these two fiscal years was 24% below that of the previous two-year period. In statistical terms, this is an issue of sample selection, where due to exogenous events the sample selected for the analysis is not representative of the overall population. The report bases its finding on a period of extremely low construction activity, which will result in artificially low numbers of applications and affected acreage. Even if the percent increase in added permits is correct, using the number of permits issued in 2010 as a baseline is very likely a significant underestimation of the affected acreage in years not subject to a crisis in the building sector.

Figure 1: United States Construction Spending, 2007-2010



If one examines building permit data for all types of construction since 1959, it is apparent that choosing FY 2009/2010 as representative years is problematic, as building permit filings were at an all-time low during this period. Figure 2 displays Census data on building permits at the national level. Again, this figure shows that the baseline time period chosen by EPA is not representative and biases the added acres calculation downwards, unless the nation's building sector never recovers.

Figure 2: New Privately Owned Housing Units Authorized by Building Permits



EPA's analysis uses an expert review to calculate a percent increase in jurisdiction. In order to arrive at the 2.7% estimate, EPA reviewed historical filing and made judgment calls as to which filings would be subject to the new rule. According to its analysis the projected percent of positive jurisdiction would rise to 100% for streams and wetlands filings (up from 98% and 98.5%, respectively) and 17% for "other waters" (up from 0%). This analysis assumes that the new rule will not affect the number of total filings. It is clear that projects that were previously not thought to be subject to the new rules did not file permitting requests. Under the new rules, however, more projects likely will be required to seek permits. What this means is that the share of projects entering the permitting process is likely to increase, which will increase the projected number of positive jurisdictional determinations and the incremental acreage estimates.

Although the report's conclusions remain unchanged, EPA provides a brief sensitivity analysis to address the influx of new applicants that had previously not entered the permitting process. It acknowledges that permit applications associated with "other" waters could double under the

proposed rule and provides several alternative estimates of the incremental effects associated with this increase. These scenarios are included in Table 2, which is reproduced from the EPA analysis.

Table 2: Alternative Incremental Jurisdiction Results from EPA Analysis [6]

Scenario[1]	Description	Option 1: Proportional Doubling[2]		Option 2: Non-Juris. Doubling[3]	
		% Other Waters Juris.	% Incremental Increase	% Other Waters Juris.	% Incremental Increase
A	5% of non-jurisdictional other waters are jurisdictional under the proposed rule	21.0%	2.9%		
B	10% of non-jurisdictional other waters are jurisdictional under the proposed rule	26.0%	3.2%		
C	There are double the number of other waters	17.0%	3.5%	8.5%	2.7%
D	There are double the number of other waters and 5% of non-jurisdictional other waters are jurisdictional under the proposed rule	21.0%	4.0%	13.0%	3.2%
E	There are double the number of other waters and 10% of non-jurisdictional other waters are jurisdictional under the proposed rule	26.0%	4.5%	18.0%	3.6%
1	Scenarios A and B do not include a doubling of records. Their impacts are listed under the proportional doubling columns for simplicity				
2	Proportional doubling refers to the doubling of records for both jurisdictional and non-jurisdictional other waters "in the same proportions as the original set of records"				
3	Non-Jurisdictional doubling refers to the doubling that "includes only [non-jurisdictional] other waters, and that adjacent other waters are only represented in the original set of records".				

EPA suggests that the doubling of records for only non-jurisdictional waters and an additional 5% increase in jurisdictional waters (scenario D, option 2) is the most likely alternative. Thus, EPA's upper bound estimate of the incremental increase in jurisdiction associated with a definitional change is 3.2%. However, the assertion is completely unjustified and is not accompanied by an explanation for why the number of section 404 permits may double with only a 5% increase in residual positive jurisdictional determinations. Additionally, this

[6] The derivation of these values is complex and omitted from this table. There are small discrepancies between EPA values and the author's recreation of EPA values, presumably due to rounding.

assessment is completed as an afterthought to the economic analysis and has no bearing on the calculations of costs and benefits associated with a definitional change.

The analysis considers only permitting data from section 404 and applies the estimated shares to all other relevant sections of the CWA. There is no reason to believe that this is a valid approach given the significant differences in the location of these types of economic activities and the nature of the activities that give rise to permitting requirements across the sections. EPA recognizes this limitation, writing "while there is only one CWA definition of 'waters of the United States,' there may be other statutory factors that define the reach of a particular CWA program or provision."[7] Unfortunately, this warning is ignored in the current analysis, and the incremental acreage estimation for all programs relies wholly on section 404 estimates.

EPA derived the number of acres per permit using the FY 2009/2010 data, taking the total number of acres permitted during that period and dividing this number by the number of permits issued. The analysis as presented does not allow one to study the underlying heterogeneity at the state level. There is a danger of significantly underestimating the impacts by using a 2.7% increase in combination with the average project size. If the new rules disproportionately affect larger projects, the proposed approach using averages underestimates the affected acres. There is no way of knowing whether this is the case without being able to review the expert judgment analysis conducted by EPA and the Corps.

Before turning to the calculation of incremental costs, it is worth noting that there are scientifically valid approaches to determining the number of acres that would become jurisdictional under the proposed rule. For the reasons describe above, the ORM2 database used by EPA is not a valid basis for inferring incremental impacts. The most important reason is that it is not a random or representative sampling of all affected projects and areas, rather it suffers from potentially severe selection bias.

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[7] EPA 2011. *Draft Guidance on Identifying Waters Protected by the Clean Water* Act. p 3.

IV. Errors with EPA's Incremental Cost Calculations

EPA's analysis calculates the costs of the proposed definitional change for several CWA regulatory programs, but emphasizes costs associated with section 404. Since many 404 permits are issued for development near wetlands and small streams, the systematic inclusion of these waters in the CWA is expected to increase costs to developers and administrative entities. Authors of EPA's analysis recognize four categories of costs associated with section 404 compliance. These include: permit application costs; compensatory mitigation costs; permitting time costs; and impact avoidance and minimization costs. Due to information constraints, the report quantifies only the first two types of costs.

Section 404 permit application costs are calculated by taking the number of individual and general section 404 permits that were issued in FY 2009/2010 and determining how many more would be issued under the new rule (2.7%).[8] These additional permits are multiplied by the average geographic impact per permit to determine how many additional acres would be impacted under the revised definition.[9] This incremental acreage of newly jurisdictional waters is multiplied by two different estimates of per-acre costs; a 1999 Corps review of permitting costs for "typical" projects up to three acres in size and a study by Sunding and Zilberman in 2000 that synthesized internal estimates of permitting costs from a sample of public and private developers. These calculations are summarized in Table 3.

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[8] Information about section 404 permits comes from the Corps' ORM2 database.

[9] Average impact per added permit reflects an average of permanent impacts from projects in FY2010 and excludes temporary impacts, ecological restoration and conversion activities.

Table 3: Derivation of Permit Application Costs

Permit Type	Permits issued FY2010	Added Permits (2.7% increase)	Average Impact Per Added Permit (Acres)	Total Added Impacts (Acres)	Costs from Corps' Analysis (2010$)	Costs from Sunding and Zilberman Study (2010$)	Additional Annual Cost (2010$ millions)
Individual	2,766	75	12.81	960	$31,400 / permit	$57,180 / permit + $15,441 / acre	$2.4 - $19.1
General	49,151	1,327	0.28	372	$13,100 / permit	$22,079 / permit + $12,153 / acre	$17.4 - $33.8
Total	51,917	1,402		1,332			$19.8 - $52.9
Calculations	*A*	*B = A*0.027*	*C*	*D = B*C*	*E*	$F_{1,2}$	*Lower: E*B Upper: $(F_1 * B)+(F_2 * D)$*

The distinction between individual and general permits is important for the purpose of evaluating the cost of a definitional change. Individual permits are required for activities that are expected to have significant impacts on a nearby water body. General permits are issued for projects that will have minimally adverse effects and fit within specific categories (i.e., bank stabilization projects, hydropower projects, etc.). The EPA analysis ignores any potential changes to the distribution of individual and general permits. The addition of jurisdictional waters could force a restructuring in the permitting system where projects that were previously eligible for general permits must apply for individual permits. These changes would have notable implications to the overall cost of the definitional change, but they are omitted from the analysis.

The EPA analysis also ignores the heterogeneity in impacted acreage within these two categories. Instead, they calculate an average for each type of permit that provides a single estimate of project size. This estimate is derived from FY 2009/2010 ORM2 data and suffers from the same sampling limitations discussed above. Since projects developed during this period were likely smaller (in additional to less numerous), this has the effect of compounding the underestimation of project costs. To illustrate the implications of this methodology, suppose the incremental

increase estimates are "updated" by increasing the number of new permits by 24% and the average size of impacts by 10%.[10] The incremental acreage estimates would be 36% higher (1,812 acres), with associated costs ranging from $24.5 million to $68.0 million (a 24-28% increase from EPA estimates). While this methodology still suffers from important shortcomings, this exercise reveals how sensitive section 404 permitting costs are to issues of sampling bias.

EPA's analysis of section 404 permit application costs suffers from several additional deficiencies. The data on permitting costs from the Sunding and Zilberman study are nearly 20 years old and are not adjusted for inflation or any other changes in the permit system. Thus, they likely underestimate the present cost of the permitting process. This underestimation is enhanced by the exclusion of other costs addressed in the Sunding and Zilberman study. Specifically, the EPA analysis ignores the costs of avoidance and delay, which are likely to dominate the out-of-pocket expenses for permit application and mitigation. The study suggests that general permits cost $28,915 and take an average of 313 days to complete, and individual permits cost $271,596 and take an average of 788 days to complete, not counting the costs of mitigation or design changes.[11] These delay estimates are likely to be larger if the influx of new permits is not offset by additional staff and infrastructure for processing. Delays and forced design changes stifle economic output and may prevent businesses from functioning at their full potential. Thus, the Sunding and Zilberman study is misused in the EPA analysis to generate upper bound estimates that markedly underestimate the cost of section 404 permitting.

The incremental costs of compensatory mitigation were calculated by taking the amount of wetland and stream mitigation that occurred in each state during FY 2010 and multiplying by EPA's expected 2.7% growth in the acreage of jurisdictional waters. This incremental mitigation

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[10] As discussed above, construction spending at the end of 2010 was 24% below spending at the end of 2008. A 10% increase in project size is a reasonable adjustment to account for the use of FY 2009/2010 data in cost estimations.

[11] Sunding and Zilberman, 2002. *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources Journal 59, pp 74-76.

requirement is multiplied by an average unit cost for mitigation (a weighted average across all states) to get an estimate of the annual costs of compensatory mitigation. These calculations are summarized in Table 4.

Table 4: Derivation of Compensatory Mitigation Costs

Water Body Type	Units of Mitigation	Unit Costs ($2010)	Annual Cost (2010$ millions)
Streams	49,075 feet	$177 - $265	$8.7 - $13.0
Wetlands	2,042 acres	$24,989 - $49,207	$51.0 - $100.5
Total			$59.7 - $113.5
Calculations	*A*	*B*	*C = A*B*

The EPA analysis derives estimates for the amount of mitigation using methods discussed in their 2011 economic analysis.[12] It assumes that all non-jurisdictional streams would become jurisdictional, requiring 49,075 feet (9.3 miles) of mitigation. The 2011 estimate of incremental wetland mitigation where all non-"other" waters are jurisdictional and 17% of "other" waters are jurisdictional (the same assumptions adopted in the current EPA analysis) is 2,517 acres. This value is more than 23% higher than the estimate provided in Table 5. This discrepancy results from different estimations of baseline mitigation in the two analyses.[13] Despite this difference, EPA suggests the current estimate "is consistent with the level of mitigation the Corps has estimated for the past 10-15 years" and provides no justification of the discrepancy. For reasons discussed above, this is likely to underestimate the extent of mitigation in a "normal" year.

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[12] EPA 2011. *Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction.*

[13] The 2014 analysis suggests there were approximately 32,500 acres of permittee-responsible mitigation documented in ORM2 records, 8,200 acres of bank mitigation documented in the Regional Internet Bank Information Tracking System (RIBITS) database, and 2,200 acres of in-lieu fee (ILF) mitigation in FY 2010 (Description to Exhibit 7). The 2011 analysis suggests there were approximately 44,000 acres of permittee-responsible mitigation, 7,000 acres of bank mitigation, and 2,000 acres of ILF mitigation in FY 2010 (EPA 2011, footnote 3).

The unit costs of mitigation also do not match 2011 EPA estimates. The weighted average utilized in the current analysis relies on state-level unit costs that are systematically lower than previously published. Table 5 provides a sample of these discrepancies for the first 10 states (listed alphabetically). While the lower bound estimates are the same between the two analyses, the upper bound estimates are depressed in the 2014 analysis. There is no discussion of these differences. If the higher estimates are accurate, this creates a strong downward bias of mitigation cost estimates in the 2014 analysis. Even if the lower estimates are more accurate, the exclusion of proper documentation and explanation is troublesome and reduces the validity of the current analysis.

Table 5: Discrepancies Between EPA Estimates for Unit Costs of Mitigation

State	2011 Analysis				2013 Analysis			
	Unit Cost Stream-Low	Unit Cost Stream-High	Unit Cost Wetland-Low	Unit Cost Wetland-High	Unit Cost Stream-Low	Unit Cost Stream-High	Unit Cost Wetland-Low	Unit Cost Wetland-High
AK	$170	$316	$500	$30,000	$170	$243	$500	$15,250
AL	$350	$888	$10,000	$20,000	$350	$619	$10,000	$15,000
AR	$170	$316	$2,000	$5,000	$170	$243	$2,000	$3,500
AZ	$170	$316	$9,000	$23,000	$170	$243	$9,000	$16,000
CA	$170	$316	$18,500	$300,000	$170	$243	$18,500	$159,250
CO	$170	$316	$32,000	$100,000	$170	$243	$32,000	$66,000
CT	$170	$316	$124,000	$160,000	$170	$243	$124,000	$142,000
DE	$170	$316	$40,000	$40,000	$170	$243	$40,000	$40,000
FI	$170	$316	$35,000	$145,000	$170	$243	$35,000	$90,000
GA	$106	$293	$12,000	$122,000	$106	$200	$12,000	$67,000

EPA estimates administrative costs associated with a rule change to be between $7.4 and $11.2 million annually. This calculation is based on a 2.7% increase in the number of employee hours needed to make jurisdictional determinations, process permits, consult with various stakeholders, generate environmental impact statements, ensure program compliance, and enforce permit regulations. Additionally, EPA suggests that additional permit applications may require increased consultation with other agencies (to comply with the Endangered Species Act and other statutes). This would increase costs to these agencies and drive up the price tag of a definitional change. These costs are omitted from this analysis.

EPA calculated costs associated with other CWA programs by adopting previous estimates and accounting for growth in jurisdictional waters and changes in program size. The cost analysis of other CWA programs is simplistic and relies on the same 2.7% acreage increase figure derived for section 404. This is especially problematic given the errors associated with the derivation of this estimate. Unsubstantiated assumptions from the incremental acreage calculations are revisited and recycled in subsequent sections to generate other cost estimates. Some of these errors could be avoided through a careful assessment of program-specific effects. Unfortunately, the EPA analysis falls short in this regard.

In its sensitivity analysis regarding the incremental acreage estimate, EPA recalculates costs and benefits under the alternative assumptions for project files related to other waters. Depending on the scenario, upper or lower bound designation, and type of doubling, they acknowledge costs could be as high as $422 million (compared to its working upper-bound estimate of $231 million). EPA's most-likely alternative estimate is that costs could be $278 million, a 20% increase from current estimates. The variation between these values reveals how relatively small changes in the assumptions used to generate incremental acreages can have substantial impacts on the cost estimates. Since the validity of these assumptions is highly suspect, it becomes clear that the EPA analysis is entirely insufficient at predicting the costs associated with a "waters of the United States" definition change.

EPA explicitly omits costs to some programs that may be affected due to lack of data. EPA asserts that other programs are likely to be "cost-neutral or minimal" without providing an analysis to support this conclusion. Specifically, EPA states that a definitional change will have little to no effect on section 303 (state water quality standards and implementation plans) and section 402 (National Pollutant Discharge Elimination System (NPDES) permitting). These are bold claims that should be substantiated with a thorough analysis.

1. Section 401 State Certification

Section 401 of the CWA requires any applicant for a federal license or permit to conduct any activity that will result in a discharge to waters of the United States to obtain a state water quality certification from the state where the discharge will occur. 33 U.S.C. § 1341(a)(1). With the proposed rule's expanded definition of "waters of the United States," more activities that require federal licenses (in particular, activities requiring section 404 permits) are likely to discharge into "waters of the United States" and will therefore require section 401 certification. EPA estimated that state certification under section 401 would experience increased annual costs of $737,100 as a result of the proposed rule. This figure is the result of a 2.7% increase in full time employees (FTE) needed to staff state permitting offices. This figure may partially account for the increased amount of state resources needed to accommodate additional state certification requests, but it does not account for the increased costs to applicants that must now obtain 401 state certification. EPA's analysis recognizes that there will be additional section 404 permits required under the proposed rule, but it does not account for the increased costs of obtaining 401 certification that are triggered by those additional section 404 permits. Nor does it address the cost of delay caused by increased Section 401 certification requirements.

2. Section 402 NPDES Permits

The CWA section 402 National Pollutant Discharge Elimination System (NPDES) permit program controls water pollution by regulating point sources that discharge pollutants into "waters of the United States." As discussed in further detail below, EPA states that the proposed rule would be cost-neutral or minimal with respect to traditional section 402 discharge permits such as those for municipal wastewater treatment facilities or industrial operations.

To calculate the incremental costs of the rule with respect to section 402 construction stormwater permitting, EPA used the October 1999 *Economic Analysis of Final Phase II Storm Water Rule*. EPA then adjusted for a 2.7% increase in jurisdictional waters and a 30% increase in

program size.[14] Accounting for inflation, this yields costs of $25.6 to $31.9 million per year. EPA concluded that the cost impacts for Municipal Separate Storm Sewer Systems (MS4s) would be negligible. However, under the agencies' proposed rule, which, for the first time, includes a regulatory definition of "tributary" that explicitly includes ditches and extends jurisdiction to "adjacent waters," including adjacent non-wetlands, many of the stormwater systems and features themselves could now be classified as "waters of the United States." EPA's economic analysis does not address or quantify the increased permitting requirements for stormwater conveyances that would result from the proposed rule. For example, work on the stormwater conveyances, including work aimed at achieving environmental best management practices (BMPs) as well as routine improvements required by stormwater permits, will trigger section 404 permitting requirements. Additionally, if stormwater conveyances are deemed "waters of the United States," then they will be subject to water quality standards. The costs of complying with water quality standards are discussed in more detail below.

EPA calculated incremental costs from section 402 Concentrated Animal Feeding Operations (CAFO) permitting in a manner similar to EPA's calculations for construction stormwater costs. It scaled up values from a 2003 rulemaking by 2.7% to account for increase in jurisdictional waters, but reduced them by 50% to account for a reduction in program size.[15] After converting to 2010 dollars, the incremental costs totaled approximately $5.5 million per year.

EPA calculated costs associated with increased numbers of Pesticide General Permits (PGP) to be between $2.9 and $3.2 million annually for operators, but made no attempt to calculate the increased impact on government entities. Growth in PGP permitting was determined to be

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[14] 30% program growth is derived from 130,000 "construction starts" in 1994 (from 1999 Economic Analysis) to 169,000 construction sites with permit coverage in 2011 (from EPA's GPRA management measures tracking).

[15] Benefit values taken from Federal Register volume 68 number 29. 50% decrease in program growth derived from ~15,000 CAFOs considered in 2003 analysis to 7,318 permit holders in 2011 (from EPA's GPRA management measures tracking).

almost 1000%, from 35,376 affected entities where EPA administers permits to a potential group of 365,000 entities where states administer permits.

EPA claims that a definitional change will have little to no effect on traditional Section 402 NPDES discharge permits such as those for municipal wastewater treatment facilities or industrial operations.

The exclusion of potential section 402 costs associated with the NPDES permitting is troubling. EPA provides several possible explanations for its observation that discharging entities are likely to acquire permits regardless of the jurisdictional status of the receiving water, and will not be impacted by a definitional change. One explanation is that EPA has authorized 46 states to administer section 402 permitting. Because state-level jurisdictional waters must be at least as inclusive as "waters of the United States," many states already have implemented the sort of programmatic changes being proposed in this analysis. However, this explanation has limited merit, given EPA's assertion that "approximately two-thirds of all states place some legal constraint on the authority of state and local government officials to adopt aquatic resource protections beyond waters of the U.S." Either way, all states will need to revisit their programs and EPA will need to reassess whether states comply with the definitional changes. As a result, both federal and state agencies will incur additional costs. Moreover, EPA completely fails to acknowledge or account for the fact that the proposed rule could affect compliance feasibility and costs for facilities that already have NPDES permits, by classifying as jurisdictional ditches, ponds, and other water features on facility sites, that facilities use for plant operations and/or compliance, and for which no discharge permit has been required previously. EPA does not account for additional costs that facilities will incur to comply with effluent limits and implement BMPs for these newly jurisdictional features. Nor does EPA's analysis account for the fact that work done to comply with NPDES permits for these newly jurisdictional ditches, ponds, and other water features (*e.g.*, installation of structures for sediment removal) will trigger costly section 404 permitting requirements and requirements to comply with water quality standards.

3. Section 311 Oil Spill Prevention Plans

Under section 311, inland non-transportation oil facilities of a certain size that have potential to discharge to "waters of the United States" must prepare and implement a Spill Prevention, Control, and Countermeasures (SPCC) Plan. *See* 40 C.F.R. § 112.1(d)(1). EPA calculated incremental costs to Section 311 oil spill prevention plans by using average annual costs from production and storage facilities, and scaling up based on an estimate of 1,000 new facilities that will need to spend money on compliance. The average annual clean-up cost is $9,128 for production facilities and $13,038 for storage facilities.[16] Production facilities make up approximately 35% of all facilities, while storage facilities make up the remaining 65%. After adjusting for inflation, this yields approximately $11.7 million annually in incremental costs.

The expansion of the "waters of the United States" definition will mean a significant increase in the number of facilities that could "reasonably be expected" to discharge oil to jurisdictional waters. As a result, many facilities not previously subject to the SPCC program requirements (because they did not previously have potential to discharge to "waters of the United States") will now be required to develop and implement an SPCC plan. This is particularly true in the arid west, where companies generally do not maintain SPCC plans because their operations are not located near navigable waters.

4. Section 303 Water Quality Standards

EPA claims that a definitional change will have little to no effect on section 303 (state water quality standards and implementation plans). This is a bold claim that should be substantiated with a thorough analysis. For example, section 303(c) requires states to establish water quality standards (consisting of uses, criteria, and an anti-degradation policy) for all navigable waters. EPA (p. 6) assumes that states may simply apply uses and criteria developed for other categories of waters (e.g., freshwater rivers and streams used by the public for fishing, swimming, boating,

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[16] Derived from EPA 2009, *Regulatory Impact Analysis for the Final Amendments to the Oil Pollution Prevention Regulations.*

and as sources of drinking water) for ditches, ephemeral streams, and other newly jurisdictional waters for which those uses and criteria would seem to be wholly inappropriate. In reality, though, states will have to designate uses and set water quality criteria for new waters and features that now meet the agencies' expanded definition of "waters of the United States." This process is extremely costly and burdensome for the states. Indeed, if states do not designate water quality standards for these newly jurisdictional waters, they are likely to be sued by third parties. In the past, states have been sued for failure to assign uses and set water quality criteria for all jurisdictional waters located within the state. EPA's analysis does not account for these obligations that will be forced upon the states and the states' increased litigation risk created by the proposed rule.

Similarly, Section 303(d) requires states to generate a list of impaired waters that do not meet specific water quality standards. States also must calculate total maximum daily loads (TMDLs) of various pollutants that are necessary to bring these waters into compliance. It stands to reason that the addition of newly-jurisdictional waters would increase the surveying, planning, monitoring, and enforcement necessary to achieve these tasks. EPA claims: "[t]o the extent that this proposed rule may increase the coverage where a state would wish to apply its monitoring resources, states are likely to adjust sampling locations or sampling frequency without a net cost increase."[17] This is simultaneously disingenuous and discouraging, suggesting states must make important decisions about water quality from a less-comprehensive scientific investigation by spreading already scarce resources even thinner.

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[17] This quote is in reference to Section 305(b), which requires states to issue a report about the water quality in all navigable waters and how they meet specific water quality goals. However, it appears to reflect the EPA's position about all programs where water quality monitoring in necessary.

V. Errors with EPA's Incremental Benefits Calculations

EPA lists several section 404 benefits that will result from a change in the "waters of the United States" definition. These include avoidance and minimization of permit impacts, which result from improved clarity in the CWA, and ecosystem benefits associated with additional compensatory mitigation that will now be required. Since quantifying the former is difficult, its analysis focuses on benefits from incremental compensatory mitigation requirements.[18] The authors use a benefits transfer approach and adopt estimates of the value of wetland mitigation from previous studies. Specifically, they select 10 contingent valuation studies that provide willingness to pay (WTP) estimates for wetland preservation. Those studies span 12 states and yield estimates for wetlands that "provide a suite of services expected to be similar to those provided by waters incrementally protected under the proposed rule". The results from these studies were standardized by determining WTP at the per-household per-acre level.[19] The authors then calculate an average WTP, weighted by the number of respondents in each study. This yields values of $0.016 and $0.012 per household per acre using a 3% and 7% discount rate, respectively.

EPA calculates benefits for incremental compensatory mitigation by multiplying WTP estimates by the number of households and the number of acres impacted in eight different "wetland regions." These regions were developed by the US Department of Agriculture's Economic Research Service, and the analysis operates under the assumption that "per acre benefits values

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[18] EPA only addresses benefits associated with wetland mitigation and omits benefits from stream mitigation.

[19] For studies that reported annual WTP, total present value was determined over a period of 50 years using a 3% and 7% discount rate. For studies that reported WTP per individual, one individual per household was assumed.

accrue to all citizens in the region."[20] The calculations used to generate incremental compensatory mitigation benefits are presented in Table 6.

Table 6: Derivation of Compensatory Mitigation Benefits

Region	Incremental Impact Estimate (Acres)	Number of Households	Present Value of Benefits per Year- 7% Discount (2010$ millions)	Present Value of Benefits per Year- 3% Discount (2010$ millions)
Central Plains	30	3,201,336	$1.20	$1.50
Delta and Gulf	85	14,521,178	$14.80	$19.80
Mountain	145	7,390,812	$12.90	$17.30
Midwest	322	23,909,088	$92.30	$123.70
Northeast	240	23,839,690	$68.70	$92.10
Pacific	79	16,163,714	$15.30	$20.50
Prairie Potholes	241	2,176,626	$6.30	$8.40
Southeast	187	20,485,107	$46.10	$61.70
Other	3	234,779	$0.00	$0.00
National	1,332	111,922,330	$257.60	$345.10
Calculations	*A*	*B*	*C = A*B*0.012*	*D = A*B*0.016*

The benefit transfer analysis used to approximate section 404 benefits is poorly documented and not consistent with best practices in environmental economics. EPA synthesizes ten previous studies to estimate an average WTP for each acre of wetland mitigation. Those studies are largely irrelevant and do not provide accurate estimates of benefits. Nine of the ten studies were conducted more than a decade ago, and the earliest was written nearly 30 years ago. Several of the studies EPA relies on were never published in peer-reviewed journals. Given these shortcomings, it is reasonable to suspect that WTP estimates may not reflect the actual preferences of individuals for expanding jurisdiction over various types of waters.

While EPA attempts to value ecological services provided by wetland mitigation, it assumes that the wetlands included in the contingent valuation studies have identical functions as the wetlands that are being considered in the current analysis. This is an important flaw that undermines EPA's benefit transfer analysis. Benefit transfer analysis operates under the

[20] Heimlich, R.E., R. Claassen, K.D. Wiebe, D. Gadsby, and R.M. House. 1998. Wetlands and Agriculture: Private Interests and Public Benefits. AER-765, U.S. Dept. Agr. Econ. Res. Serv., Aug.

presumption that benefits calculated for a specific geography and time can be readily applied elsewhere. This oversimplification comes at the expense of accuracy. For example, the Loomis et al. study used in the EPA analysis examined WTP to reduce contamination from agricultural drainage in wetlands in California. While this service may have considerable value, this value is likely highly localized. Indeed, Loomis found that respondents near the wetlands in question had WTPs approximately 15% higher than respondents elsewhere in the state.[21] This pattern is likely to be more pronounced when extrapolating benefits to regions containing multiple states and heterogeneous patterns of wetlands.

EPA's analysis rests on an unstated assumption that all of the incremental wetlands affected by the definitional change would be compromised if federal jurisdiction is not expanded. Conversely, it also assumes that all would be preserved or mitigated if federal jurisdiction is extended. The reality is likely to be quite different. State and local regulatory programs frequently protect wetlands even in the absence of federal jurisdiction. State-level planning, monitoring, and enforcement activities can be carried out with state-specific concerns in mind, and may be better-suited to effectively preserve wetland resources. Thus, the benefits associated with expanding federal jurisdiction over wetlands could be partially offset by programmatic changes that pass control from states to federal agencies.

EPA makes little effort to account for changes in economic trends, recreational patterns, and stated preferences over time. It simply applies a multiplier based on the growth (or decrease) in permit applications. This suffers from the same error discussed above, where growth is based only on the subset of individuals who have already sought a permit. It does not address those who may seek a permit under the proposed rule. Even in the sensitivity analysis, which was conducted to address this issue, alternative calculations are carried out using the same multipliers and many of the same assumptions from the initial analysis. EPA concludes: "because estimated

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[21] Respondents in the San Joaquin Valley had a WTP of $174 annually to prevent the degradation of an 85,000 acre tract of wetlands. Respondents in the rest of the state had a WTP of $152.

benefits would also rise with more wetland protection, benefits would continue to justify costs." This amounts to a doubling down on the original benefits estimates, which contain all of the original biases and shortcomings. This is insufficient for evaluating the benefits associated with programmatic changes of this scale.

Much like its cost estimates, EPA calculates benefits to other CWA programs by scaling up previous estimates according to the growth in jurisdictional waters and program size. Incremental benefits associated with section 402 stormwater permitting are estimated to be between $25.4 and $32.3 million per year. This is based on programmatic growth of 30% and a jurisdictional expansion of 2.7% from original 1998 estimates.[22] Incremental benefits from additional section 402 CAFO permitting range from $3.4 to $5.9 million per year, and are based on a 50% contraction in program size from 2001 estimates.[23] These estimates reflect benefits to large CAFOs, which comprise 85% of the operator costs and 66% of the administrative costs.

Incremental benefits associated with section 311 (oil spill prevention plans) are calculated by summing expected annual benefits of $14,255 per spill over 1,000 non-complying facilities.[24] This calculation yields annual benefits of approximately $14.3 million.

The EPA analysis does not quantify benefits derived from expanded state certification of waters (section 401). It recognizes the lack of uniformity in section 401 implementation across states, and suggests: "[t]o the extent that states condition permits, added costs to permittees and environmental benefits associated with compensatory mitigation would be accounted for in the methodology for assessing those incremental impacts: they would accrue to the same extent as represented in the baseline."

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[22] See footnote 14.

[23] See footnote 15.

[24] Average spill volume of 1,290 gallons (2000-2005 National Response Center data) multiplied by average clean-up costs of $221/gallon, assuming a 1/20 chance of a spill.

Benefits to some programs that may be affected are explicitly omitted due to lack of data. EPA suggests there may be "across the board" savings in program enforcement related to increased clarity in the CWA. While there may be some legitimacy to this claim, it remains unquantified and thus plays little value in the economic analysis. Whatever enforcement benefits are realized may be offset by programmatic changes that expand permitting and administrative requirements.

A summary of costs and benefits associated with a change in the "waters of the United States" definition are provided in Table 7.

Table 7: Summary of Costs and Benefits (2010$ millions)

Program	Costs		Benefits	
	low	high	low	high
§404 Mitigation- Streams [2]	$8.7	$13.0		
§404 Mitigation- Wetlands	$51.0	$100.5	$257.6	$345.1
§404 Permit Application [3]	$19.7	$52.9		
§404 Administration	$7.4	$11.2		
§401 Administration [4]	$0.7			
§402 Construction Stormwater	$25.6	$31.9	$25.4	$32.3
§402 Stormwater Administration	$0.2			
§402 CAFO Implementation [5]	$5.5		$3.4	$5.9
§402 CAFO Administration	$0.2			
§402 Pesticide General Permit [6]	$2.9	$3.2		
§311 Implementation	$11.7		$14.3	
Total	$133.7	$231.0	$300.7	$397.6

Notes (from EPA documents):

1	§303 impacts are assumed to be cost-neutral; §402 impacts are components of costs and benefits previously identified for past actions, not new costs and benefits associated with this proposed rule
2	Benefits of stream mitigation are not quantified
3	Costs of potential delayed permit issuance and costs and benefits of avoidance/minimization are not quantified, nor are any benefits from reduced uncertainty
4	Costs to permittees and benefits of any additional requirements as a result of §401 certification are reflected in the mitigation estimates to the extent additional mitigation is the result, yet not calculated to the extent avoidance/minimization is the result.
5	Benefits apply to large CAFOs only, which account for 85% of implementation costs and 66% of administrative costs
6	PGP benefits and government administrative costs are not available

VI. Conclusion

The estimates associated with section 404 compensatory wetland mitigation, which contain some of the most glaring errors, represent approximately 40% of the total costs and 85% of the total benefits. This suggests the entire analysis is fraught with uncertainty as to render it insufficient for evaluating programmatic impacts of this scale. Estimates of economic impacts to other programs rely on an incremental jurisdiction determination that is deeply flawed. Additionally,

the systematic exclusion of various costs and benefits ignores important impacts to permit applicants and permitting agencies.

In addition to the methodological errors discussed above, EPA's analysis suffers from a lack of transparency. Explanations of calculations, basic assumptions, and discrepancies between various EPA analyses are rarely provided. This is particularly troubling given that the entire report is based on records from the Corps' internal ORM2 database, which is unavailable to outside entities. The author of this report spent considerable time replicating the calculations used in the analysis, but was unable to vet the validity of the underlying data. Any errors or inconsistencies in documentation, sample selection, or data extraction are necessarily overlooked. These shortcomings indicate that a more thorough analysis is required to properly assess the economic impacts of a definitional change.

Arkansas Game & Fish Commission
2 Natural Resources Drive Little Rock, Arkansas 72205

Scott Henderson
Director

April 15, 2003

Water Docket
ENVIRONMENTAL PROTECTION AGENCY
Mailcode 4101T
1200 Pennsylvania Ave., NW
Washington, DC 20460
Attention: Docket ID No.OW-2002-0050

Dear Sir or Madam:

The Arkansas Game and Fish Commission (AGFC) is providing these comments to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) in regard to the January 15, 2003 *"Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States,'"* (ANPRM; FR Doc. 03-960).

The AGFC is the primary agency responsible for the protection and management of Arkansas' fish and wildlife resources, many of which are wholly or partially dependent upon waters of the United States, including wetlands. With responsibility over both resident and migratory fish and wildlife, we are concerned with the health of wetland systems throughout Arkansas, as well as those across North America, that migratory wildlife depend upon.
We strongly discourage you from restricting the extent of federal protection for any areas currently considered "waters of the United States" subject to the Clean Water Act: perennial, intermittent, and ephemeral streams and their wetlands. Further, we urge you to review your policy on isolated waters, including wetlands, and consider subsurface hydrologic connectivity as a criterion for continuing jurisdiction over them. We will support these positions with information on Arkansas resources, below.

The ANPRM proposes unprecedented, broad restrictions in jurisdiction that would transform federal protections for aquatic and wetland resources. Isolated waters, tributary waters, and the meaning of adjacency and navigation are all brought into question. Legally, this is an apparent reversal of 30 years of regulation and case law.

In 1985, the Supreme Court upheld Congress's grant of broad jurisdiction, based on the recognition that all waters are connected, noting that ["water] moves in hydrologic cycles." US. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985). The narrow SWANCC decision should not completely undermine that previous, broader ruling. Further, in the last 30 years a growing body of scientific evidence increasingly illustrates the connection of these waters and their biota. The Clean Water Act was intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33USC 1251(a). This cannot be done without protection of the tributary systems, and the wetlands throughout the watershed. We will address issues of biological integrity for each of the potential reductions in jurisdiction: tributary systems, adjacent wetlands, and "isolated wetlands."

Tributary systems:
Arkansas is rich with mountain streams, most of which are tributary orders away from any river used or historically used for commercial navigation (i.e., barge traffic). One such river is the Buffalo, an Ozark Zone Blue Ribbon smallmouth bass stream and a national recreation destination. Sportfishing in Arkansas resulted in a 2001 economic output of $843 million (American Sportfishing Association; Southwick Associates). Removing the Buffalo National River, its tributaries, or similar streams from CWA jurisdiction would have devastating impacts both to the biological integrity of the stream, and the economy of Arkansas.

Moving further upstream, many first-order tributaries of the Ozark Mountains originate in Karst topography, where seeps and caves support endemic crayfish and the endangered Ozark cave fish. Removing these areas from CWA jurisdiction could not only impact rare and endangered species, but also reduce habitat, threatening additional endemic species with extinction.

In karst topography, sinkhole and spring run flow moves through eroded paths in the bedrock. In some mountain streams, seasonal stream flow may be inter-gravel or below the surface, only to reappear miles downstream. It might be argued by some that sinks, springs and upstream reaches should be considered isolated, since the surficial flow of water is interrupted. However, dye experiments have clearly shown these areas to be connected in the subsurface, and that water quality in the upper reach affects water quality in the lower. To make arguments of isolation ignores important hydrologic pathways and aquatic functions.

Impacts to these tributary streams, whether by filling or degradation of water quality, will have an impact on the biological, chemical and physical integrity of downstream waters. Many of the fish that live in the larger rivers spawn in the mountain streams.
For these reasons, we urge you to continue extending jurisdiction over all streams, and not to reduce jurisdiction to only areas that are traditionally navigable.

Adjacent Wetlands:
Wetlands adjacent to streams, whether at the headwaters or in the bottomland hardwood areas of the state, provide functions critical for maintaining the biological, chemical and physical integrity of the nation's waters. In Arkansas, we have classified our wetlands using a hydrogeomorphic approach, and characterized the functions of each class (http://www.mawpt.org/wetlands/classification/classes.asp). Adjacent wetlands typically comprise a mosaic of wetland types, each of which adds to the functional integrity of the aquatic/wetland ecosystem. For instance, many fish in the

large rivers spawn in the bottomland forest wetlands immediately adjacent to the large streams and their tributaries, while pools in wetlands further upstream, where predatory fish are not as abundant, are important breeding grounds for many amphibians. All adjacent wetland intercept overland flows, and therefore protect the physical and chemical integrity of their streams by recycling nutrients, reducing sedimentation and erosion in streams, reducing flood peaks and draw downs, and providing carbon and other nutrients to aquatic food webs.

Historically, the largest percentage of the Mississippi Flyway's mallard population (Cache River EIS) has wintered in the wooded and moist soil wetlands of Arkansas. Management of waterfowl and waterfowl habitat is a major responsibility of AGFC. In addition to their ecological and societal importance, waterfowl are a tremendously valuable interstate and international economic resource. According to U.S. Fish and Wildlife Service reports, 3 million migratory bird hunters, including approximately 1.6 million waterfowl hunters, expended approximately $1.4 billion in 2001 for hunting related goods and services. An economic analysis of migratory bird recreation completed in 1991 documented expenditures of $1.3 billion, having a total economic multiplier effect of $3.9 billion considering the 46,000 additional jobs and $176 million in sales and income tax revenues produced. The 2001 study documented that 14% of migratory bird hunting took place in a state other than the one in which the participant resided. Arkansas is a premier destination for many of the nation's waterfowl hunters – in 2001 over 170,000 migratory bird hunters, mostly waterfowl hunters, spent over $118 million in our state. The economy of many Arkansas communities is based on these expenditures.

These same wetlands host an amazing array and quantity of webless migratory birds. Arkansas birding websites and list servers are now spinning with postings about the progress of wading bird and songbird migration. In 2001, 464,000 people observed wild birds around the home and 149,000 more took bird watching trips for a total of 55 million activity days (NSFHWAR, 2001). Much of the $244 million of wildlife-watching expenditures in Arkansas during 2001 may be attributed to bird watching.

The functional role of adjacent wetlands does not cease at a specific distance from the stream, but rather changes in nature gradually, with the more distant and upstream wetlands often supporting less common or lesser-known species. All three federally listed plants in Arkansas are restricted to specific wetland habitats. One of these, Harperella (*Ptilimnium nodosum*) lives only in wetlands adjacent to low-order Ouachita Mountain tributaries. While known populations of this species are protected under the Endangered Species Act, the loss of CWA protection for these areas could impact undocumented populations, as well as reduce populations of similar species whose status is not yet known.

Isolated Wetlands:
While some guidance has been issued on the subject, we urge you to revisit jurisdictional determinations over wetlands that are not surficially or spatially connected to streams, so-called isolated wetlands. The AGFC has serious concerns over any action that potentially lessens protection of wetlands, particularly those that are geographically isolated and by their nature provide the greatest production potential for North American waterfowl. Small wetlands, many of which are surficially and spatially isolated, play a critical role in the annual life cycle needs of North American waterfowl. For example, the prairie pothole region is the single most important waterfowl breeding

area in North America. An estimated 50% of the average total annual production of ducks comes from the potholes in years of average precipitation, and 70% or more during wet years. Even though wetlands in the prairie-pothole region are mostly spatially isolated, most are hydrologically connected via groundwater, and are therefore not functionally isolated. In addition, vernal pools in flat wetlands within Arkansas are vitally important to the wintering habitat of waterfowl. Depending on the adopted definitions and jurisdictional status of isolated wetlands, tributaries, and adjacent wetlands, these areas could lose their CWA protection, and compromise duck populations.

The AGFC urges EPA and the Corps to consider the subsurface hydraulic functionality when defining the term "isolated waters". While many wetlands may appear to be isolated on the surface, most are in fact hydrologically connected in the subsurface, or seasonally via headwater tributaries. The future of many of Arkansas' wildlife resources is dependent on protection of these small, surficially isolated wetlands.

In addition, isolated waters and wetlands throughout the state support many rare and endemic species that contribute to Arkansas biological diversity and natural heritage. Several species of salamanders and toads must migrate over the woodland or meadow floor to locate vernal pools and other isolated wetlands for breeding. These wetlands provide a nursery relatively free of fish predators. Two of the three Federally listed plant species rely exclusively on isolated wetland types: Pondberry (*Lindera melissifolia*) relies primarily on Sand Ponds and Valley Train ponds, both spatially isolated wetland types in sandy glacial outwash deposits of the Mississippi alluvial plain; Geocarpon (*Geocarpon minimum*) depends on alkali slicks in wet prairie habitats.

Most of the streams in the Mississippi Alluvial Plain and West Gulf Coastal Plain have tributaries that originate in flatwood wetlands. Some of the wet flats are immediately adjacent to the headwater tributaries, but large expanses of them may be considered isolated, since they are often part of an upland/wetland mosaic. These wet flats store a lot of precipitation that would otherwise run overland to the small streams, making them very flashy and prone to erosion. This water also provides base flow for these tributaries through slow release of this water via subsurface transport. Large expanses of these wet flats could be compromised if the protections of isolated wetlands or tributaries are removed, and degradation of downstream areas is sure to follow.

Conclusion:
The EPA and Corps have been valuable federal partners in wetland protection, research and education. However, by issuing the joint guidance memorandum and proposing new rule-making, the agencies have gone well beyond their obligation under the SWANCC decision and consequently initiated a major federal action that may place them in violation of NEPA, if not the CWA. To protect the public interest in waters of the United States, we do not need a crazy-quilt of state wetland laws. We need a context of federal law and regulation that recognizes the diversity and function of all wetlands and reflects the advances in wetland science.

We respectfully request that the Corps and EPA develop their guidance to include all streams, whether ephemeral, intermittent or perennial, all tributaries, and all associated wetlands as jurisdictional under the Clean Water Act. Further, we urge you to define "isolated waters" to afford maximum protection to all wetlands that are functionally connected. AGFC believes that the intent of the CWA cannot be fully achieved without protection of tributary systems, all adjacent wetlands, no matter the distance from a

August 25, 2003

stream, and spatially isolated wetlands.

Sincerely yours,

Scott Henderson

Scott Henderson, Director
ARKANSAS GAME & FISH COMMISSION

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

HEALTHY LAKES HEALTHY LIVES
HEALTHYLAKES.ORG

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

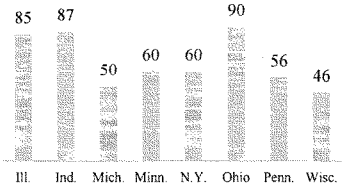
Protecting and restoring wetlands and streams is critical to the restoration and protection of the Great Lakes. According to a draft review of more than a thousand publications from peer-reviewed scientific literature conducted by an EPA Science Advisory Board, streams, tributaries (e.g., headwater, 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,

Lyman C. Welch
Water Quality Director
Alliance for the Great Lakes

Katie Rousseau
Director, Clean Water Supply – Great Lakes
American Rivers

Erin Crotty
Executive Director
Audubon New York

Loren H. Smith
Executive Director
Buffalo Audubon Society

Barbara Williams
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Brian Smith
Associate Executive Director
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Anne M. Vaara
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Jeffrey D. Fullmer
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Jill Ryan
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Mike Strigel
Executive Director
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Nick Schroeck
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League of Women Voters Lake Michigan Region

Susan Smith
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George Meyer
Executive Director
Wisconsin Wildlife Federation

Harvests and Healthy Waters

By Joe Logan

I've been a farmer most of my life but I didn't always intend to be. When I went away to college at Bowling Green State University, I didn't major in agricultural science. I majored in psychology and sociology, which is about as far from agricultural science as you can get. It was the '60s, and college campuses were the epicenter of the country's social and political upheaval. After four years of conflict, I wanted a more "grounded" lifestyle. I returned to farming.

A few years later, I bought my dad's farm, which ultimately evolved from dairy to beef and row crops like corn, Soybeans, oats and barley. We even have a small maple sugaring operation that is a family tradition and that we make pretty much as people did in the 1800s.

Farmers, more than most, are concerned about the quality of our soil and water. We pride ourselves on our stewardship. So, it's a wonder that we didn't pick up earlier on the downstream effects of some of our practices. Two recent events in Ohio show us that we need to confront them now and directly. In August, a half-million people in Toledo lost drinking water for several days because toxins in Lake Erie, created by an excess of phosphorus made it unsafe to drink. Earlier, Grand Lake St. Marys, Ohio's largest inland lake, had become unsafe for swimmers due to algal blooms which produced toxins vastly exceeding the United Nations' safety threshold. In each case, agricultural runoff was a major contributor (though not the only one) and farmers (though not only farmers), have to help solve it.

Since about 2010, most farmers have increasingly acknowledged that we are a major contributor to nutrient pollution. We were a little late to the game, in part because farmers were continually misled by organizations and institutions with a commercial stake in the maximization of yields or the sale and distribution of nutrients. For instance, farmers were repeatedly informed by these groups that phosphorous had unique bonding characteristics that made it stable in the soil. We now know that is not always the case.

The same special interests are now spreading misinformation and mischaracterizations about a new federal rule that clarifies Clean Water Act protections for small streams and wetlands. The rule, proposed by the Environmental Protection Agency and U.S. Army Corp of Engineers, protects waters that more than 5.2 million Ohio citizens depend on for drinking water. The rule is good for the people of Ohio—and it's good for farmers in Ohio.

I have participated in a conversation with EPA Administrator Gina McCarthy, who has enunciated two guiding principles of the new rule: to preserve the integrity and quality of waters in the United States and to minimize needless litigation and intrusions on farmers and other land owners in accomplishing the first goal. Clearly, their efforts, in the early drafts of the rule and communication efforts, have been far from perfect, but I believe she is acting in genuine good faith.

The proof is in the rule itself, which only affects waters that were already covered by the Clean Water Act. It acknowledges and reinforces existing exemptions in the Clean Water Act for common farming

practices like plowing, cultivating seeding and most commonly used agricultural drainage practices. It regulates fewer ditches, and for the first time, it exempts stock watering and irrigation ponds in certain cases. In fact, the rule applies to fewer waters than were historically covered under six of the previous seven presidents.

Detractors of the rule, trying to further their own political or financial interests, have sought to use the EPA as a bogeyman and to discredit the usefulness of any agency oversight of water quality on private lands. In doing so, they also discredit farmers who are trying to do the right thing for all Ohioans. Ironically, as organizations rail against the USEPA proposed rule, they have remained mute or quietly supportive as the Ohio Legislature is finalizing a suite of sweeping new regulations on agricultural producers.

Farmers have a professional stake in the rule because it will clarify the law for us and give us certainty without undue encroachment on our farming operations. But while we are farmers, we are also parents, grandparents, Ohioans, Americans. We are boaters, and fishermen, and consumers of Great Lakes fish. Ours is more than a commercial interest, we have an emotional and moral stake in passing on waters clean and pure to our children and our grandchildren.

One of the greatest experiences of my childhood was to visit my Uncle Jess and Aunt Beulah every summer. They lived on a forty-foot bluff overlooking Lake Erie. The land just ended and there was blue water as far as the eye could see. It was my ocean. I swam and fished for Perch from the pier. Lake Erie seemed to offer up an endless supply for thousands of Friday fish-fries in Great Lakes communities. Then, something happened. That treasure of my childhood became nasty and forbidding in the '60s and '70s for reasons not well-understood then but crystal clear now. The quality of the lake improved for a time in the late-'90s but it now seems headed back in a direction none of us want to contemplate. Many farmers in Ohio have similar childhood stories about the Great Lakes. I would hate to think that those childhood stories may end for future generations because we, as farmers, had failed to address that part of the responsibility that is ours.

Joe Logan is a farmer in Kinsman, Ohio. He serves as the President of the Ohio Farmers Union and has served as the Director of Agricultural Programs for the Ohio Environmental Council and served on the boards of the National Farmers Union and Dairy Farmers Of America.

KANSAS

DEPARTMENT OF WILDLIFE & PARKS KATHLEEN SEBELIUS, GOVERNOR

15 April 2003

Water Docket
Environmental Protection Agency
Mailcode 4101T
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
Attention: Docket ID No. OW-2002-0050

APR 16 2003

Ref: A1.0810
Track: 20030098

Dear Madam or Sir:

The Kansas Department of Wildlife and Parks is commenting on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' (USACE) January 15, 2003, Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," (68 FR 1991-1998). The Department's mission is to conserve and enhance Kansas' natural heritage, provide the public with opportunities to use and appreciate these resources consistent with conservation, and inform the public of natural resource status to promote understanding and gain assistance to help achieve the mission. The Department also has the responsibility to administer the State's Kansas Nongame and Endangered Species Conservation Act. Thirty percent of Kansas' threatened and endangered species inhabit wetlands or are associated with wetlands at some point in their natural history. Because of the recognized importance of wetlands in flood water attenuation, water recharges, filtration, as wildlife habitats, and for recreation, the Department has a vested interest in ensuring that wetlands are protected.

The Department is involved with other groups and agencies that have programs designed to conserve and protect wetlands including the Playa Lakes Joint Venture, Kansas Alliance for Wetlands and Streams, U.S. Fish and Wildlife Service, and programs administered by the U.S. Department of Agriculture. Besides these voluntary programs, Kansas has relied on the USACE's Section 404 authority to regulate and thus protect wetlands that have since been removed from USACE's regulatory purview since the U.S. Supreme Court's SWANCC decision. Wetlands now considered "isolated" are important habitats for many species of wildlife including migratory birds.

Hunting, wildlife watching, and fishing are activities that are carried out in wetlands and streams and thus would seem to provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters as one of the factors listed in 33 CFR 328.3(a)(3)(i)-(iii), or more specifically "use of the water by interstate or foreign travelers for recreational or other purposes." We believe that regulation should define isolated waters. We concur with Ducks Unlimited's detailed explanation that adjacency to define isolated waters should be based on hydrological

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connections not just apparent surface connections. This is because intricate hydrological connections, though not obviously apparent at the surface, have the potential to affect the water quality of navigable waters through tributaries to navigable waters. Defining isolated waters using the factors listed above and those factors considered collectively as the Migratory Bird Rule should increase the protection of wetlands and streams and help ensure that the Department can fulfill its mission.

Thank you for the opportunity to make these comments and recommendations. If you have any questions or need clarification, please E-mail me at chrish@wp.state.ks.us or telephone extension 198.

Sincerely,

Chris Hase

Chris Hase
Environmental Services Section

xc: KDWP Regional Supervisors
KDWP Secretary, Hayden

Michael F. Easley, Governor

William G. Ross Jr., Secretary
North Carolina Department of Environment and Natural Resources

Alan W. Klimek, P.E., Director
Division of Water Quality

April 16, 2003

Water Docket
Environmental Protection Agency
Mailcode 4101T
1200 Pennsylvania Ave., NS
Washington, DC 20460

Dear Sir or Madam:

RE: Comments on the Advanced Notice of Proposed Rule Making (ANPRM) on the definition of waters of the United States
EPA Docket OW-2002-0050

The following comments from the NC Division of Water Quality are in response to the Corps of Engineers and US Environmental Protection Agency's request for comments on the Definition of Waters of the United States as published in the January 15, 2003 Federal Register. Specifically, the Corps of Engineers and EPA are seeking comments on the proposed definition of isolated waters in response to the SWANCC decision from the US Supreme Court in 2001.

The NC Division of Water Quality (DWQ) implements various water quality statutes in NC including implementation of Sections 303, 401 and 402 of the Clean Water Act as well as separate state rules concerning water supply watershed protection, ripiarian buffer rules and (most recently and in response to the SWANCC decision), rules for impacts to isolated wetlands. As such, the DWQ is keenly interested in maintaining a robust, effective water quality protection program in NC

We urge the Corps and EPA to adopt a narrow, precise, narrative definition of the term ""isolated" that can be readily implemented in the field. The operational definition in NC is that an isolated water shows no sign of any surface hydrologic connection. We support the adoption of this definition for isolated waters in NC.

The isolated wetland rules adopted by the NC Environmental Management Commission effective as of April 1, 2003 relies on the Corps of Engineers "or its designee" (in practice, the DWQ) to make determinations as to whether a waterbody is isolated. Since DWQ will be (and already has been in a few cases) required to make the determination as to whether a waterbody is isolated, we would like to use the final Corps definition as long as it is precise and can be readily implemented in the field. We believe that this approach also benefits the public since there would only be one, clearly understood definition of isolated waters in NC.

Considerable concern has been expressed by various entities that the Corps and EPA may want to expand the scope of the SWANCC decision by excluding intermittent and small perennial streams from coverage under Section 404 Permits. Although the ANPRM does not explicitly propose this change, the ANPRM could be read to include this change. DWQ strongly urges the Corps and EPA not to expand the SWANCC ruling in this regard for the following reasons:

1. Intermittent streams make up a significant percentage of waters in NC: Based on intensive field studies in and near Greensboro, NC about 13% of the stream length was composed of intermittent streams. These intermittent stream segments averaged about 400 feet in length. This is a significant percentage of the total stream length and represents a correspondingly significant percentage of streams in NC's watersheds.

2. The watershed approach to water quality management requires management of intermittent streams: NC leads the nation in our basinwide planning and permitting efforts. In addition, the state's in-lieu fee mitigation program (the Wetlands Restoration Program) is focused on a watershed approach to protection

and management. The watershed approach to water quality management is only effective if the entire watershed is being managed. If intermittent streams are no longer regulated, then this watershed approach will be ineffective.

3. Aquatic life protection: Ongoing research conducted by the DWQ using an EPA Wetland Program Development Grant has clearly shown the value of aquatic life in intermittent streams. Data collected last summer during our severe drought showed that about one-half of the macrobenthos taxa found in intermittent streams were aquatic in nature rather than terrestrial. In contrast, ephemeral (stormwater-driven) channels (often directly upslope of the intermittent stream) had very few aquatic species and were dominated by terrestrial insects. Preliminary data from this winter shows that winter insect life in intermittent streams is all aquatic in nature. Other studies in the scientific literature have reported on the nutrient removal function of intermittent streams. We believe (based on these data) that intermittent streams are essential to the functioning of downstream perennial channel. Loss of regulatory protection to these intermittent streams will clearly negatively impact downstream aquatic life. These data are available from the DWQ upon request.

4. Regulatory conflicts: Many NC regulatory programs (including non-discharge of animal waste, water supply watershed protection and riparian buffer protection) rely on setbacks or buffers from stream channels for the benefit of water quality. If the Corps and EPA no longer regulate intermittent streams, then the state programs will need to become more stringent in order to provide this protection. The net result will be an even more complex and contradictory regulatory program with conflicting definitions of streams (federal versus state).

In summary, The NC Division of Water Quality urges the US Army Corps of Engineers and US Environmental Protection Agency to adopt a narrow, precise, narrative definition of the term ""isolated" that can be readily implemented in the field. Also we urge the Corps and EPA to not expand the impact of the SWANCC case by proposing to exclude intermittent streams from coverage with 404 Permits. To do so would result in a much weaker water quality protection program for the reasons outlined above. Please call John Dorney of my staff at 919-733-9646 if you have any questions.

Sincerely yours,

Coleen Sullins, Deputy Chief

Cc: Alan Klimek
Dennis Ramsey
John Dorney
Ken Jolly, Chief – Regulatory Section, Wilmington District Corps of Engineers\
Tom Welborn, US Environmental Protection Agency – Region IV

North Carolina Wildlife Resources Commission

Charles R. Fullwood, Executive Director

April 15, 2003

The Honorable Christine Todd Whitman
Administrator, U.S. Environmental Protection Agency
Ariel Rios Building, Room 3000; Pennsylvania Avenue, N.W.
Washington, D.C. 20460

The Honorable George Dunlop
Acting Principle Deputy Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, D.C. 20310

The Honorable James L. Connaughton
Chairman, White House Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Dear Administrator Whitman, Acting Deputy Assistant Secretary Dunlop, and Chairman Connaughton:

I am writing on behalf of the North Carolina Wildlife Resources Commission (NCWRC). This agency is charged with the protection, enhancement and conservation of the wildlife and fishery resources of North Carolina. This includes both game and non-game species and their habitats, which clearly includes wetlands. NCWRC is offering comments regarding the advanced notice of proposed rulemaking (ANPRM) regarding the scope of waters subject to the Clean Water Act (CWA), in light of the U.S. Supreme Court Decision in the Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531U.S. 159 (2001) (SWANCC), Docket ID No. OW-2002-0050.

The CWA was passed in 1972 by congress for the purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. During the 30 years since its inception, court decisions have essentially upheld the authority of the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers to administer the Act as necessary to maintain the intent of Congress. The CWA was not specific in

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defining "waters". Court challenges regarding the definition of "waters of the U.S." have shaped Section 404 regulations. Throughout these court challenges the linkage of surface waters such as tributaries both intermittent and perennial and drainage ditches to the quality of navigable waters has usually been upheld. However, court decisions provide less clarity in defining the relationship between wetlands and "waters of the U.S.". This was highlighted by the Supreme Court case known as the SWANCC decision. In that case, the court ruled that geographically isolated wetlands could no longer be considered jurisdictional solely on the basis of use by migratory birds, a resource with interstate and international commerce ties. This decision had the effect of withdrawing federal jurisdiction and CWA protection from isolated, intra-state and non-navigable wetlands.

Since the Supreme Court did not define "isolated" in the SWANCC decision, the scope of waters and wetlands within federal jurisdiction is unclear. Regulatory application has become inconsistent within the agencies and has caused confusion among the regulated community. Recent court decisions and decisions within the regulatory agencies themselves have excluded jurisdiction from many wetlands that were protected prior to the SWANCC decision.

It is our position that wetlands play a critical role in supporting the quality and quantity of the Nation's waters. The biological communities supported by wetlands play an important role in that process. Policy that threatens the status of wetlands will work counter to the goals of the CWA.

Wetlands are a focus of interest for ecologists, hydrologists, soil scientists, and resource managers because they represent a dynamic interface between the land and water systems. However, many people have little understanding of the characteristics that make an area a wetland. Many regard wetlands as wasted land that could be best used by filling or draining. In North Carolina, there is a wide diversity of wetland types, particularly freshwater wetlands.

The U.S Fish and Wildlife Service report on the status of the Nation's wetlands indicates that of the estimated 221 million acres of wetlands in the U.S. at the time of European settlement, 53% (115.5 million acres) had been lost by 1997 (Dahl 2000). Also many millions of additional acres have been impacted or converted to other wetland types. Because of functional linkages between wetlands and waters, wetland science does not separate out "isolated wetlands". In Dahl (2000), there is no data that allows for an assessment of the status of "isolated" wetlands. However, it is very likely that these types of wetlands experience the highest rate of loss of all wetland types, simply due to the ease of conversion and a regulatory bias that seems to place lesser value on these systems.

In North Carolina, based on the presence of soils which develop in wet conditions, it is estimated that there were nearly 7.5 million acres of wetlands prior to European settlement (DEM 1994). According to estimates by the N.C. Division of Environmental Management, about 34% of North Carolina's original wetland acreage has been impacted. Of this acreage about 2.5% has been converted to urban land use, 18% has been converted to agriculture and about 13% has been converted to forestry (DEM 1996). Typically, the

wetlands that have been converted for these uses have been what could be termed "geographically isolated". Most of the wetlands that have been converted were marginally wet areas rather than extremely wet areas (DEM 1996). For example, 83% of Carteret County is believed to have been wetlands prior to European settlement (DEM 1991). By the 1950's, about 73% of the county was still covered by largely natural wetlands (wetlands with little disturbance and intact systems of hydrology, hydric soils, and wetland plants). However, by the 1980's, only 52% of the county was covered by largely natural wetlands. Only 2% of the wetlands that were modified were salt or brackish marshes; most were freshwater wetlands (DEM 1996).

Many wetland types found in North Carolina could be termed "geographically" isolated. Wetland types that fall into this category are freshwater systems and include Carolina bays, mafic depressions, mountain bogs, pine savannahs, and vernal pools. Although many of these wetlands may give the appearance of being "geographically" isolated they are not, in fact, functionally or hydrologically isolated.

The terms functions and values are often used interchangeable with regards to wetlands, but they do have different meanings. ***Functions*** are "ecological, hydrological, or other phenomena which contribute to the self-maintenance of the wetland ecosystem". Functions are processes taking place within the wetland ecosystem irrespective of their effect on human society. Net primary productivity, production of organic material above what plants need to survive and grow, is an example of a wetland function (DEM 1996).

Values, on the other hand, denote "something worthy, desirable or useful to humans" (Mistch and Gosselink 1993). Values are derived from ecosystem functions that are perceived to have a positive impact on people. They are centered on the needs and perspective of human society. The law has often afforded protection to wetland functions that demonstrate value to humans. For example, plant production in salt marshes is critical for fish and shellfish harvests so salt marshes are given stringent protection in law. Because the perceptions of human society changes over time, values may also change (DEM 1996).

The value of the Nation's wetlands, even though they only occupy 5% of the United States' land surface, is recognized and well documented. Although the large-scale benefits of (wetland) functions can be valued, determining the value of individual wetlands is difficult because they differ widely and do not all perform the same functions or the same functions equally well. Decision makers must understand that impacts on wetland functions can diminish or eliminate the values of wetlands.

Some examples of wetland ***values*** are cited on the EPA website (www.epa.gov/owow/wetlands 2003). Some of these include:

Wetlands Improve Water Quality – Wetlands help stop pollutants from entering receiving waters. For example, the wetlands in the Congaree Bottomland Hardwood Swamp in South Carolina remove sediment and toxic substances and remove or filter excess nutrients. The least cost substitute for these wetland benefits would be a waste

treatment plant costing $5 million (in 1991 dollars) to construct, and additional money would be needed to maintain and operate the plant.

Wetlands Help Control Floods – The Minnesota Department of Natural Resources has computed a cost of $300 to replace, on average, each acre-foot of flood water storage. In other words, if development eliminates a one acre wetland that naturally holds 12 inches of water during a storm, the replacement cost would be $300. The cost to replace the 5,000 acres of wetlands lost annually in Minnesota would be $1.5 million (in 1991 dollars).

Wetlands Provide Important Wildlife Habitat – Up to one half of all North American bird species nest or feed in wetlands (>700 species in the U.S. alone). Also more than one-third of the United States' threatened and endangered species are wetland -dependant and nearly half are wetland-associated.

Wetlands Provide Recreational Opportunities – More than half of all U.S. adults (98 million people) hunt, fish, birdwatch, or photograph wildlife. These activities which rely on healthy wetlands, added an estimated $59.5 million to the national economy in 1991. Individual states likewise gain economic benefits from recreational opportunities in wetlands that attract visitors from other states.

The hydrologic values derived from wetlands can be divided into two categories, water storage and pollutant removal. The first category, water storage, refers to the value wetlands have in temporarily storing heavy rain, surface runoff, and floodwaters (DEM 1996). Wetlands in any watershed, including geographically isolated wetlands serve a critical function in storing and holding water and associated pollutants including sediment, which could otherwise flow into navigable waters. Wetlands play a significant role in regional water flow regimes by intercepting storm runoff and storing and releasing those waters in a delayed fashion, either through surface or groundwater discharges (Mitsch and Gosselink 1986). The presence of many isolated wetlands decreases runoff velocity and volume by releasing water over an extended period (Carter 1996). The effect of this important wetland function is to abate flooding by lowering and moderating the peaks of flood stages, thereby reducing flood damages (Mitsch and Gosselink 1986). Some isolated wetlands perform important groundwater recharge functions related to water storage. Isolated wetlands can lose their water through evapotranspiration, into the soil profile and to ground water or often through ephemeral channels as surface water flow. "Isolated" wetlands can and often do contribute to groundwater recharge (and discharge). This groundwater then continues movement downslope toward intermittent or flowing streams ultimately entering navigable waters (Winter et al. 1998). Therefore, many wetlands, which are seemingly "isolated", are actually functionally connected and adjacent to navigable waters that are clearly regulated by the CWA. In other words, water contained in an "isolated" wetland is water that could otherwise flow (either surface or subsurface) into navigable water or a tributary if that wetland was drained or filled. Any sediment or pollutants contained therein would also be carried into those waters with out the connected wetlands.

Isolated wetlands also play a key role in pollutant removal. It is well established that wetlands of all types have the capability to improve water quality by trapping, precipitating, transforming, recycling, and/or exporting many of its chemical and waterborne constituents (Mitsch and Gosselink 1986; DEM 1991; DEM 1996). Wetlands serve as important buffers between upland areas and flowing water. They improve water quality by removing heavy metals and pesticides from the water column, and by allowing the precipitation of sediment particles to which many pollutants are attached. Wetland vegetation removes excess nutrients, e.g. phosphorous and nitrogen, and incorporates them into plant tissue or the soil structure by providing an environment in which microbial and other biological activity pulls these compounds out of the water, enhancing its quality.

Nitrogen is one of the most difficult pollutants to remove from our waterways. Often introduced through agricultural or residential fertilizer use or through treated wastewater, it affects plant growth in wetlands and streams and can lead to detrimental algal blooms that can lead to fish kills. Wetland plants temporarily remove nitrogen when they absorb them to build plant tissue. When the plants die the microbes in the soil again release these nutrients. However, alternating periods of inundation and dry down can create conditions by which nitrogen is permanently removed. When wetlands are inundated, animals in the soil and water begin to consume dissolved oxygen leading to anaerobic conditions. Under these conditions, organic nitrogen in plant tissues is converted to ammonium by bacteria. Some ammonium escapes to the atmosphere. As the wetland dries and aerobic conditions return, aerobic bacteria convert the ammonium to nitrate in a process called nitrification. When anaerobic conditions return, another set of anaerobic microbes converts the nitrate to gaseous nitrogen in a process called denitrification (DEM 1996).

Water quality contributions are made by wetlands regardless of their landscape position. Isolated wetlands serve as important chemical and nutrient sinks, trapping and holding these compounds (Mitsch and Gosselink 1986). Because some of this water enters the groundwater, which makes its way into stream and springs, (Weeks and Gutentag 1984), functionally there is an important connection between the status and water quality of "isolated" wetlands and the status and water quality of groundwater aquifers, and navigable waters or tributaries. Increased flood flow associated with the loss of geographically "isolated" wetlands is an important factor in streambank erosion. This type of erosion is a significant water quality problem in many areas downstream of "isolated" wetlands in the United States, contributing greatly to sediment pollution loads in navigable waters.

We feel that there is sufficient evidence in the literature to suggest that there is functional adjacency between most categories of wetlands and navigable water to warrant jurisdiction under the CWA. The functional relationship of wetland to groundwater, groundwater to tributary and navigable stream flows appears to be strong enough to be the foundation for a presumption of jurisdiction. Without this type of presumptive foundation for jurisdiction, a wetland-by-wetland demonstration of hydrologic relationships would make enforcement of the CWA impossible.

Isolated wetlands, ephemeral streams and tributaries are an important part of North Carolina's watersheds. These systems affect the biological and chemical integrity of our

waterways. Since these non-navigable tributaries and their adjacent wetlands drain to larger bodies of water and groundwater, their degradation will negatively affect traditional navigable waters. Unregulated destruction of these non-navigable waters would also jeopardize many important and unique wetlands that provide significant fish and wildlife habitat that supports an enormous diversity of species including federally listed threatened and endangered species.

Waterfowl are especially tied to wetlands; more specifically associated and dependent on wetlands that are not directly associated with navigable waters or their tributaries. Hence, many species of waterfowl are dependant on "isolated" wetlands, which will no longer be regulated by the CWA. The prairie pothole region is the most important breeding area for the most economically important species of ducks (e.g., mallards, blue-winged teal, northern pintails) in North America (Ducks Unlimited 2001). An estimated 50% of the average total annual production of ducks comes from the potholes (Dahl 1990), and in wet years 70% or more of the continent's duck production can originate in this region (Ducks Unlimited 2001).

Waterfowl watching and hunting is a valuable interstate and international economic resource. Nearly 3 million migratory bird hunters, including 1.6 duck hunters, spent approximately $1.4 billion in 2001 for hunting related goods and services (U.S. Fish & Wildlife Service 2002). The 2001 study documented that 14% of the migratory bird hunting took place in a state other than the one in which the participant resided. Waterfowl hunting and watching is an important recreational activity in North Carolina. Currituck Sound is one of the more important wintering habitats for waterfowl in the Atlantic Flyway. In some years, as much as 5% of the waterfowl in the flyway winter there. This area was identified as a "Focus Area" in the Atlantic Coast Joint Venture of the North American Waterfowl Plan. This plan is an international strategy developed by the United States, Canada, and Mexico to facilitate the recovery of North American Waterfowl populations. A reduction of waterfowl production due to loss of nesting habitat such as prairie potholes could result in economic losses from a reduction in hunting license and duck stamp sales, reduction in the use of local guides, and a reduction in patronage to motels and restaurants that cater to hunters and bird watchers. The patronage of these local businesses by waterfowl hunters can be very important because it occurs in the "off-season". Many local businesses and individuals depend on the money generated by waterfowl hunters and other waterfowl related tourists to supplement their income or to remain open during the winter months (D. Luszcz, NCWRC Waterfowl Biologist, pers. comm.).

In addition to the importance of waterfowl hunting to commerce, bird watching contributes substantially to the national economy. In 2001, 14.4 million people participated in watching waterfowl, with associated expenditures and values also measured in the billions of dollars (U.S. Fish & Wildlife Service 2002). Approximately 30% of that waterfowl watching was conducted in states other than the participant's state of residence.

In a time of budget shortages in many states, the removal of federal oversight for such a large percentage of our Nation's wetlands would only serve to further strap state agencies that would be forced to assume these regulatory responsibilities. In the past, states have

relied on Section 404 of the CWA, and have only developed limited regulations of their own to protect these types of wetlands. We fear that if the CWA protection is removed through this rulemaking process, there will be little or no state regulations in place to prevent the further loss and degradation of non-navigable wetlands and the associated pollution of the Nation's waterways.

We believe limiting the jurisdictional reach of the CWA simply to navigable waters and their adjoining wetlands is imprudent. We have seen the improvements to water quality and the associated benefits to wildlife and fishery resources and ultimately to the citizens of our state and nation from the implementation of the CWA. Only through a strong environmental policy and stringent enforcement can we provide for the wise use and enjoyment of our natural resources. We urge the EPA and federal government to continue to place a high value on these non-navigable resources; clarify the definition of navigable waters to include the systems that are important in maintaining the chemical and biological integrity of our Nation's waterways.

We appreciate the opportunity to provide input on this critically important issue. If you have questions or need further information regarding our comments please contact me at (919) 528-9886.

Thank you,

David R. Cox
Technical Guidance Supervisor, NCWRC

Literature cited

Carter, V. 1996. Technical aspects of wetlands: wetland hydrology, water quality and associated functions, in J.D. Fretwell, J.S. Williams, P.J. Redman (eds.), National Water Summary on Wetland Resources, USGS Water Supply Paper 2425.

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.

Dahl, T.E. 2000. Status and trends of wetlands in the conterminous United States 1986 to 1997. U.S. Department of the Interior: Fish and Wildlife Service, Washington, D.C.

Division of Environmental Management (DEM), 1991. Original extent, status and trends of wetlands in North Carolina: a report to the N.C. Legislative Study Commission on Wetlands Protection. Report No. 91-01. Raleigh: North Carolina Department of Environment, Health, and Natural Resources.

Division of Environmental Management (DEM),1994. Water quality progress in North Carolina: 1992-1993 305 (b) report. Report No. 94-06. Raleigh: North Carolina Department of Environment, Health, and Natural Resources.

Division of Environmental Management (DEM), 1996. A field guide to North Carolina wetlands. Report No. 96-01. Raleigh: North Carolina Department of Environment, Health, and Natural Resources.

Ducks Unlimited, Inc. 2001. Ducks Unlimited's Conservation Plan: meeting the annual life cycle needs of North America's waterfowl. Memphis, TN.

Mitsch, W.J. and J.G. Gosselink, 1986. Wetlands. New York: Van Nostrand Reinhold Company.

Mitsch, W.J. and J.G. Gosselink, 1993. Wetlands. 2nd Edition. New York: Van Nostrand Reinhold Company.

U.S. Fish & Wildlife Service. 2002. 2001 National survey of fishing, hunting and wildlife associated recreation: national overview – preliminary findings. U.S. Department of the Interior – U.S. Fish & Wildlife Service, Washington, D.C.

Weeks, J.B. and E.D. Gutentag. 1984. The High Plains regional aquifer: geohydrology. Pages 6-25 in G.A. Whitestone, editor. Proceedings of the Ogallala Aquifer Symposium. Texas Tech. University, Lubbock, Texas.

Winter, T.C., J.W Harvey, O.L. Franke, and W.M. Alley. 1998. Ground water and surface water a single source. U.S. Geological Survey Circular 1139.

Before the Senate Committee on Agriculture, Nutrition, and Forestry

Hearing on "Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule"

Statement for the Record of the National Wildlife Federation in Support of the Clean Water Act "Waters of the United States" Rulemaking

March 24, 2015

The National Wildlife Federation (NWF) submits this statement for the hearing record in strong support of the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") Clean Water Rule defining "Waters of the United States" under the Clean Water Act. NWF represents over 4 million conservation-minded hunters, anglers, and outdoor enthusiasts nationwide. Conserving our Nation's wetlands, streams, and rivers is at the core of our mission. We have been active in advocating for Clean Water Act protections since the Act was passed in 1972. **For the reasons summarized below, we support this rigorous and transparent rulemaking and strongly oppose any legislative effort to delay or derail this much-needed Clean Water Rule.**

With the recent water pollution threats to drinking water from Ohio and West Virginia to Iowa and Montana, we would hope that the House and Senate committees of jurisdiction would convene to consider meaningful solutions to fix these pressing problems. Instead, they seem bent on providing a platform to belittle and undermine the landmark 1972 Clean Water Act. These events remind us of the high value of clean water, and crystallize the need to improve the Clean Water Act, not weaken it.

The Clean Water Act has been successful at improving water quality and stemming the tide of wetlands loss in every state. However, Clean Water Act safeguards for streams, lakes and wetlands have been eroding for over a decade following two controversial Supreme Court decisions which cast doubt on more than 30 years of effective Clean Water Act implementation.

For more than a decade now, 60 percent of stream miles in the United States, which provide drinking water for more than 117 million Americans, are at increased risk of pollution and destruction. Wetlands are at risk as well. In fact, the rate of wetlands loss increased by 140 percent during the 2004-2009 period – the years immediately following the Supreme Court decisions. This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago during the Nixon administration.

When wetlands are drained and filled and streams are polluted, we lose the ability to pursue our outdoor passions and pass these treasured traditions on to our children. Moreover, pollution and destruction of headwater streams and wetlands threaten America's hunting and

fishing economy – which accounts for over $200 billion in economic activity each year and 1.5 million jobs, supporting rural communities in particular.

We respectfully submit this statement for the hearing record emphasizing the following key points from our formal rulemaking comments:

1. **This rule is needed and offers the best opportunity in a generation to clarify the waters that are – and are not – subject to clean water act protections.**

The Waters of the United States rule is necessary to revise the longstanding definition of "waters of the United States" subject to the Clean Water Act in light of the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*,[1] and *Rapanos v. United States.*[2]

The final rule must address the *SWANCC* and *Rapanos* decisions in a manner that is consistent with the Clean Water Act, its goals, and the applicable aquatic ecosystem science. Such a revised regulation will establish a binding rule that will provide for restoring longstanding clean water protections, and will provide greater certainty and consistency in jurisdictional determinations for landowners, agency field staff, and the courts. Rule-making to address this definition was clearly called for by at least two of the Supreme Court Justices in their *Rapanos* concurring opinions: Chief Justice Roberts[3] and Justice Breyer.[4]

2. ***Swancc, Rapanos*, and subsequent agency guidance have created a decade-long untenable status quo of uncertainty, confusion, wasteful litigation, and lost clean water protections.**

The 2001 *SWANCC* decision was narrow. It simply precluded the Corps from asserting jurisdiction over certain ponds based solely on their use by migratory birds. It did not overturn any aspect of the existing waters of the U.S. regulatory definition, including the broad (a)(3) "other waters" provision. Nevertheless, in 2003, the Bush Administration's EPA issued SWANCC guidance (immediately effective ***without advance public notice and comment***) with an advanced notice of proposed rulemaking to potentially remove from Clean Water Act jurisdiction many non-navigable, intrastate wetlands, streams and other waters. **That spring, 39 state agencies and hundreds of thousands of individuals and organizations submitted comments urging the EPA and the Corps not to reduce the historic scope of waters protected under the Clean Water Act. Later that year, over 200 members of Congress from both parties (including Rep. Paul Ryan among others) wrote a letter to President Bush urging him "not to pursue any policy or regulatory changes that would reduce the scope of waters protected under the Clean Water Act."** In the face of such strong opposition, the Bush Administration abandoned its rulemaking to reduce the scope of waters covered by the Clean Water Act, but retained the SWANCC Guidance, effectively removing CWA protections for an estimated 20 million so-called "isolated" wetland acres.

In 2006, in *Rapanos*, the Supreme Court issued a fractured (4-1-4) decision involving wetlands adjacent to non-navigable tributaries of traditional navigable waters. Importantly, the Court issued five opinions, none of which garnered a majority. **Recognizing the confusion wrought by their fractured decision, three of the various opinions urged the agencies to initiate a**

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[1] 531 U.S.159 (2001).
[2] 126 S. Ct. 2208 (2006).
[3] 547 U.S. at 757-58.
[4] 547 U.S. at 812.

rulemaking clarifying the "waters of the U.S". While the federal courts await a revised waters of the U.S. rule, federal court litigation on "Waters of the U.S" mounts in the wake of *Rapanos*, leading to costly litigation, uncertainty, delay, and hampered Clean Water Act enforcement.

In 2007, the Corps and the EPA issued its *Rapanos* Guidance, again ***without advance notice and public comment.*** The agencies amended this guidance in December 2008. **This guidance imposes a confusing and burdensome case-by-case jurisdictional requirement on most wetlands and streams. The 2008 guidance is contrary to sound science and creates an unworkable, time-consuming, expensive process that unnecessarily burdens decision makers and applicants.**

From 2002 through 2010, bills languished in Congress that would have amended the Clean Water Act to clarify the Act's jurisdiction over the Waters of the United States. The Clean Water Restoration Act (CWRA) would have restored the historical scope of the Clean Water Act to those waters protected by the Act prior to the 2001 SWANCC decision, but would not have expanded the scope of jurisdiction beyond those covered at that time.

3. **At stake in this rulemaking are millions of stream miles and wetland acres, drinking water supplies for 117 million Americans, healthy waters to support a healthy economy, and the effectiveness of the Clean Water Act itself.**

The 2003 *SWANCC* Guidance and the 2008 *Rapanos* Guidance have placed millions of wetland acres and tens of thousands of stream miles at risk of pollution and destruction. Given the interrelationship between waters, the existing Guidance has put all of the Nation's waters at risk by retreating from the comprehensive protections needed to achieve the Act's goals. The resources most at risk of losing the Act's protections as a result of the existing guidance are intermittent and ephemeral streams, many wetlands adjacent to such streams and other tributaries, and wetlands and other so-called "isolated" waterbodies that are not adjacent to tributaries.

EPA has estimated that intermittent or ephemeral streams comprise fifty-nine percent of all streams miles in the United States, excluding Alaska.[5] In the arid west, as much as ninety-six percent of all stream miles in some states are intermittent or ephemeral.[6] These headwater, intermittent, and ephemeral waters feed the public drinking water supplies of an estimated 117 million Americans.[7]

Moreover, twenty million acres of wetlands in the lower forty-eight states are considered

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[5] Letter from Benjamin H. Grumbles, Assistant Administrator, U.S. Environmental Protection Agency to Jeanne Christie, Executive Director, Association of State Wetland Managers (Jan. 9, 2006) [mistakenly date stamped Jan. 9, 2005] at 2.

[6] *See, e.g.*, Letter from Stephen A. Owens, Director, Arizona Department of Environmental to Benjamin H. Grumbles, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency (December 5, 2007) at 2 (describing the quality and function of surface waters in Arizona) (submitted as comments on the Guidance).

[7] U.S. Envtl. Protection Agency, Geographic Information Systems Analysis of Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S (State-by-State) and (County-by-County), http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm (last visited 7/19/11).

"isolated."[8] Many more acres are adjacent to small streams that are not navigable, and therefore at risk. According to the most recent national wetlands status and trends report, since 2004 the rate of wetland loss has increased by 140% over the previous report period. This is the first acceleration of wetland loss over a 50-year period, and the first since the passage of the 1972 Clean Water Act. This is the first study period occurring entirely post-*SWANCC*, and the U.S. Fish and Wildlife Service notes that the acceleration of wetland loss is likely at least partially explained by the jurisdictional confusion and the withdrawal of CWA protections by the agencies in the wake of the *SWANCC* and *Rapanos* cases.[9]

Science has demonstrated that these waters that are losing protection are some of the most important waters to maintaining the integrity and health of larger waters and the aquatic ecosystem as a whole. If they are polluted, degraded or destroyed, the health of wildlife and people that depend on these resources will suffer. Wetlands also help combat global warming and their preservation as habitat, sources for water storage, flood control and the like will be vital to the ability of wildlife to adapt to the challenges of a warming planet.[10]

On a practical level, the 2008 Guidance has resulted in delays, confusion and uncertainty for applicants seeking permits along with increased workloads for Corps and EPA officials. EPA's costs to enforce CWA 402, 404, and 311 have increased significantly due to the incremental resources required to assert jurisdiction post *SWANCC* and *Rapanos*.[11] Because it can be difficult to establish where the CWA applies after the Supreme Court's decisions in *SWANCC* and *Rapanos*, enforcement efforts have shifted away from small streams high in the watershed where jurisdiction is a potential issue. **Post-*Rapanos* uncertainty and added time and expense is undermining Clean Water Act enforcement and the overall effectiveness of the Clean Water Act in maintaining and restoring the nation's waters.**

4. **The clean water rule is the product of four years of rigorous and transparent scientific and public policy deliberation and offers the best chance in a generation to clarify the "Waters of the United States."**

In the face of congressional inaction, in 2011, EPA and the Corps formally launched an administrative effort to clarify the "waters of the U.S." **The 2011 Proposed Guidance was the subject of extensive interagency review, economic analysis, and public notice and comment. Approximately 250,000 comments were submitted on the guidance, and these overwhelmingly supported the revised guidance.**

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[8] *See* Pianin, Eric, *Administration Establishes New Wetlands Guidelines: 20 Million Acres Could Lose Protected Status, Groups Say*, WASHINGTON POST, pg. A5 (Jan. 11, 2003) (in discussing the 2003 agency guidance concerning *SWANCC* and so-called isolated wetlands, it states, "The new [guidance] would shift responsibility from the federal government to the states for protecting as much as 20 percent of the 100 million acres of wetlands in the Lower 48 states, according to official estimates.").

[9] DAHL, T.E. 2011. Status and trends of wetlands in the conterminous United States 2004 to 2009, at 16 U.S. Department of the Interior; Fish and Wildlife Service, Washington, D.C. 108 pp.

[10] *See, e.g.*, EPA National Water Program Strategy 2012: Response to Climate Change (Goal 6) http://water.epa.gov/scitech/climatechange/upload/epa_2012_climate_water_strategy_full_report_final.pdf.

[11] *See* 2014 EPA Economic Analysis at 30-31, at: http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

In 2011-2012, on a parallel track, the EPA Office of Research and Development compiled a draft science report, *The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report).[12] This scientific report, based on peer-reviewed literature and an additional review by independent scientists, was prepared to inform the Administration's proposed rule clarifying which waters are protected under the Clean Water Act.

In July 2013, the EPA Science Advisory Board (SAB) launched an SAB Expert Scientific Peer Review of the Connectivity Report.[13] In September 2013, the agencies released the Draft Connectivity of Streams and Wetlands Science Report for public comment. Also in September 2013, after holding up action on the Clean Water guidance in the Office of Management (OMB) for almost two years, the Administration sent its draft proposed Clean Water Rule to OMB for interagency review.

In March 25, 2014, after months of interagency review, the EPA and the Army Corps of Engineers jointly proposed the formal rule clarifying and partially restoring the historic scope of waters protected under the Clean Water Act. The 2-page proposed rule text in the federal register is thoroughly explained and supported by a lengthy preamble, including both scientific and legal appendices, the publicly available Connectivity Science Report, and a thorough Economic Analysis. **The 200-day public comment period ended November 14, 2014.[14] Americans submitted over 1 million comments on the proposed rulemaking, and these comments were overwhelmingly in support of the rulemaking.**

In late September-early October 2014, the SAB issued reports affirming the scientific basis for the proposed rule (SAB Rule Letter) [15] and affirming – with recommendations for enhancing – the scientific accuracy of the Connectivity Report (SAB Connectivity Peer Review Letter).[16] The Connectivity Report was revised and strengthened in accordance with the SAB recommendations and was released in final form in January 2015.[17] **Both the SAB report and the Final Connectivity Report will inform the agencies' final "waters of the U.S." rule.**

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[12] *See* Draft Connectivity Report (September 2013) at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

[13] *See* SAB Peer Review process at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report!OpenDocument&TableRow=2.1#2.

[14] *See* EPA Waters of the U.S. rulemaking process materials at: http://www2.epa.gov/uswaters.

[15] EPA SAB letter to Administrator McCarthy, *Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act"* (September 30, 2014) (SAB Rule Letter) at: http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf

[16] EPA SAB letter to Administrator McCarthy, *SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (October 17, 2014) (SAB Connectivity Peer Review Letter) at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf

[17] *Final EPA Report: Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (January 2015) at: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414#Download

Throughout 2014, EPA has held hundreds of stakeholder meetings, including repeated meetings with agricultural and municipal and other stakeholders seeking improved clarity in the rulemaking. The EPA and the Corps prepared thoughtful responses to clarifying questions about agricultural concerns raised in the letter from Senate Agriculture Committee Chair Debbie Stabenow and 13 other Senators. As EPA Administrator McCarthy has noted, this is a positive dialogue that will make the rule better while still allowing the proposal to move forward to provide solutions for the nation's pressing water problems. We applaud the agencies' efforts to reach out to landowners to improve the clarity of the final rule, clearly distinguishing between regulated tributaries on the one hand, and excluded ditches, gullies, and rills on the other.

This rigorous and transparent proposed rulemaking process offers the best opportunity in a generation to clarify which waters are – and are not – waters of the U.S. subject to the Clean Water Act in a manner that provides more clarity than ever before. This rulemaking is informed by over 30 years of agency field experience, by the most comprehensive synthesis of stream and wetland connectivity science ever compiled, and by well over one million public comments.

We urge members of Congress to respect this rigorous and transparent rulemaking process and allow the agencies to move without further delay to finalize a strong final rule, consistent with the rule's foundations in the connectivity science, the goals of the Clean Water Act, and the Kennedy significant nexus jurisdictional standard. Until that final rule is in place, the 2003 and 2008 guidance documents and the lack of a clear jurisdictional standard for judicial review continue to require cumbersome, confusing, and resource intensive case-specific jurisdictional determinations. And millions of stream miles and wetland acres, drinking water supplies for 117 million Americans, healthy waters to support a healthy economy, and the effectiveness of the Clean Water Act itself all remain at risk.

5. **For the first time, the proposed rule is expressly excluding many ditches and other water features from CWA jurisdiction.**

In the interest of increasing clarity and certainty about the scope of the Clean Water Act, we support the agencies' proposed list of waters to be explicitly excluded from jurisdiction by rule. We support the agencies' proposal to explicitly exclude erosional and artificial water features such as gullies, rills, non-wetland swales, small ornamental waters, water-filled depressions incidental to construction activity, among others. Expressly making these kinds of waters non-jurisdictional by rule should help convey clarity and address many of the concerns of important segments of the landowning public and, in particular, the farming and ranching communities. **The proposed rule goes further in excluding waters than previous regulatory guidance has gone as set forth in the Corps' 1986 preamble language at 51 Fed. Reg. 41206, 41217 (November 13, 1986) and the 1988 EPA preamble language at 53 Fed. Reg. 20764 (June 6, 1988).**

6. **Clarifying and restoring clean water act protections fosters strong local economies and millions of jobs.**

EPA's conservative economic analysis demonstrates that this rule clarifying and restoring clean water protections is good for the economy. "Overall, a comparison indicates that the benefits

justify the costs of this proposed action."[18] EPA's estimated annual indirect benefits of $300.7 million to $497.6 million are based primarily on estimates of ecosystem services flowing from protected or mitigated aquatic resources as a result of this increased compliance, as well as government savings on enforcement expenses:

> Benefits that accrue from this action include the value of the many ecosystem services provided by the small streams, wetlands, and other open waters protected by the many CWA provisions that would apply to them. These waters **provide habitat and biodiversity, support recreational fishing and hunting, filter sediment and contaminants, reduce flooding, stabilize shorelines and prevent erosion, recharge ground water, and maintain biogeochemical cycling**. Other benefits include **government savings on enforcement expenses** through reduced need for costly jurisdictional determinations where jurisdiction has been unclear under the current interpretation of the existing regulation. **Business and government may also achieve savings from reduced uncertainty in where CWA jurisdiction applies**. *Id.* at 32. (Emphasis added).

The agencies' benefit estimates are solidly supported by other economic analyses. Costanza et al (2014) estimated that the value of ecosystem services for "inland wetlands" averaged $25,682/ha/yr. The value of the services provided by the navigable waters themselves (included within "rivers and lakes") averaged only $4,267/ha/yr.

Healthy wetlands and streams are economic engines for local recreation-based economies. Every year 47 million Americans head to the field to hunt or fish. For example, the American Sportfishing Association reports that **anglers generated more than $201 billion in total economic activity in 2011, supporting more than 1.5 million jobs**.[19] The U.S Fish and Wildlife Service estimated that duck hunting in 2006 had a positive economic impact of more than $2.3 billion, supporting more than 27,000 private sector jobs.[20]

In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Indeed, throughout the headwaters states, river recreation, including boating, fishing and wildlife watching, represent billions of dollars in commerce.[21] **In the Colorado River Basin portion of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, 2.26 million people participated in water sports in 2011, spending $1.7 billion that generated $2.5 billion in total economic output**.[22]

Another indication of the economic implications of protecting the Nation's water resources is revealed in the example of the actions taken by New York City to initiate a $250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskill Mountains to protect the quality of its water supply rather than constructing water treatment

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[18] Economic Analysis of Proposed Revised Definition of Waters of the United States (March 2014) at 32.

[19] American Sportfishing Association, *Sportfishing in America* (January 2013).

[20] Economic Impact of Waterfowl Hunting in the United States, Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, November 2008. US Fish and Wildlife Service.

[21] Western Resource Advocates 2014 Rule Comments.

[22] SOUTHWICK ASSOC., ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION ON THE COLORADO RIVER & ITS TRIBUTARIES (May 3, 2012) (Table E-3), *available at* http://protectflows.com/wp-content/uploads/2013/09/Colorado-River-Recreational-Economic-Impacts-Southwick-Associates-5-3-12_2.pdf.

plants which could cost as much as $6-8 billion. (Dailey et al. 1999). In South Carolina, a study showed that without the wetland services provided by the Congaree Swamp, a $5 million wastewater treatment plant would be required (http://water.epa.gov/type/wetlands/people.cfm).

The algal blooms that cause health problems also come at high economic costs. **For example, Dodds et al (2009) estimated that the total annual cost of the eutrophication of U.S. freshwaters was $2.2 billion.** This estimate included recreational and angling costs, property values, drinking water treatment costs, and a conservative estimate of the costs of the loss of biodiversity. Polasky and Ren (2010) cited research that estimated that if two lakes (Big Sandy and Leech) in Minnesota had an increase in water clarity of three feet, lakefront property owners would realize a benefit of between $50 and $100 million.

By any measure, clarifying and restoring clean water protections for America's waters is a good investment for healthy communities and a healthy economy.

CONCLUSION

National Wildlife Federation strongly supports this historic "waters of the United States" rulemaking as necessary and the best chance in a generation to clarify which waters are – and are not – "waters of the United States" protected by the 1972 Clean Water Act. We urge Congress to respect the agencies rulemaking and allow them to finalize this much-needed rule without further delay. We look forward to a final rule in 2015 that will provide greater long-term certainty for landowners and advance our collective efforts to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Respectfully Submitted,

Jan Goldman-Carter
Senior Manager, Wetlands and Water Resources
National Wildlife Federation
1990 K St. NW Suite 430
Washington, DC 20006

AMERICAN FISHERIES SOCIETY · AMERICAN FLY FISHING TRADE ASSOCIATION · BULL MOOSE SPORTSMEN'S ALLIANCE · INTERNATIONAL FEDERATION OF FLY FISHERS · IZAAK WALTON LEAGUE OF AMERICA · NATIONAL WILDLIFE FEDERATION · NORTH AMERICAN GROUSE PARTNERSHIP · SNOOK AND GAMEFISH FOUNDATION · THEODORE ROOSEVELT CONSERVATION PARTNERSHIP · TROUT UNLIMITED

February 3, 2015

The Honorable Jim Inhofe
Chairman
Committee on Environment & Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Barbara Boxer
Ranking Member
Committee on Environment & Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Bill Shuster
Chairman
Committee on Transportation & Infrastructure
U.S. House of Representatives
Washington, DC 20515

The Honorable Peter DeFazio
Ranking Member
Committee on Transportation & Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Inhofe, Ranking Member Boxer, Chairman Shuster and Ranking Member DeFazio:

The undersigned sportsmen organizations represent millions of hunters and anglers nationwide, and we strongly support efforts to clarify longstanding Clean Water Act protections for wetlands and headwater streams across the country. We appreciate the opportunity to comment on your hearing titled "Impacts of the Proposed Waters of the United States Rule on State and Local Governments." We request that you include the concerns of America's 47 million hunters and anglers in your discussions by adding this statement to the hearing record.

Like all Americans, hunters and anglers rely on clean water. Yet bedrock safeguards for streams, lakes and wetlands have been eroding for nearly 15 years because of administrative guidance following a pair of confusing Supreme Court decisions (*Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers (2001)* and *Rapanos v. United States (2006)*) that called into question more than 30 years' worth of Clean Water Act protections for these waters. As a result, 60 percent of stream miles in the United States, which provide drinking water for more than 117 million Americans, are at increased risk of pollution and destruction. Wetlands are at risk as well. In fact, the rate of wetlands loss increased by 140 percent during the 2004-2009 period – the years immediately following the Supreme Court decisions. This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago during the Nixon administration.

Following Supreme Court direction in the *Rapanos* decision, as well as at the request of many diverse stakeholders, including sportsmen's organizations, the Environmental Protection Agency and U.S. Army

Corps of Engineers jointly proposed a rule on March 25, 2014, to clarify the jurisdiction of the Clean Water Act. We commend the agencies for advancing this long overdue rulemaking. This rule represents the best chance in a generation to restore protections to waters upon which hunters and anglers rely while preserving – and, in some cases, enhancing – longstanding Clean Water Act exemptions for farmers, ranchers and foresters that encourage wise stewardship of land and water resources.

Sportsmen have been requesting a rulemaking to resolve Clean Water Act confusion for years, because, simply put, clean water equals better hunting and fishing. We were particularly pleased to see the proposed rule categorically include tributaries to waters already covered by the Clean Water Act in the definition of "waters of the United States." These tributaries include, for example, many headwater streams that provide spawning grounds for trout and salmon. Also, the proposed rule categorically includes wetlands adjacent to these tributaries, which provide critical nesting habitat for waterfowl, in the definition of "waters of the United States."

During the public comment period, many of our organizations commented on a third category of waters – so-called "other waters," which are not categorically included in the proposed rule. Many waters of this type are important as waterfowl habitat, as well, and the scientific literature supports a more definitive inclusion of these waters than contained in the proposed rule. For example, the Prairie Pothole Region, which stretches from Iowa through the Dakotas and into Canada, contains thousands of small, shallow wetlands that fall into the "other waters" category. This region provides nesting habitat to as many as 70 percent of all the ducks in North America.

The impacts of a final rule on the sporting communities will be dramatic and overwhelmingly positive. It will reinvigorate our outdoor pursuits that depend on quality habitat. Hunting and fishing collectively represent a $200 billion a year economy, supporting 1.5 million jobs. These economic benefits are especially pronounced in rural areas, where income generated during the hunting and fishing seasons can keep small businesses operational for an entire year. Through fees and excise taxes on sporting equipment, sportsmen also pay hundreds of millions of dollars each year for wildlife management, habitat conservation and public access. This economic engine runs on clean water.

Hunting and fishing aren't just valuable components of the local, state and national economies. They are a tradition we hope to pass on to our children. Now, when fewer children are spending time outdoors, we cannot afford to lose quality habitat and days in the field due to confusing federal laws.

We urge your support for this once-in-a-generation rulemaking process so we can improve and ultimately finalize a rule that – at long last – definitively states which waters are and are not covered by the Clean Water Act. Our hunting and fishing economy and way of life depend on it.

Sincerely,

American Fisheries Society
American Fly Fishing Trade Association
Bull Moose Sportsmen's Alliance
International Federation of Fly Fishers
Izaak Walton League of America
National Wildlife Federation
North American Grouse Partnership
Snook and Gamefish Foundation
Theodore Roosevelt Conservation Partnership
Trout Unlimited

National Wildlife Federation * Izaak Walton League of America
Theodore Roosevelt Conservation Partnership * Trout Unlimited

October 16, 2014

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, DC 20310

Re: Clean Water Rule Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

As sportsmen-conservation organizations representing millions of hunters and anglers nationwide, we strongly support your administration's vital effort to clarify and restore longstanding Clean Water Act protections for headwater streams and wetlands across the country.

Headwater streams provide important spawning and rearing habitat for fish, and they are incredibly important to water quality in downstream lakes, rivers, and bays that also provide important fish and wildlife habitat. These streams also supply drinking water for 1 in every 3 Americans.

Wetlands, even so-called isolated ones that are not adjacent to streams, are used by breeding, migrating, and resident waterfowl. They are the bedrock of our waterfowl hunting and conservation traditions. They also provide important habitat for a diversity of wildlife, filter pollutants, provide rural and coastal communities with critical flood control, and replenish ground and surface waters during drought.

America's 47 million sportsmen and women rely on clean water for hunting, angling, and other outdoor recreation. Yet the Clean Water Act -- the primary tool for maintaining and restoring the water quality of streams and wetlands – was unnecessarily weakened by agency guidance following two confusing Supreme Court decisions. As a result, 60 percent of stream miles in the United States are at increased risk of pollution and destruction. Also, the rate of wetlands loss increased by 140 percent from 2004 to 2009 -- the years immediately following the Supreme Court decisions. This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago.

When wetlands are drained and streams are polluted, it imperils America's hunting and fishing economy -- which accounts for over $200 billion in economic activity each year and 1.5 million jobs. These impacts are felt by rural communities in particular.

We commend your administration's proposed Clean Water Act rule for the protections it restores to headwaters streams and adjacent wetlands, and ask that the final rule offer similar protections for other important yet presently unprotected waters. We also support your administration's efforts to preserve longstanding Clean Water Act exemptions for farmers and foresters that encourage wise stewardship of land and water resources.

The current rulemaking is our best chance to restore protections for streams, wetlands and other waters critical to our hunting and fishing traditions and outdoor economy. We look forward to working with your administration to finalize and implement the Clean Water Act rule. Our economy and way of life depend on it.

Sincerely,

NATIONAL ORGANIZATIONS
American Fisheries Society
Backcountry Hunters & Anglers
National Wildlife Federation
Theodore Roosevelt Conservation Partnership
Trout Unlimited
Quail and Upland Wildlife Federation
Izaak Walton League of America
B.A.S.S. LLC
ALABAMA
Alabama B.A.S.S. Nation
Bluff City Bassmasters
ARIZONA
Arizona Council of Trout Unlimited
Arizona Wildlife Federation
Old Pueblo Chapter, Trout Unlimited
Gila Trout Chapter #530 Trout Unlimited
Trout Unlimited - Zane Grey Chapter
Grand Canyon Chapter 190, Trout Unlimited
ARKANSAS
Arkansas Audubon Society
Arkansas Canoe Club
Arkansas Chapter of the American Fisheries Society
Arkansas Chapter of The Wildlife Society
Arkansas Stream Team #443
Arkansas Wildlife Federation
White River Conservancy
Yell County Wildlife Federation
Friends of the North Fork and White Rivers
Arkansas Public Policy Panel
CALIFORNIA
California Council of Trout Unlimited
COLORADO
West Denver Trout Unlimited
Angler's Covey
Boulder Flycasters/Trout Unlimited

Colorado Tackle Pro
Denver Bassmasters
Pikes Peak Outfitter
Rocky Mountain Flycasters Chapter - Trout Unlimited
Colorado Wildlife Federation
North American Grouse Partnership
Bull Moose Sportsmen's Alliance (Rocky Mountain West)
Colorado Backcountry Hunters & Anglers

FLORIDA

Bonefish & Tarpon Trust
Snook & Gamefish Foundation
Florida Wildlife Federation

GEORGIA

Blue Ridge Mountain Chapter Trout Unlimited 626
Cohutta Chapter Trout Unlimited 242
Coosa Valley Chapter Trout Unlimited 519
Georgia Council Trout Unlimited
Georgia Foothills Chapter Trout Unlimited 629
Georgia Wildlife Federation
Gold Rush Chapter Trout Unlimited 733
Middle Georgia Chapter Trout Unlimited 435
Oconee River Chapter Trout Unlimited 661
Rabun Chapter Trout Unlimited 522
Savannah River Chapter Trout Unlimited 592
Tailwater Chapter Trout Unlimited 532
Chattahoochee/Nantahala Chapter 692 of Trout Unlimited

IDAHO

Idaho Wildlife Federation

ILLINOIS

Champaign County Izaak Walton League of America
Illinois Council Trout Unlimited

INDIANA

Indiana Wildlife Federation
Porter County Chapter
Tippecanoe Watershed Foundation

IOWA

Floyd County Ikes
Iowa Driftless Chapter, Trout Unlimited
Iowa Trout Unlimited
Iowa Wildlife Federation
Living River Group, Sierra Club
Northern Prairies Land Trust
Spring Creeks Chapter, Trout Unlimited

Trout Unlimited North Bear Chapter

KANSAS

Kansas BASS Nation

Kansas Wildlife Federation

KENTUCKY

Trout Unlimited, Kentucky

LOUISIANA

Louisiana Wildlife Federation

MAINE

Maine Council Trout Unlimited

MARYLAND

Free State Chapter, Izaak Walton League of America

Maryland Bass Nation

MICHIGAN

Dwighy Lydell Chapter, Izaak Walton League of America

Michigan United Conservation Clubs

MINNESOTA

Cass County Minnesota Chapter, Izaak Walton League of America

Headwaters Trout Unlimited Chapter #642

Hiawatha Trout Unlimited

Minnesota Conservation Federation

Minnesota Trout Unlimited

Trout Unlimited, Minnesota Gitche Gumee Chapter

Trout Unlimited, Minnesota Waybinahbe Chapter

Twin Cities - Trout Unlimited

MISSOURI

Conservation Federation of Missouri

MONTANA

MOBASS Federation Nation

Montana Wildlife Federation

NEBRASKA

Lincoln Chapter 65, Izaak Walton League of America

Nebraska Wildlife Federation

NEVEDA

Nevada Wildlife Federation

NEW MEXICO

New Mexico Wildlife Federation

NEW YORK

Rome NY Chapter of Izaak Walton League

NORTH CAROLINA

Blue Ridge Trout Unlimited

Pisgah Chapter Trout Unlimited

Albemarle Conservation & Wildlife Chapter

Charlotte Reconnecting Ourselves With Nature
Concord Wildlife Alliance
Fayetteville Increasing Sustainable Habitat
Gaston County Piedmont Area Wildlife Stewards
Greater Raleigh Outdoors and Wildlife
Habitat and Wildlife Keepers
Lake James Area Wildlife and Nature Society
Lake Norman Wildlife Conservationists
Mountain Island Lake Wildlife Stewards
Mountain Wild!
North Carolina Trout Unlimited Council
North Carolina Wildlife Federation
Protecting, Advocating, and Conserving Together in the High Country
Rocky River Trout Unlimited
South Wake Conservationists
Table Rock Trout Unlimited

OHIO

Headwaters Chapter Izaak Walton League of America
Izaak Walton League, Capitol City Chapter

OKLAHOMA

Conservation Coalition of Oklahoma

OREGON

Oregon Division, Izaak Walton League of America
Berkley Conservation Institute

PENNSYLVANIA

Hokendauqua Chapter Trout Unlimited
Central Pennsylvania Conservancy
Cumberland Valley Chapter Trout Unlimited
God's Country Chapter Trout Unlimited
Lackawanna Valley Trout Unlimited
Lloyd Wilson Chapter of Trout Unlimited
Monocacy Chapter Trout Unlimited
Pennsylvania State Council, Trout Unlimited
Stanley Cooper Sr Trout Unlimited
Trout Unlimited Tiadaghton chapter 688
Valley Forge Chapter Trout Unlimited
Allegheny Mountain Chapter of Trout Unlimited
Penns Creek Chapter of Trout Unlimited
Caldwell Creek Chapter, Trout Unlimited
Trout Unlimited, Pennsylvania North-Central Region
Adams County Chapter Trout Unlimited 323
Donegal Chapter of Trout Unlimited
Schuylkill County 537

Arrowhead Chapter of Trout Unlimited
Doc Fritchey Chapter of Trout Unlimited
Forks of the Delaware Chapter #482 of Trout Unlimited
Fort Bedford Trout Unlimited
Ken Sink Chapter Trout Unlimited
Little Lehigh Chapter of Trout Unlimited
Mountain Laurel Chapter of Trout Unlimited
Neshannock Chapter Trout Unlimited #216
Perkiomen Valley Trout Unlimited
Seneca Chapter of Trout Unlimited
Spring Creek Chapter of Trout Unlimited
Western Pocono Trout Unlimited #203
Trout Unlimited, Forbes Trail Chapter 206
Chestnut Ridge Trout Unlimited

SOUTH CAROLINA

Mountain Bridge Trout Unlimited
South Carolina Wildlife Federation
Campbells Farm Rod Co.
Chattooga River Chapter of Trout Unlimited
Trout Unlimited, South Carolina

SOUTH DAKOTA

Friends of the Big Sioux River
Kampeska Chapter, Izaak Walton League
Northeastern S.D. Walleye Club
Rapid City Chapter, Izaak Walton League
Sioux Falls Izaak Walton League
South Dakota Wildlife Federation
Sunshine Chapter, Izaak Walton League

TENNESSEE

Tennessee Council of Trout Unlimited

TEXAS

Dallas Safari Club
Guadalupe River Trout Unlimited
Texas Conservation Alliance

VERMONT

Greater Upper Valley Trout Unlimited Chapter
Trout Unlimited of Southwestern Vermont

VIRGINIA

Trout Unlimited, Mountain Empire Chapter
Bill Wills Southeast Virginia Chapter Trout Unlimited Chapter
Commonwealth Chapter Izaak Walton League of America
Massanutten Chapter (171), Trout Unlimited
New River Trout Unlimited

Northern Shenandoah Valley Trout Unlimited (Chapter 701)
Rapidan Chapter Trout Unlimited
Roanoke Valley Chapter of the Izaak Walton League of America
Roanoke Valley Chapter of TU (no. 308)
Smith River Trout Unlimited Chapter 264
Virginia Division Izaak Walton League

WEST VIRGINIA

Blennerhassett Chapter 304 of Trout Unlimited
Sal Font Chapter of Trout Unlimited
KYOVA Chapter, Trout Unlimited
Recreation Department, Beckley, WV
Upper Ohio Valley Northern Panhandle Chapter Trout Unlimited

WISCONSIN

Antigo Chapter Trout Unlimited
Aldo Leopold Chapter Trout Unlimited
Blackhawk Trout Unlimited
Brown County Chapter of the Izaak Walton League
Central Wisconsin Chapter of Trout Unlimited
Fox Valley Trout Unlimited
Northwoods Chapter Trout Unlimited
Oconto River Chapter of Trout Unlimited
Marinette County Chapter of Trout Unlimited
SEWTU - Southeast Wisconsin Trout Unlimited
Southern Wisconsin Chapter of Trout Unlimited
Wisconsin Council of Trout Unlimited
Wisconsin Wildlife Federation

Steve Moyer
Vice President for Government Affairs

March 23, 2015

The Honorable Pat Roberts
Chairman
Committee on Agriculture, Nutrition and Forestry
Washington, DC 20515

The Honorable Debbie Stabenow
Ranking Member
Committee on Agriculture, Nutrition and Forestry
Washington, DC 20515

Dear Chairman Roberts and Ranking Member Stabenow:

On behalf of Trout Unlimited's (TU) more than 150,000 members nationwide, I am writing to provide testimony for your March 24, 2015, hearing on the Clean Water proposal from the Army Corps of Engineers (Corps) and the EPA. I ask that you please include our letter in the hearing record.

TU strongly supports the proposed rule because it will clarify and strengthen the very foundation of the Clean Water Act's protections for important fish and wildlife habitat, especially the small headwater streams that serve as the keystone of watershed health. Based on our experience working in the field with the Clean Water Act, and the detailed analysis completed by the U.S. Army Corps of Engineers, EPA, and OMB for the proposal, we believe that the clean water proposal is worthy of your thoughtful consideration. When it is finalized, it will provide landowners, conservationists, and businesses with substantial improvements in how the law is implemented.

In that light, we urge the Committee to review the final rule when it is completed in the coming months. The agencies have conducted hundreds of stakeholder meetings and have considered over 1 million comments on the draft, and more than 85% of the comments supported the proposal. The final draft will almost certainly contain changes designed to fix the constructive criticisms that some have been offered during the comment period, resulting in a clearer, stronger final product.

The Clean Water Act is vital to TU's work, and to anglers across the nation. Our mission is to conserve, protect and restore North America's trout and salmon fisheries and their watersheds. Our volunteers and staff work with industry, farmers, and local, state and federal agencies around the nation to achieve this mission. On average, each TU volunteer chapter annually donates more than 1,000 hours of volunteer time to stream and river restoration and youth

Trout Unlimited: America's Leading Coldwater Fisheries Conservation Organization
1300 N. 17th St. Suite 500, Arlington, VA 22209
Direct: (703) 284-9406 • Fax: (703) 284-9400 • Email: smoyer@tu.org • www.tu.org

education. The Act, and its splendid goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" serves as the foundation to all of this work. Whether TU is working with farmers to restore small headwater streams in West Virginia, removing acidic pollution caused by abandoned mines in Pennsylvania, or protecting the world famous salmon-producing, 14,000-jobs-sustaining watershed of Bristol Bay, Alaska, we rely on the Clean Water Act to safeguard our water quality improvements.

Conservation of our nation's water resources is not only critically important to TU, but also to the success of the agriculture industry. Partnering with farmers and ranchers is an integral part of the work that we do. In the Midwest Driftless Area (southwest Wisconsin, southeast Minnesota, northeast Iowa, and northwest Illinois), TU's work with dairy farmers has restored watersheds and tripled trout populations in some streams, creating excellent fishing opportunities for sportsmen throughout the upper Midwestern states. In West Virginia, working with dairy farmers and beef ranchers, TU has installed over one million feet of stream-side fencing to reduce the impacts of cattle on streams, while adding upslope water sources to allow cattle access to water. Additionally, TU has worked extensively with ranchers and landowners in many parts of the western United States to upgrade irrigation infrastructure to improve agriculture production while keeping more water in streams to aid watershed health. Much of this good work was funded by Farm Bill conservation dollars flowing to our agriculture partners.

In our view, the protections for watersheds provided by the Clean Water Act, and the restoration programs provided by the Farm Bill, fit beautifully together.

Unfortunately, the nation's clean water safety net is broken, and if you appreciate clean water and the Clean Water Act, then you will appreciate the agencies' efforts to resolve the law's most fundamental question: which waters are – and are not – covered by the Clean Water Act. Over the last 15 years, agency guidance following a series of Supreme Court decisions have weakened and confused these protections. The agencies' proposal takes important steps to clarify and restore protections to intermittent and ephemeral streams that may only flow part of the year. These intermittent and ephemeral streams provide habitat for spawning and juvenile trout, salmon, and other species, and protecting these streams means protecting the water quality of larger rivers downstream. Thus, sportsmen strongly support the reasonable efforts embodied in the proposal from the agencies to clarify and restore the protection of the Clean Water Act to these bodies of water where we spend much of our time hunting and fishing.

I Because of the uncertainties caused by the Supreme Court cases, a rulemaking was sought by many business interests, as well as by Supreme Court Justice Roberts who presided over the *Rapanos* case.

It is important to note that the proposal works to clarify what waters are **not** jurisdictional. The proposed rule and preamble reiterates all existing exemptions from Clean Water Act jurisdiction, including many farming, ranching, and forestry activities. These exemptions include activities associated with irrigation and drainage ditches, as well as sediment basins on construction sites. Moreover, for the first time, the proposed rule codifies specific exempted waters, including many upland drainage ditches, artificial lakes and stock watering ponds, and water filled areas created by construction activity. Finally, we believe that the final rule must, and likely will, include even greater clarity on agricultural exemptions.

As highlighted above, TU works with farmers, ranchers, and other landowners across the nation to protect and restore trout and salmon habitat. We have a keen interest in ensuring that the proposal works well for producers on the ground.

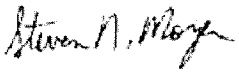
We also urge the Committee members to remember the great, and direct, benefit that clean water and healthy watersheds provide to their districts and states. Pennsylvania, for example, depends on thousands of miles of rivers and streams for clean and abundant drinking water, diverse and abundant fish and wildlife habitat, and local fishing, hunting, bird-watching, and boating recreation that support a strong outdoor recreation economy. According to the Fish and Wildlife Service, more than 1.1 million people fished and 775,000 people hunted in Pennsylvania in 2011. Together, they directly spent more than $1.4 billion on gear and trip expenditures alone. These hunting and fishing economies depend on healthy habitat and clean water. They depend on the Clean Water Act.

Lastly, the Clean Water Act and the Farm Bill, passed last year under the able leadership of the committee, go hand in hand, creating opportunities for producers and conservationists to work together in watershed management. While the Farm Bill provides the funding and projects for producers to update aging infrastructure and more effectively manage their land, the new Clean Water rule will provide clarity and allow producers to continue with these practices with predictability. The Farm Bill has spurred fish habitat restoration on agricultural land. The Clean Water Act offers protections which ensure that those conservation gains are not undermined by pollution and habitat degradation in other parts of the watershed. This partnership between agriculture and conservation is an essential piece of protecting our nation's water resources and the fish and wildlife that rely on it.

The committee helped to give birth to the new Farm Bill last year. In 1972, Congress gave birth to the Clean Water Act. These laws do, and should even more so over time, work together. But the Clean Water Act has come to a major crossroads. The agencies which the Congress authorized to implement the Clean Water Act, spurred by the Supreme Court itself and a wide range of stakeholders, have put forth a proposal that will help strengthen the very foundation of the law for years to come.

Attached is a letter from 10 national sportsmen conservation and fisheries professional organizations in support of the proposal and in opposition to Congressional action to gut it. As you scrutinize the proposal, we urge you to strongly consider the views of sportsmen and women in Pennsylvania, Kansas, Michigan, and others around the nation, and support the reasonable and science-based efforts of the Corps and EPA to clarify and restore the Act's jurisdictional coverage.

Thank you for considering our views,



Steve Moyer
Vice President of Government Affairs
Trout Unlimited

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

Attention: Docket ID No. EPA-HQ-OW-2011-0880
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
Federation of Southern Cooperatives/Land Assistance Fund, Atlanta, GA
National Hmong American Farmers, Inc., Fresno, CA
North Carolina Association of Black Farmers Land Loss Prevention Project, Durham, NC

American Sustainable Business Council, Washington, DC
Community Food and Justice Coalition, Oakland, CA
Earthjustice, Washington, D.C.
Food & Water Watch, Washington, DC
National Family Farm Coalition, Washington, DC
National Immigrant Farming Initiative, Washington, D.C.
Slow Food USA, Brooklyn, NY
Union of Concerned Scientists, Washington, D.C

#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, Kentucky
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

Testimony of Joe Logan

President, Ohio Farmers Union

Before the House Agriculture Subcommittee On Conservation

Concerning EPA's Proposed Changes to the Definition of Waters of the United States

Hearing Held March 5, 2015

Good morning. My name is Joe Logan. I am President of Ohio Farmers Union. On behalf of the family farmers, ranchers and rural members of Ohio Farmers Union, thank you for the opportunity to testify regarding the Environmental Protection Agency and Army Corps of Engineers' proposed changes to the definition of "waters of the U.S." OFU was organized in 1934. We work to protect and improve the well-being and quality of life of family farmers, ranchers and rural communities in Ohio and throughout the country by promoting grassroots-derived policy adopted annually by our membership. OFU members represent producers of varied commodities, crops, and livestock employing varied practices, but hold in common reliance on and good stewardship of our shared water resources.

The proposed changes to the definition of "waters of the U.S.," commonly referred to as "the WOTUS rule," have been the subject of much overheated rhetoric and unduly politicized. While the proposed rule definitely required some adjustments, demands to "ditch the rule" ignore the process through which regulations are made and the opportunity to improve regulatory certainty for family farmers. In Ohio, last summer's algae bloom in Lake Eerie demonstrates the importance of protecting our shared water resources. Impeding adequate protections against pollution jeopardizes all who rely on clean surface water, whether they rely on municipal water systems or smaller private systems.

The rulemaking process is designed to incorporate conversation with and feedback from the regulated community. It is unreasonable to expect a proposed rule to get all the nuances precisely correct. While EPA could have done a better job communicating with farmers over the course of this rulemaking, the basic process is still in place: EPA issued a proposed rule, sought feedback from agriculture and fully expects to make changes acknowledging farmers' expertise. Our understanding of this process compelled us to present EPA with instructions on how to make the rule work for family farmers rather than resist the process entirely.

OFU echoes National Farmers Union's four main critiques of EPA's proposed rule:

- First, wetlands should not be considered tributaries.
- Second, there must be strict, bright-line limits on what waters can be considered "similarly situated."
- Third, groundwater connections warrant further examination before they may be used as a basis for finding waters jurisdictional.
- Fourth, the definition of "perennial flow" should be embellished, allowing farmers to know with certainty whether ditches on their property are jurisdictional or not.

Other changes in the proposed rule, including proposed definitions of "tributary" and "adjacent," simply re-affirm jurisdiction over waters that would be found within jurisdiction through case-by-case determinations using the current rule. Their intent is to establishing regulatory reliability and reduce litigation, saving time and resources for all parties concerned.

Right now, family farmers are subject to a convoluted pair of Supreme Court decisions on a statute that has not been substantially revisited since 1987. EPA

and the Army Corps have had trouble applying the court rulings with consistency, preventing farmers from anticipating the jurisdictional status of water on their land with any confidence. OFU does not view the proposed rule, as some groups do, as an over-reaching grab for power or land. Rather, it is an attempt to meet the demands of the Supreme Court and allow commerce and agriculture to proceed without fear of unexpected permitting complications.

The current regulatory landscape is unacceptable. We need more clarity and reliability. While the proposed rule did not accommodate all of agriculture's concerns, I understand that EPA will take all feedback, including NFU's, under serious consideration. I expect a final rule from EPA that will protect the nation's water resources without obstructing our ability to farm productively. I would encourage all parties presenting testimony today to stop politicizing this matter and be good advocates for American farm families by telling EPA what needs to change in the rule. Right now our farmers operate under the shadow of agency interference, uncertain of how to maintain environmental compliance. We all have the opportunity to fix that by telling EPA and the Corps how to make this rule work for rural America.

In conclusion, I would add that:

1. Concerns that proposed definitions of "tributary" and "adjacent" are unwarranted because those definitions merely clarify existing jurisdiction,

2. The final rule should establish that wetlands cannot be considered "tributaries,"

3. Groundwater connections to jurisdictional waters need to be more carefully examined before they are considered grounds for finding a water that is so connected to be jurisdictional.

4. Further language identifying perennial flow as "year round when rainfall is normal" should be added to the definition of perennial flow, and

5. A final rule incorporating these points would have a positive impact on rural America by allowing farmers to know with certainty when Clean Water Act jurisdiction is triggered.

Ohio Farmers Union stands ready to provide this committee with any further information or explanation that may be helpful on this matter. Thank you for the opportunity to testify.

Joe Logan

President

Ohio Farmers Union

QUESTIONS AND ANSWERS

MARCH 24, 2015

Senate Committee on Agriculture, Nutrition & Forestry
Waters of the United States:
Stakeholder Perspectives on the Impacts of the EPA's Proposed Rule
3.24.2015
Questions for the Record
Mr. Furman Brodie

Chairman Pat Roberts

1. How would you rate EPA's level of engagement with stakeholders during this entire rulemaking process and how responsive has the EPA and other agencies involved been to the questions you have had about the impacts of this proposed rule? To date, have any of you received any further assurances or clarity from EPA about any of your outstanding questions?

   To date we have not received any assurance or clarity from EPA other than Administrator McCarthy's non-binding verbal promises. The rule needs to be rewritten to address all of the concerns of the Agricultural and forestry communities. Once the rule is rewritten it should be published for additional comment from all sectors.

2. In March, EPA Administrator McCarthy told farmers in a speech that "We're not interested in the vast majority of ditches – roadside ditches, irrigation ditches – those were never covered." She also mentioned that EPA has "listened" to farmers and as a result, the agency is going to change the way "other waters" are addressed in the final rule. Do any of you find any comfort or assurances in these statements or are actions stronger than words in this instance?

   There is no comfort or assurance in the promise to address our concerns. If EPA really wants to address our concerns they will rewrite the rule and publish it for additional comment. That is the only way we can be sure EPA heard, and understood, what has been said.

Senate Committee on Agriculture, Nutrition & Forestry
Waters of the United States:
Stakeholder Perspectives on the Impacts of the EPA's Proposed Rule
3.24.2015
Questions for the Record
Mr. Jason Kinley

Chairman Pat Roberts

1. How would you rate EPA's level of engagement with stakeholders during this entire rulemaking process and how responsive has the EPA and other agencies involved been to the questions you have had about the impacts of this proposed rule? To date, have any of you received any further assurances or clarity from EPA about any of your outstanding questions?

   Given our unique circumstances, EPA is not able to address the concerns from mosquito control districts via rulemaking. Instead, the duplicative NPDES/FIFRA regulatory regime has been compelled via court rulings and can only be resolved through a legislative clarification.

2. In March, EPA Administrator McCarthy told farmers in a speech that "We're not interested in the vast majority of ditches – roadside ditches, irrigation ditches – those were never covered." She also mentioned that EPA has "listened" to farmers and as a result, the agency is going to change the way "other waters" are addressed in the final rule. Do any of you find any comfort or assurances in these statements or are actions stronger than words in this instance?

   Our mosquito control district is charged with the responsibility of eliminating the vectors that spread various diseases. We take seriously the concerns of those in the agriculture community about the breadth of this proposed rule and the potential consequences of that expansion. Regardless of a future narrowing of the definition of Waters of the U.S. (such as an exemption of some agricultural activities), it is clear that this rule will greatly expand the areas that fall under Clean Water Act jurisdiction. This expansion causes great concern for public health agencies such as mine. The lack of an NPDES/FIFRA clarification for pesticide applications, coupled with the proposed or revised Waters of the U.S. definition will continue to drain oversight resources and expose us to unnecessary activist litigation.

Senate Committee on Agriculture, Nutrition & Forestry
Waters of the United States:
Stakeholder Perspectives on the Impacts of the EPA's Proposed Rule
3.24.2015
Questions for the Record
Mr. Mac McLennan

Chairman Pat Roberts

1. How would you rate EPA's level of engagement with stakeholders during this entire rulemaking process and how responsive has the EPA and other agencies involved been to the questions you have had about the impacts of this proposed rule? To date, have any of you received any further assurances or clarity from EPA about any of your outstanding questions?

   Minnkota is a small business as defined by the Small Business Administration (SBA) and we are particularly concerned about the impacts of the proposed rule on our operations. The absence of genuine consultation with small business certainly contributed to the October 2014 comments of the SBA Office of Advocacy concluding that the proposed rule would have a significant impact on small business. We agree with the SBA Office of Advocacy that EPA and the Corps should withdraw the rule and conduct a Small Business Advocacy Review Panel prior to promulgating any further rule on the issue. EPA must revise and clarify the rule, because currently the broad categories and ambiguous definitions have only increased confusion and uncertainty. The agencies have given every indication they are surprised by the level of concern and confusion with the proposed rule. Issues related to scope and clarity could have been resolved with a thorough pre-proposal consultation process.

2. In March, EPA Administrator McCarthy told farmers in a speech that "We're not interested in the vast majority of ditches – roadside ditches, irrigation ditches – those were never covered." She also mentioned that EPA has "listened" to farmers and as a result, the agency is going to change the way "other waters" are addressed in the final rule. Do any of you find any comfort or assurances in these statements or are actions stronger than words in this instance?

   While Administrator McCarthy's comments referenced above are positive, our concerns will not be alleviated until the actual language of the proposed rule is changed and clarified. The rule, as written, is far too ambiguous to place complete confidence in the Administrator's remarks alone.

Senator Debbie Stabenow

1. **Do you believe the current Clean Water Act guidance provides the needed certainty and clarity for you to effectively manage your power cooperative, or do you believe the Clean Water Act needs further clarification?**

   The preamble to the rule claims that it will "enhance protection for the nation's public health and aquatic resources. . .by increasing clarity" regarding what is and what is not jurisdictional under the Clean Water Act. However, the proposal does little to resolve inconsistency and confusion surrounding the jurisdiction of the Clean Water Act, and in fact increases confusion and uncertainty. The proposed rule is not cost-effective and will impose significant economic impacts on a substantial number of small entities, including electric cooperatives. The proposed rule creates a substantial expansion of federal government jurisdiction leading to permitting delays and increased costs with no measurable environmental benefit.

2. **If the EPA and the Army Corps produce a final rule that fully reflects the concerns and comments that you and your industry have made over the past year, will you support moving forward with a final rule?**

   We agree that the courts have created confusion over what is considered waters of the United States. Minnkota is not categorically opposed to clarifying efforts by the EPA and the Corps under the Clean Water Act as to what are considered waters of the United States. We believe the best way to provide clarity is for the agencies to withdraw the proposed rule and engage in formal consultation with stakeholders, including small business, prior to re-proposal.

3. **You expressed dissatisfaction with EPA's consultation efforts before the release of the proposed rule. In an effort to address all stakeholder concerns, EPA has held over 400 stakeholder meetings across the country since the proposed rule was published last year, and the agency is completing analysis of the more than one million comments received during the 200-plus day comment period. Given the need for regulatory certainty, if EPA makes the changes you requested, would you oppose such a rule and continue to request additional administrative process past the issuance of the final rule?**

   EPA and the Corps should have consulted stakeholders *before* the rule was proposed to make the agencies aware of potential impacts to small entities like electric cooperatives. Much of the confusion surrounding the proposal could have been avoided had the agencies taken this proactive step. The agencies are precluded, once a rule has been proposed, from the interactive exchanges that could result in the clarity that we seek. We would like to see EPA and the Corps take the time necessary to get the definition of the "waters of the US" right. We believe a better rule will emerge if the agencies withdraw the proposed rule,

engage in formal consultation with stakeholders including small business, and re-propose a rule that reflects those consultations.

Senate Committee on Agriculture, Nutrition & Forestry
Waters of the United States:
Stakeholder Perspectives on the Impacts of the EPA's Proposed Rule
3.24.2015
Questions for the Record
Mr. Jeff Metz

Chairman Pat Roberts

1. How would you rate EPA's level of engagement with stakeholders during this entire rulemaking process and how responsive has the EPA and other agencies involved been to the questions you have had about the impacts of this proposed rule? To date, have any of you received any further assurances or clarity from EPA about any of your outstanding questions?

I would rate the level of engagement as poor. While EPA has held stakeholder meetings, they did a very poor job of reaching out to farmers and ranchers while the rule was being crafted. The stakeholder meetings themselves were also problematic as no true interpretation was ever provided for many of the questions that were asked. During an EPA Region 7 stakeholder meeting in Nebraska, every question asked about the rule was met with the response, "*That's a great question, please include it in your comments,* or *the rule is not final so we legally cannot interpret how the rule would impact that situation.*" This type of response only leads me to ask as to the purpose of spending federal tax dollars on meetings that provide no answers to those in attendance.

2. In March, EPA Administrator McCarthy told farmers in a speech that "We're not interested in the vast majority of ditches – roadside ditches, irrigation ditches – those were never covered." She also mentioned that EPA has "listened" to farmers and as a result, the agency is going to change the way "other waters" are addressed in the final rule. Do any of you find any comfort or assurances in these statements or are actions stronger than words in this instance?

It seems that the EPA Administrator is wanting farmers and ranchers to judge the rule based upon what she says is in it or what EPA may have intended. However, I am looking at what is actually spelled out in it and the legal interpretation of a number of organizations. While the Administrator has said that many of the concerns we all have with the rule will be taken care of, I will remain skeptical. In fact, I have a hard time trusting what the Administrator says when the fine print says something entirely different.

Senator Debbie Stabenow

1. You expressed dissatisfaction with EPA's consultation efforts before the release of the proposed rule. In an effort to address all stakeholder concerns, EPA has held over 400 stakeholder meetings across the country since the proposed rule was published last year, and the agency is completing analysis of the more than one million comments received during the 200-plus day comment period. Given the need for regulatory certainty, if EPA makes the changes you requested, would you oppose such a rule and continue to request additional administrative process past the issuance of the final rule?

Again, I will agree that EPA did reach out to stakeholders, however, they did a very poor job of reaching out to farmers, ranchers, county officials, homeowners, etc. while the rule was being crafted. While I cannot speak to all of the 400 stakeholder meetings you mention, the Nebraska meetings provided little clarity as to what EPA says the rule covers vs. the fine-print contained in EPA's proposal.

To answer your question, this proposal cannot be salvaged. EPA needs to hit the reset button and start over. While the EPA Administrator likes to talk about all of the changes they are going to make to the rule, she also continues to make statements that I find troubling including saying that EPA simply got off on the wrong foot with this rule because of its title and that her agency didn't communicate things as clearly as it needed. If she truly feels that the only problem with this proposal is the title and the manner in which they talked about it, she obviously hasn't been paying attention to the meaningful and legally sound concerns farmers, ranchers, homebuilders, counties and others have raised.

2. The agriculture industry has received longstanding exemptions under both sections 404 and 402. The proposed rule has included language that not only maintains these exemptions, but also includes specific exemptions that have never before been carved out in the Clean Water Act, such as for prior converted cropland, artificially irrigated areas, stock watering ponds, and others. How, then, does the proposed rule pose a threat to agriculture, other than the need to further clarify key terms, such as upland ditches?

The clarification of a few terms won't solve all of problems I have with this rule. I would also say that the definitions provided by EPA in the final rule might be problematic themselves. The fact that the EPA and Corps are moving directly into a final rule vs. an interim rule that is open for comment also concerns me greatly. We get the feeling that EPA and the Corps are more interested in shoving this massive rule down our throat rather than working with us to create a workable rule. The general public should have the ability to comment on changes before it goes into effect.

Senator Joni Ernst

1) Many farmers and ranchers proactively work with local government officials and representatives to ensure they are effectively pursuing best management practices of their farming operations. If producers are bombarded with burdensome government regulations when they conduct everyday tasks on their farms, they may cease to continue such practices. How do you anticipate this proposed rule will impact the relationship producers have with local governmental entities and agents?

The impact of this rule on the relationships farmers and ranchers have with state/local officials will be significant. Currently, Nebraska farmers and ranchers deal with the §402 program for certain livestock operations and pesticide applications on or near water. For livestock producers, the NDEQ first started regulating discharges to "waters of the state" in 1974. Thousands, if not tens of thousands, of livestock producers have been visited by the NDEQ since that time. This relationship between the agricultural community and state regulatory agency has been invaluable as state regulators have a better idea of the specific needs of producers in Nebraska.

While this regulatory structure has evolved at the state level in tandem with the federally delegated NPDES program since its inception, all determinations have been made under the state definition of regulated waters. If the proposed rule is adopted, Nebraska's farmers and ranchers are left wondering if his or her operation is effectively permitted or exempted. This is because, with the broad categorical definition of tributaries and neighboring waters, it is possible that currently exempted operations may now be subject to federal CWA jurisdiction. What's worse is that a producer may have, in good faith, constructed a landscape feature to divert flow away from livestock operations and now those very features may themselves be a "tributary" or an "adjacent" water. This will cause confusion, increase costs and will expose producers to new liability to enforcement from the federal or state government or to citizen suits under the CWA. This federalization of a current state program also infringes states' rights and runs counter to the concept of "cooperative federalism".

Senate Committee on Agriculture, Nutrition & Forestry
Waters of the United States:
Stakeholder Perspectives on the Impacts of the EPA's Proposed Rule
3.24.2015
Questions for the Record
Mrs. Susan Metzger

Chairman Pat Roberts

1. This proposed rule would be applicable not only to Section 404 Dredge and Fill permitting but also to all of the existing Clean Water Act programs. How would the expansion of "waters of the United States" impact the administration and enforcement of existing regulatory programs – programs like those designed to enforce Section 402 (National Pollutant Discharge Elimination System – NPDES permitting), Section 401 (State Water Quality Certifications), and Section 303 (Water Quality Standards and Total Maximum Daily Loads – TMDLs)?

   The proposed rule and the associated expansion of "Waters of the United States" will have administrative and enforcement impacts well beyond Section 404 of the Clean Water Act. State pesticide programs and regulations will need to be revised as the line between applications to terrestrial and aquatic resources becomes blurred by the proposed rule. Counties will become restrained in routine ditch maintenance or control of noxious weeds for fear of running afoul of the Act. New permitting conditions and limitations for land applications of livestock waste or wastewater sludge that affect minor drainages will add operational costs to agricultural and municipal waste water management.

   Application of the Clean Water Act through water quality standards, total maximum daily loads, 305b assessments, or certain permitting, e.g., general NPDES permits for pesticide applications on, over or near waters that see flow only on the occasion of localized rain, will divert and distract State resources away from the more pressing priority of protecting the established surface waters of the State. It cost Kansas over $300,000 annually (in 2004 dollars) to conduct 500 simplified, expedited Use Attainability Analyses (UAAs) on Kansas streams. Should the proposed rule come into force, Kansas can expect to expend significantly greater amounts over a number of years re-doing those UAAs and performing new UAAs as our universe of classified streams expands many times over with the inclusion of ephemeral tributaries.

2. As a state partner that helps administer and carry out Clean Water Act programs, how would you characterize EPA's consultation process since the beginning of the rulemaking process? Are there any questions that you have raised with EPA or the U.S. Army Corps of Engineers that remain unanswered?

As the co-regulators with the Federal agencies of the Clean Water Act we characterize EPA's consultation process incomplete and falling well short of the effective coordination called for in Executive Order 13132. To be relegated to the status of interested party, indistinguishable from the myriad of environmental, agricultural and development commenters on the rule, effectively undermines the states' role and discretion for effective administration under the Act. It dilutes our input on the repercussions and consequences of the proposed rule.

The next steps taken by the Federal agencies must adhere more closely to cooperative Federalism and not render lip service to consultation with the States as required by Executive Order 13132. Whatever shape the proposed rule takes will have profound impact on the State agencies tasked with applying and administering the Clean Water Act on Kansas waters. Those implementing the rule should have a say in the scope of the rule.

Questions remaining unanswered are a clear declaration of which waters mapped under the National Hydrography Database, will be defined as Waters of the United States under the proposed rule. Additionally, the states have recommended that groundwater be explicitly exempt within the rule and that greater attention be afforded to the definition of ditches within the rule to ensure ditches are explicitly exempt. Kansas particularly disagrees with the inclusion of ephemeral streams in the definition of tributary and recommended those waters be excluded pursuant to current State law, included in an alternate category or defined as other waters allowing for in-field assessments of jurisdiction.

Senator Debbie Stabenow

1. You expressed dissatisfaction with EPA's consultation efforts before the release of the proposed rule. In an effort to address all stakeholder concerns, EPA has held over 400 stakeholder meetings across the country since the proposed rule was published last year, and the agency is completing analysis of the more than one million comments received during the 200-plus day comment period. Given the need for regulatory certainty, if EPA makes the changes you requested, would you oppose such a rule and continue to request additional administrative process past the issuance of the final rule?

   We found the stakeholder process orchestrated by EPA to thwart an earnest discussion of the specific concerns held by States, such as Kansas, with the Federal agencies. In Kansas' comment letter to the agencies in October 2014, we requested the rule be withdrawn. Expression of the state's comments and recommended changes is far more complex than what can be gleaned from a comment letter. The changes Kansas requests stand in stark contrast to current Federal agency positions and will require additional direct conversations between the states, EPA and the Corps. Issuance of a final rule reflecting our concerns is unlikely, and without allowing for full consultation and advice of the states, will likely result in litigation.

2. The agriculture industry has received longstanding exemptions under both sections 404 and 402. The proposed rule has included language that not only maintains these exemptions, but also includes specific exemptions that have never before been carved out in the Clean Water Act, such as for prior converted cropland, artificially irrigated areas, stock watering ponds, and others. How, then, does the proposed rule pose a threat to agriculture, other than the need to further clarify key terms, such as upland ditches?

Kansas ranks third in the nation in terms of acres of land devoted to farming. Agriculture comprises 90% of the land use in the State and 99% of our land is held in the private sector. Agriculture and related food and food processing industries contribute an estimated $53 billion to the state's economy, 37% of the state's GDP. These lands are dissected by a historic stream network created by conditions totally unlike those seen today. Especially in western Kansas, this stream network only flows in response to localized rainfall. Under the proposed rule and the inclusion of ephemeral streams, because these smaller order streams have a bed, bank and ordinary high water mark they will be considered jurisdictional under the Act. This expansion of additional jurisdictional waters will impact the growth of agribusiness and agriculture in Kansas. Under the proposed rule, construction and expansion activities in our Kansas dairies and livestock industries, especially in western Kansas, will now need to consider the presence of these smaller order, ephemeral streams – increasing project costs and experiencing delays due to permitting and mitigation.

Inclusion of additional ephemeral watercourses under Federal jurisdiction will also result in imposing Federal permitting conditions on application of pesticides and livestock waste on predominantly dry land.

Voluntary, incentive-based program participation by our Kansas producers has been key to achieving improvements in water quality in the state. The proposed rule has degraded the trust and increased skepticism that acceptance of cost-share funds to implement best management practices will open private property to federal oversight of management decisions. This unintended consequence works directly opposite to the intentions of meaningful administration of the Clean Water Act in Kansas.

Senate Committee on Agriculture, Nutrition & Forestry
Waters of the United States:
Stakeholder Perspectives on the Impacts of the EPA's Proposed Rule
3.24.2015
Questions for the Record
The Honorable Lynn M. Padgett

Chairman Pat Roberts

1. How would you rate EPA's level of engagement with stakeholders during this entire rulemaking process and how responsive has the EPA and other agencies involved been to the questions you have had about the impacts of this proposed rule? To date, have any of you received any further assurances or clarity from EPA about any of your outstanding questions?

Chairman Roberts, thank you for your question. While EPA did consult with us, we wish it had been more meaningful and that the consultation had occurred before the proposed rule was released for public comment.

Under the Clean Water Act, local governments share implementation responsibilities with the states and counties can be both regulators and regulated entities under the Act. Any changes to the "waters of the U.S." definition within the Act will directly impact states and local governments.

State and local governments work in conjunction with the federal government to protect the public. This shared duty is called Federalism (Executive Order 13132). Under Federalism, the federal government consult with its intergovernmental partners on proposed rules and regulations that will directly impact states and local governments. The Federalism process requires the federal government to start a consultation process—as early and often as possible—BEFORE the proposed rule is even published in the Federal Register, to ensure the federal rules are workable and obtainable for all levels of government. This process was not followed by the agencies.

While EPA maintains that they started the Executive Order 13132: Federalism consultation process with state and local governments in 2011, this is misleading. In the 17 months between the Federalism consultation on the draft guidance and the publication of the proposed rule, the agency didn't continue meaning discussions and thereby failing to fulfill the intent of Executive Order 13132 and the agency's internal process for implementing it.
NACo, along with other governmental groups, sent numerous letters and requests to the agencies expressing concerns about the state and local consultation process and the scope of the rule-making. We repeatedly requested the agencies undertake further review and consultation with the impacted state and local governments.

Only after the proposed rule was published in the Federal Register did the EPA agree to consult with its local government partners. At that point, EPA held numerous conference calls with NACo's technical experts—county engineers, legal staff, public works directors and stormwater managers. During the

course of these conference calls, on behalf of its county experts, NACo submitted 11 pages of specific questions on the proposed rule's impact. Some of the questions the agencies were easily able to answer, others were inconsistently answered and some questions are still outstanding.

While we appreciate the willingness of EPA to engage with our members after the proposed rule was published, these efforts are not a substitute for Executive Order 13132. And, if meaningful consultation had been provided earlier before the proposed rule was published, these discussions could have lessened the confusion surrounding the proposed rule.

2. In March, EPA Administrator McCarthy told farmers in a speech that "We're not interested in the vast majority of ditches – roadside ditches, irrigation ditches – those were never covered." She also mentioned that EPA has "listened" to farmers and as a result, the agency is going to change the way "other waters" are addressed in the final rule. Do any of you find any comfort or assurances in these statements or are actions stronger than words in this instance?

Chairman Roberts, thank you for your question. While the agencies have assured us that is it not their intent to regulate more roadside or drainage ditches or stormwater features, our county experts—county engineers, public works directors, stormwater managers and legal staff—who are on the ground implementing Clean Water Act programs, assert that the answer is not that simple. There are already inherent problems within the current federal permitting process—the proposed rule will actually create more confusion and uncertainty due to unclear terminology.

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 and their regional offices have delivered inconsistent information about which waters would or would not be covered under federal jurisdiction. If there is uncertainty now about what the rule does and doesn't do, there will certainly be uncertainty in the field when the final rule is being implemented by the regional Corps districts.

The current permitting process is already complex, time-consuming and expensive, leaving local governments and public agencies vulnerable to citizen suits. For example, counties are 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 municipal separate storm sewer system (MS4) permits.

That is why it is especially important the federal government collaborate with state and local governments prior to publication of any proposed rule.

Senator Debbie Stabenow

1. What specific categories of waters does NACo believe should be guaranteed protection by the CWA, and has NACo offered specific language refinements during the rulemaking process to accomplish that? For waters that NACo would leave out, can you point to scientific evidence that allowing them to be polluted or degraded would not have a significant effect on downstream water quality?

Senate Stabenow, thank you for your question. NACo has submitted extensive public comments on the proposed rule that contain specific recommendations for the agencies and these comments have been submitted for the record.

Counties are on the front line of protecting water resources. Since the proposed rule was published in the Federal Register, NACo has worked closely with the federal agencies to discuss a number of key county concerns which were derived from our county experts—county engineers, stormwater managers, public works directors and legal staff—who work on environmental and public safety issues on a daily basis. An extensive list of their questions and concerns were submitted to the agencies on the proposed rule.

Counties would not leave out specific water category protections under the Clean Water Act. 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 collaboration with state and local governments to explore unintended implications.

We want to work with the agencies and Congress to ensure we have a clean, safe supply of water for generations to come, while protecting public safety. We look forward to working with the federal government to clearly define and achieve these shared goals through a meaningful consultation process.

2. You expressed dissatisfaction with EPA's consultation efforts before the release of the proposed rule. In an effort to address all stakeholder concerns, EPA has held over 400 stakeholder meetings across the country since the proposed rule was published last year, and the agency is completing analysis of the more than one million comments received during the 200-plus day comment period. Given the need for regulatory certainty, if EPA makes the changes you requested, would you oppose such a rule and continue to request additional administrative process past the issuance of the final rule?

Senator Stabenow, thank you for asking for clarification about the consultation process.
When crafting federal laws and regulations, the federal government is required to consult with its intergovernmental stakeholders because state and localities are closer to the problems and best able to solve them. There are numerous federal laws and executive orders that reaffirm this partnership including the Regulatory Flexibility Act (RFA), Executive Order 13132 on Federalism and Executive Order 13866 on Regulatory Planning and Review. In the realm of the Clean Water Act, local governments share implementation authorities with the states, counties can be both a regulator and a regulate

entity. That is why federal agencies should (and must) consult with their state and local government partners on proposed rules.

The Federalism process requires the federal government to start these consultations—as early and often as possible—BEFORE the proposed rule is even published in the Federal Register, to ensure the federal rules are workable and obtainable for all levels of government. But, the agencies only consulted with state and local government groups after the proposed "waters of the U.S." rule was published in the Federal Register, which does not honor the intent of these laws.

NACo, along with other governmental groups, sent numerous letters and requests to the agencies expressing concerns about the state and local consultation process and the scope of the rule-making. Additionally, the groups requested the agencies undertake further review and consultation with its state and local government partners. If state and local governments were involved prior to the proposed rule's publication in the Federal Register, these discussions could have led to a more workable and concise proposed rule.

Senate Committee on Agriculture, Nutrition & Forestry
Waters of the United States:
Stakeholder Perspectives on the Impacts of the EPA's Proposed Rule
3.24.2015
Questions for the Record
The Honorable Leslie Rutledge

Senator Debbie Stabenow

1. In your testimony, you claim the proposed rule ignores Justice Kennedy's advice of using ordinary high water marks to define tributaries, and instead, the rule only requires that waters "contribute flow, either directly or through another water..." You go on to state that "Even a trickle" and "every stream, no matter how small, would meet this standard."

   However, the proposal defines tributary as "water physically characterized by the presence of a bed and banks and ordinary high water mark...which contributes flow...to a water." This definition clearly requires both the presence of a bed and bank, an ordinary high water mark, AND a contribution of flow. Therefore, it seems the proposal is actually going a step beyond what Justice Kennedy suggested by adding additional requirements in the definition of tributary. In fact, the only waters considered jurisdictional that do not require the presence of a bed and bank and ordinary high water mark are wetlands, lakes, and ponds. So it seems that "every stream, no matter how small" would not, in fact, meet the proposed definition of tributary.

   In light of this, how do you reconcile your testimony?

   I respectfully disagree with your understanding of my testimony. My written testimony does not state that Justice Kennedy advised "using ordinary high water marks to define tributaries." My testimony points out that Justice Kennedy looked at the practice of using the evidence of an ordinary high water mark to delineate a tributary and found it lacking. Justice Kennedy stated that, if the use of the ordinary high water mark was consistently applied, it might "provide a rough measure of the volume and regularity of flow...and a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act." Rapanos v. United States, 547 U.S. 715, 781 (2006). However, he went on to determine:

   > *Yet the breadth of this standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it – precludes*

> *its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system compromising navigable waters as traditionally understood.* Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*. Id (emphasis added).

See Rutledge Written Testimony, pgs. 5-6. The crux of Justice Kennedy's opinion was that basing the standard on evidence of an ordinary high water mark would likely lead to the inclusion of waters that carry only minor water volumes toward the navigable-in-fact water. Nothing in the proposed rule prevents the application of the law in this manner. The requirement that the stream in question "contribute flow, either directly or through another water" does not address the issue of volume. In fact, if the EPA can assert jurisdiction over streams that contribute flow "through another water," the proposed rule offers no limit to how far upstream from the navigable water they will go, even if the stream in question has little to no flow for most of the year.

2. **You expressed dissatisfaction with EPA's consultation efforts before the release of the proposed rule. In an effort to address all stakeholder concerns, EPA has held over 400 stakeholder meetings across the country since the proposed rule was published last year, and the agency is completing analysis of the more than one million comments received during the 200-plus day comment period. Given the need for regulatory certainty, if EPA makes the changes you requested, would you oppose such a rule and continue to request additional administrative process past the issuance of the final rule?**

   While I do agree with the need for regulatory certainty, I cannot predict how EPA will respond to the States' call for further clarification and revision of the proposed rule. I would oppose any rule that is still so vague as to prevent farmers and ranchers from understanding the scope of the Clean Water Act. Depending on the final rule issued by EPA, I would make a determination at that time whether a legal challenge is necessary. At over 350 pages, the proposed rule is lengthy and confusing and does not provide regulatory certainty.

3. **The agriculture industry has received longstanding exemptions under both sections 404 and 402. The proposed rule has included language that not only maintains these exemptions, but also includes specific exemptions that have never before been carved out in the Clean Water Act, such as for prior converted cropland, artificially irrigated areas, stock watering ponds, and others. How, then, does the proposed rule pose a threat to agriculture, other than the need to further clarify key terms, such as upland ditches?**

As stated in the response to Question 1, the proposed rule does not put any kind of limitation or measure on what it means to "contribute flow." As such, farmers and ranchers would be left wondering if small natural features on their property would be considered jurisdictional wetlands or streams. These areas would not be exempt as prior converted croplands or artificially irrigated areas, but they may be wet for only a small portion of the year, if at all. However, if through its connection to other waters, this small area provides any amount of flow to a navigable-in-fact water, it could be considered "waters of the United States" and under the jurisdiction of the EPA and the Corps of Engineers. As stated above, the rule does not provide any guidance in regards to the volume of flow that would be necessary to establish a "significant nexus" to a navigable-in-fact water.

Likewise, an important example is the agricultural stormwater exemption for section 402 permits for Concentrated Animal Feeding Operations ("CAFO"). With this exemption, farmers and ranchers are already at odds with EPA and an expansion of the scope of "waters of the United States" would create more legal uncertainty. Under the CAFO regulations, a farm or ranch is only exempt from NPDES permitting if the facility does not discharge pollutants into waters of the United States. Farmers and ranchers have already been locked in battles with the EPA over whether incidental amounts of dust and feathers from poultry ventilation fans are exempt as "agricultural stormwater." Thus, farm families cannot be certain that existing exemptions will protect their interests. Only a clear standard within the limits of the Clean Water Act can provide certainty to the agriculture community.

Senator Joni Ernst

1. **This proposed rule, if finalized, would create an added layer of federal government oversight of projects that have not historically fallen under their jurisdiction. As such, many state and local governments already have methods in place to provide oversight and ensure compliance with local laws and regulations. How do you anticipate this rule will impact the ability of state and local governments to effectively maintain this level of accountability, while also complying with federal regulators?**

Arkansas law has addressed water pollution since 1949, when the legislature created a Water Pollution Control Commission within the State Board of Health. In 1971, the Arkansas Department of Pollution Control and Ecology was created (later renamed the Arkansas Department of Environmental Quality), which received authority to issue NPDES permits in 1986. ADEQ also issues permits for activities that fall outside the scope of the federal Clean Water Act but are necessary to protect water quality. Examples of such permits are for disposal of wastewater from oil and gas production and liquid animal waste, two areas that have recently become hot topics for EPA but have been managed for years by state government. Arkansas is able to quickly address

compliance issues and work with farms and regulated facilities to protect water quality. Increased federal oversight will likely lead to lengthy enforcement actions that do not result in effective compliance with the law. At the local level, expanded federal oversight will ignore the knowledge and expertise of local conservation districts. No one wants to protect water quality more than the people that own the land and use the water for their livelihood and recreation.

Senate Committee on Agriculture, Nutrition & Forestry
Waters of the United States:
Stakeholder Perspectives on the Impacts of the EPA's Proposed Rule
3.24.2015
Questions for the Record
Dr. Donald van der Vaart

Chairman Pat Roberts

1. This proposed rule would be applicable not only to Section 404 Dredge and Fill permitting but also to all of the existing Clean Water Act programs. How would the expansion of "waters of the United States" impact the administration and enforcement of existing regulatory programs – programs like those designed to enforce Section 402 (National Pollutant Discharge Elimination System – NPDES permitting), Section 401 (State Water Quality Certifications), and Section 303 (Water Quality Standards and Total Maximum Daily Loads – TMDLs)?

Expansion of the definition of "waters of the United States" will affect more than just the Clean Water Act Section 404 program, as the Chairman suggests. In North Carolina, otherwise unclassified unnamed streams take the classification assigned to the named stream to which they are tributary. However, incorporating within the scope of "waters of the United States" ephemeral streams within floodplains and riparian areas will mean, for example, that these "streams" subject to prohibitions on discharge and to water quality standards applicable to the named tributary to which the floodplain or riparian ultimately applies. Stormwater containing small amounts of fertilizers or other agricultural chemicals that flows into these ephemeral streams may routinely exceed water quality standards, because stormwater, by definition, constitutes the entirety of the flow in an ephemeral stream. Keep in mind that EPA is also pressuring states to adopt numeric water quality standards for nitrogen and phosphorus, which are principal ingredients in many agricultural chemicals as well as lawn and garden chemicals. Discharges of agricultural stormwater are, at 33 U.S.C. §1362(14), definitionally excluded from the term "point source," but violations of water quality standards can be cited irrespective of a point source contribution. The result would be farmers having to scale back their acreage to minimize the possibility that stormwater might convey residues of agricultural chemicals into such ephemeral streams. In addition to the impact on farmers, stormwater flows from golf courses, state and local parks, and even the lawns and gardens of homeowners, would potentially violate water quality standards as a result of the conveyance of residues of lawn and garden chemicals, lawfully applied, into ephemeral streams. For example, water quality standards for dissolved oxygen and turbidity, as well as nitrogen and phosphorus, if EPA forces the adoption of numeric standards for those substances, might routinely be exceeded in purely stormwater-driven ephemeral streams. Under North Carolina law, and the laws of many, if not most, other states, the violation of a water quality standard is unlawful, irrespective of whether the pollutant contributing to the violation was conveyed to the "stream" by a point source.

Total Maximum Daily Loads are assigned to streams or other waters identified as being impaired. A stream may be impaired if, despite compliance by point source discharges to the stream with

appropriate and required effluent limitations, water quality standards cannot be maintained. It follows that many streams identified as being impaired come to that condition as a consequence of nonpoint source discharges. These nonpoint sources might include stormwater contributions from agriculture, golf courses, parks, or residential subdivisions. If ephemeral streams and ditches are incorporated into the definition of waters of the United States, there will likely be many more impaired streams. The total maximum daily load assigned to an impaired streams will include point source contributions and nonpoint source contributions. The impairment condition will persist until water quality standards are maintained – but if water quality standards apply to ephemeral streams and ditches, the task becomes far more sweeping.

The Section 401 certification program requires that states certify that discharges resulting from activities allowed under the terms of federal permits or licenses will comply with state water quality standards. If the discharge results in violations of water quality standards is unavoidable, and the permit application otherwise passes Section 402 or 404 muster (or any of several other permit and license programs implemented by agencies other than EPA or the Corps of Engineers), the permit applicant may be required to compensate for the loss of functionality in the stream by performing mitigation. In the 404 context, which represents the overwhelming majority of requests for 401 certifications, mitigation is typically consists of restoration or enhancement of streams or wetlands which have been degraded in the past. It is also sometimes acceptable for an applicant to create a stream or wetland which meets standards and is ecologically and hydrologically functional. Mitigation is expensive, and, because of modest success rates in replacing equivalent ecologic and hydrologic functionality, multipliers are generally applied. For example, if a project is going to cause the loss of 100 linear feet of stream, an acceptable mitigation plan might require 200 feet of restored stream, and considerably more for a stream that is enhanced or created. If ephemeral streams and ditches are considered waters of the United States, the amount of stream impact in permitted projects could multiply exponentially. The result is greater cost to the applicant. For example, greater demand for approved mitigation credits from mitigation banks will lead to higher costs as a market function based on a finite number of available approved credits, but also because more mitigation providers will be seeking land susceptible to mitigation projects in the same areas, causing the initial price of that land to rise. Greater costs for residential construction as growth pushes developers into more marginal land will mean higher housing costs. Construction costs for transportation projects will increase dramatically, as state Departments of Transportation will need to find more and costlier mitigation credits for highway construction. Those costs will borne by taxpayers, or highway projects will be delayed or abandoned due to costs, leading to greater congestion, fuel consumption, and vehicular air emissions.

The impact of the new definition to the Section 402 permit program will be felt principally by stormwater dischargers, especially construction sites and municipal stormwater systems. Outlet points might be moved significantly upstream to the head of a newly-characterized ephemeral stream or ditch. Water quality standards in those ephemeral streams or ditches would be enforceable and permit limits might have to be imposed in stormwater permits which previously were not subject to such effluent limitations. To the extent treatment was required to meet effluent limitations based on water quality standards in purely stormwater-driven conveyances such as ephemeral streams, costs imposed on construction sites and municipal governments would dramatically escalate. The potential for enforcement would amplify these costs as regulated entities would either invest a great deal more in efforts to comply or simply take their chances with penalties.

2. As a state partner that helps administer and carry out Clean Water Act programs, how would you characterize EPA's consultation process since the beginning of the rulemaking process? Are there any questions that you have raised with EPA or the U.S. Army Corps of Engineers that remain unanswered?

Characterizing the communication between the states and the Corps and EPA as a consultation process reflects a new meaning to the term. There was little or no consultation in the sense that the term is customarily understood. Senator Stabenow notes that EPA "held over 400 stakeholder meetings across the country *since the proposed rule was published last year*." As a state partner with EPA and the Corps on Clean Water Act programs, we would expect that meaningful consultation would have taken place in advance of the publication of the proposed rule. As a state partner, our "consultation" has consisted of the opportunity, along with the rest of the regulated public, NGOs, and other stakeholders, to submit comments and to raise issues and concerns at stakeholder meetings about an already-published and proposed rule. The typical response parroted the preamble to the rule. For example, EPA has repeatedly asserted that the rule represents minimal change, if any, from the way that waters of the United States has been interpreted. In other words, it is merely a codification and clarification of existing practice. The partner-states did not have the opportunity to explore that assertion prior to the publication of the proposed. In our opinion, it is, at best, a sweeping exaggeration. There are a host of undefined terms, including terms which are ambiguous for lack of limitation, *e.g.*, riparian area and floodplain, and assertions of jurisdiction over "waters" which had never previously been considered to be regulated. Reading this proposed rule, one would never speculate that the Corps was not the prevailing party in the SWANCC and *Rapanos* cases.

The questions that the State of North Carolina had for the agency have been restated in the comments submitted by the Department of Environment and Natural Resources. The questions have been answered to the extent that the answers have been that this proposed rule is merely a clarification of Clean Water Act jurisdiction and a codification of existing agency practice. It is safe to say that we do not believe our questions have been satisfactorily answered.

Senator Debbie Stabenow

1. You expressed dissatisfaction with EPA's consultation efforts before the release of the proposed rule. In an effort to address all stakeholder concerns, EPA has held over 400 stakeholder meetings across the country since the proposed rule was published last year, and the agency is completing analysis of the more than one million comments received during the 200-plus day comment period. Given the need for regulatory certainty, if EPA makes the changes you requested, would you oppose such a rule and continue to request additional administrative process past the issuance of the final rule?

The opportunity to "consult" with EPA on the crafting of the definition of waters of the United States never transpired until after the proposed rule was published. At that point, the states consultation opportunity was no different than that of the general public. States had the opportunity to express concerns in stakeholder meetings, and to submit comments for review, no different anyone else reading the Federal Register. The opportunity to submit comments is a substantial right, which I will not diminish. However, consultation with our EPA partner would ostensibly involve some opportunity to have a say in the crafting of the proposed rule in advance of publication of the proposed rule in the

Federal Register. That opportunity was never presented, as EPA apparently did not view the opinions and concerns of its state partners to be valuable in the process of developing the proposed rule.

It is the opinion of the State of North Carolina that the rule should be withdrawn and revisited. We have not suggested changes, *per se*, that would address the problems with the definition. In essence, we believe that EPA based its definition solely on the discernment of some hydrologic connection between an accumulation of water and navigable-in-fact waters, irrespective of how remote that connection might be. The test set down by Justice Kennedy in his concurring opinion in the *Rapanos* decision was characterized as a "significant nexus" between a navigable-in-fact waterbody and an accumulation of water over which the agency sought to assert jurisdiction. The questions thus raised are whether the proposed rule can be fixed with language that addresses the significance of the nexus between some accumulation of water, whether that is found in an ephemeral stream or a ditch, and whether it is appropriate in the first instance to adopt as the basis of the definition a phrase from a concurring opinion which no other Justice joined. We believe that the answer to both questions, but certainly the first, is no. The rule is not fixable. EPA needs to withdraw it, include its state partners in the development of a new definition, and repropose a more reasonable rule more in line with the case law and with the roles of the states in regulating water quality within those states. The answer to these questions may be that the federal government does not need, or should not feel compelled, to assert jurisdiction over all accumulations of water, no matter how remote from navigable-in-fact waters.

As to whether the State of North Carolina would "continue to request additional administrative process past the issuance of the final rule," the answer would lie in whether EPA believes that the states have a role in the regulation and protection of water quality within their own boundaries, and should have some say in the manner in which they carry out those responsibilities. We hope that the EPA would recognize that the states do have a role, that the intent of the Clean Water Act is that states have that role, and that EPA needs to step back and start over with that role in mind.

2. **The agriculture industry has received longstanding exemptions under both sections 404 and 402. The proposed rule has included language that not only maintains these exemptions, but also includes specific exemptions that have never before been carved out in the Clean Water Act, such as for prior converted cropland, artificially irrigated areas, stock watering ponds, and others. How, then, does the proposed rule pose a threat to agriculture, other than the need to further clarify key terms, such as upland ditches?**

First, EPA does not have the authority to repeal or modify exemptions granted to the agriculture industry by federal statute, so irrespective of the language of the proposed rule, such exemptions would remain. Additionally, EPA lacks authority to create exemptions from the scope of the Clean Water Act. What the proposed rule does is to assert jurisdiction over accumulations of water which may never before have been subject to Clean Water Act jurisdiction. The specific exemptions to which reference is made are "exemptions" only in the sense that there is no interstate commerce connection between those accumulations of water and navigable-in-fact waters (with the possible exception of artificially irrigated areas, as return flows from irrigated agriculture have always been excluded from the definition of "point source'). The rule codifies that long-held understanding. On the other hand, the proposed

rule draws into the asserted jurisdiction of the Clean Water Act other accumulations of water which have also been long understood to lack an interstate commerce connection to navigable-in-fact waterbodies. So it is not so much that the proposed rule creates specific exemptions, which it cannot, but it selects certain accumulations of water long understood to be outside the meaning of waters of United States, and purports to pull some in, while leaving others alone. The rule is more about asserting jurisdiction over accumulations of water previously not considered jurisdictional than it is about "including specific exemptions that have never before been carved out in the Clean Water Act." Those "exemptions" were not carved out of the Act – they were never in.

Senator Joni Ernst

1) Some of the best conservation practices known today were developed through the trial and error of farmers and ranchers. Many times producers work with local conservation officers and specialists to find innovative solutions to protect soil composition and structure. To what degree do you believe this rule will alter the decision making process of producers on whether they will attempt such projects going forward?

A prudent farmer or rancher will have to consider the new definition of waters of the United States with respect to every project or measure undertaken within any reasonable proximity of an ephemeral stream or ditch on his or her property. The fact that a project or practice may redirect water, including stormwater flow, to or away from such a potential water of the United States could have regulatory consequences, including civil penalties or restoration obligations.

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