United States Senate Committee on Agriculture, Nutrition & Forestry

"Farmers and Freshwater: Voluntary Conservation to Protect Our Land and Waters"

Written Testimony of Trudy D. Fisher

December 3rd, 2014.

My name is Trudy Fisher, and I am the former Executive Director of the Mississippi Department of Environmental Quality.

I will focus my comments today on two topics. I will first discuss the voluntary agricultural practices utilized in Mississippi to address nutrient reduction and improve water quality. We accomplish this through vital collaborative partnerships with the Natural Resource Conservation Service, agricultural producers, and many other partners focused on a common purpose.

As former director for 7 ½ years I have witnessed firsthand the power of partnerships, true collaboration, and common purpose around improving water quality.

I will conclude my testimony with a few comments on the proposed "waters of the United States" rule.

Voluntary Conservation Practices for Water Quality Improvement

Nutrient reduction is not only a prevalent topic in the Mississippi River Basin, it's a pervasive topic throughout the country. The Mississippi River drains 43% of the United States and two provinces in Canada. The River is the lifeblood of the US economy and drives coastal productivity in the Gulf of Mexico. The Mississippi River Basin is also the proverbial bread basket of agriculture in the United States. Over 80% of corn and soybeans grown in the US are grown within the basin. With this intensive agriculture comes the potential for increased nutrients moving downstream, and impacting water quality. Mississippi is one of only two states that border both the Mississippi River and the Gulf of Mexico. The 7000 square miles known as

the Yazoo-Mississippi River Delta and the Gulf of Mexico are economic engines for both our state and the country. For that reason Mississippi has been in the forefront of understanding how we can improve our environment and water quality, while concurrently sustainably intensifying agriculture. The sustainable intensification of agriculture has to go hand-in-hand with conservation. Conservation in the 21st century has to make economic sense. Mississippi has focused on a strategy that has turned potentially competing paradigms into voluntary leveraged opportunities.

As a coalition, the Mississippi River states, as well as federal partners have created the Hypoxia Task Force that is charged with identifying opportunities to improving water quality in the Gulf of Mexico. Mississippi was the first state to co-lead the Hypoxia Task Force. One of the visions that needs to be fully comprehended is that the coastal water quality issue in the Gulf of Mexico is a coastal problem with an inland solution. The inland solution is designing systems that work well with agriculture to reduce the amount of nutrients delivered downstream. Mississippi is also positioned to engage both the Hypoxia Task Force as well as the Gulf of Mexico Alliance (GOMA) – a coalition of Gulf States trying to holistically improve ecosystem conditions in the Gulf. Mississippi was the first state to lead GOMA and the associated Nutrients Priority Team. By being able to connect the Hypoxia Task Force to the Gulf of Mexico Alliance, Mississippi had a strategic ability to understand what was needed from an individual state to tackle the problem of hypoxia.

Each state has its own way to go about addressing the nutrient reduction problem. Mississippi was the very first state in the entire Mississippi River Basin to tackle this problem at a grass roots level. We devised a nutrient reduction strategy that is meaningful and will work. This could not have been accomplished without the support of our agricultural producers, Natural Resource

Conservation Service, and many others. We weren't just first in undertaking a nutrient reduction strategy, but also first in designing, creating, implementing, and showcasing how well it works. The nutrient reduction strategy that has now been replicated up and down the river basin was a collaborative effort between Mississippi Department of Environmental Quality, a state agency, and a nonprofit organization called Delta FARM (Farmers Advocating Resource Management). This effort was based on a couple of simple tenants:

- We know that there are clear connections between the Gulf of Mexico and what is happening on the ground on our farms.
- To really improve water quality we need to understand this connection.
- We understand tangible connections between high level strategies of the Hypoxia Task Force, the Gulf of Mexico Alliance and other federal agencies and how it is translated to effective conservation practices on the ground.
- Any conservation practice that is implemented needs to make economic sense. Sustainable intensification is rooted in that conservation practices need to make economic sense to our farmers.

Mississippi also took a different approach from the beginning to understand solutions to water quality improvement. Knowing that we were advocating a voluntary strategy for the implementation of conservation practices, our nutrient reduction strategy didn't ask what is the number we were aiming towards for improvement. Rather, we decided to ask a tougher set of questions that was centered on: what nutrient reductions are achievable? The other questions were: What will these strategies cost? What is the value to each stakeholder of these reductions? and What nutrient reductions will protect Mississippi waterbodies and the Gulf of Mexico.

Mississippi uses a three part strategy: 1) form partnerships, 2) find a common purpose to everything we do, and 3) we leverage everything. Partnership goes beyond the typical getting together and discussing the creation and development of the strategy. We engage state, federal, non-governmental organizations and most importantly the farmers together to build the nutrient

reduction strategy. But after building it, we continue this partnership. Our monitoring efforts of what is achievable are completely coordinated – federal and state agencies are in close and constant communication so that efforts are in unison. Our story is told at multiple scales.

We leverage other projects and programs into our study watersheds to help answer those tough questions – we leverage state dollars, federal dollars, private research dollars all towards the common purpose. Whether someone is doing research, outreach, or extension – everyone's purpose is the same, everyone is aiming to understanding our system better and to communicate our results to all of our stakeholders. We have also taken this communication to another level. Our communication pathways include innovative technologies showcasing conservation practices, we use short video features that last on average 2 minutes or 120 seconds that package how the practice works, what it means to the agricultural community, and how it improves water quality. Our strategy was the first of its kind and so was our implementation approach. It is all good to have a strategy in place, to partner and leverage, but if we don't have results or truly document the impact it is all for naught. Mississippi has done just that. We have documented our successes. Understood our failures. We are coordinated in measuring our impacts. Our successes are tangible. We are seeing measurable improvements to water quality moving to downstream environments.

Near the beginning of this briefing I talked about the sustainable intensification of agriculture and how it, in tandem with conservation in Mississippi has been turned from competing paradigms into leveraged opportunities. Let me give you some concrete examples of how that works in Mississippi. Again, I want to reiterate when we address the use of conservation practices we value its role in agriculture just as heavily as we value its role in addressing water quality concerns. Let me talk to two specific examples.

The first example I would like to give you is land leveling.

- Agricultural land that is un-even and not level has some significant agricultural and conservation challenges. Yield distribution is uneven. Irrigation of this land is difficult, and distribution of water is not efficient and uneven. Because of slopes, runoff from storm events are high, carrying sediments and nutrients downstream.

- Land-leveling is the act of smoothing out of the land and creating a uniform grade to the field.

- It is a practice that is cost-shared by the USDA

- By leveling the land, yields are now more consistent. Yields are typically higher because you have better drainage. Yields are higher because irrigation is delivered more efficiently. Input costs are decreased because irrigation of graded land is more efficient.

- Levelled land decreases runoff velocities of storm events. Decreased velocities means less sediment and nutrients moving downstream.

- Levelled land means more efficient uptake and utilization of nutrients by crops. This means better yields, and less nutrients available to move downstream.

The second example I would like to give you is the use of the most ubiquitous feature of every agricultural landscape across the US – the drainage ditch.

- The drainage ditch is a vital feature for adequate drainage for the farm landscape.

- Often though drainage ditches are too narrow, too shallow, and don't drain as well as they could in storm events causing back flooding of agricultural lands and potential loss of yield or entire crops.

- Drainage ditches also serve as conduits of sediments and nutrients moving downstream.

- In Mississippi, over the last 5 years, we have worked diligently in redesigning the drainage ditch, and putting in innovative water control structures. Both the redesign and implementation of structures can be incentivized by USDA.

- By opening up the ditch you do remove some agricultural land out of production but often that land is very low-yielding land and makes better economic sense in this capacity.

- By implementing water control structures you will see significant improvements in water quality moving downstream. Research has shown that in a new ditch configuration, they do not alter the drainage capacity of the system and thus do not impact back flooding on agricultural lands.

I want to wrap up this section with applying our lessons. These are some take home messages that we can stand on:

1. We have a common goal when it comes to putting together a strategy that is implementable for water quality improvement. It has importance for all stakeholders. It needs to be implementable – it needs to work. This means making sure that farmers can implement these strategies as well as sustainably intensify agriculture. It needs to provide the information for the state departments of environmental qualities so that we can document improvements to aquatic systems of the state. And also important for the regional EPA offices to highlight protection of waters of the US.

2. Though we are dealing with water quality, often conservation practices integrate with improvements in water quantity. This integration is pervasive across the US. Our approach has been to understand what is actually achievable in terms of water quality and quantity improvement versus placing an arbitrary number for reductions and going with that number that maybe over promising improvement delivery.

3. We don't look at a conservation practice solely for its potential for water quality improvement but rather how it can integrate with agriculture to achieve sustainable intensification.

4. Each state is going to have their own respective problems and concerns as it pertains to water quality and quantity. But we can lean on each other – look for cross state collaborations and opportunities for leveraging and cooperation. Mississippi has helped out other states and stands ready to continue leading the pack in understanding water

quality improvement, what is achievable, and coordinating, leveraging, and partnering across administrations and agencies to the good of the environment as well as agriculture.

Proposed Waters of the United States Rule

Where we are on the proposed rule is not a mere "communication issue" as the Environmental Protection Agency (EPA) submits. Where we are with the proposed rule is a classic case of "no input" equals "no buy in". As a former regulator, you cannot successfully enforce what the intended regulated community has not bought into. The EPA maintains a robust social media campaign and listening tour, but are we truly listening or plodding forward?

The EPA and the Army Corps of Engineers (Corps) proposed "waters of the United States" rule is one of the most controversial rules proposed and should be withdrawn. I have attached comment letters to my testimony and ask that they be included in the record.

I will share with you a few lessons learned as a former state agency director:

- A legally required comment period is not dialogue.
- Activity is not achievement.
- Diverse polarization of opinion on a proposed rule usually means the solution is somewhere in the middle.
- No dialogue means no buy in especially in the agricultural sector where voluntary programs are so successful.

As evidenced in my earlier testimony, the agricultural community in Mississippi and throughout the country are voluntarily employing conservation practices on their properties. These practices are employed on a voluntary nature because farmers recognize the benefits to the environment, clean water, to agriculture, and the economy. Often these practices result in changes to drainage systems, the creation of holding ponds, and as such would then be under the juris of the new

proposed rule. Further alterations to these practices would also potentially have regulations and permitting requirements associated with them under the new rule. With this new rule, rather than creating an environment where farmers are included in enhancing clean water and helping them put conservation efforts in the ground, the new rule does the absolute opposite by forcing farmers into a regulatory environment in any effort to do so. This would only lead to the agricultural community backing away from conservation practices that makes conservation and agricultural sense.

EPA and the Corps hit the “pause” button on the proposed rule. I submit it is time for EPA to hit the “rewind” button and withdraw the proposed rule.

STATE OF MISSISSIPPI
PHIL BRYANT
GOVERNOR
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
TRUDY D. FISHER, EXECUTIVE DIRECTOR

July 7, 2014

Ms. Damaris Christensen
Office of Water (4502-T)
Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington D.C. 20460

Mr. Chip Smith
Office of Deputy Assistant
Secretary of the Army (Policy and Legislation)
108 Army Pentagon
Washington D.C. 22310

Re: Interpretive Rule Comments
Federal Register Notice

Greetings:

The Mississippi Department of Environmental Quality is responsible for protecting the state's air, land, and water. Our mission is to safeguard the health, safety, and welfare of present and future generations of Mississippians by conserving and improving our environment and fostering wise economic growth through focused research and responsible regulation. In that spirit, the Department offers the following comments:

I. Current practices for "normal farming" activities: It is unclear how many commonly occurring "normal farming" practices will no longer be exempt as a result of the interpretive rule. The Department feels an effort was made to be inclusive of most activities. However, there are conservation practices in Mississippi that were not included that have shown great environmental benefit in Mississippi. We would like the opportunity to have those practices added and/or to have the flexibility to determine the best practices for our state at the state level in coordination with our state NRCS office.

II. The interpretive rule purpose: The goals expected to be achieved with the interpretive rule is unclear. While there are outlined activities that will obtain exemptions from 404 permitting, it is difficult to follow how these activities will be considered for other federal permitting actions. It is also unclear when these activities may not be considered an established farming operation. For instance, if a farm is expanding into waters including wetland areas not previously included in the

Exhibit 1
Testimony of
Trudy Fisher

farming operation and is employing a conservation practice standard, would a permit be required for this expansion? Will this interpretive rule apply to farming operations that have been fallow for several years and wetland vegetation has been allowed to re-establish?

III. Voluntary conservation programs: Currently, the Department is working in partnership with other state and federal agencies as well as conservation groups to address both water quality and water quantity issues through the implementation of Nutrient Reduction Strategies and Conjunctive Water Management Strategies. There are practices, such as NRCS Practice Code 410 (large overfall pipes and low grade weirs) and 607 (2-Stage Ditches) which have demonstrated environmental benefits in Mississippi that were not exempt in the rule. The Department has concerns that this rule may complicate the continued implementation of some of the most promising voluntary conservation practices and programs.

IV. Potential for unintended impacts: There are instances where a landowner may follow the NRCS practice standards but not be operating with NRCS oversight, In the event that a landowner deviates from the practice standard, it is unclear what regulatory roles would be involved. Also a landowner may be following the NRCS practice standards but not be considered an ongoing farming operation. Further information is needed to clarify what is intended by an ongoing farming operation.

Thank you for the opportunity to comment on this matter. The Department looks forward to obtaining additional clarification and information on this issue. Should you have any questions about the comments provided, please contact Mike Freiman, Chief of the Surface Water Division at (601) 961-5271.

Sincerely,

Trudy D. Fisher
Executive Director
Mississippi Department of Environmental Quality

cc: Mr. Richard Harrell, Director, Office of Pollution Control
Mrs. Kay Whittington, Director Office of Land and Water
Mr. Mike Freiman

STATE OF MISSISSIPPI
PHIL BRYANT
GOVERNOR
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
GARY C. RIKARD, EXECUTIVE DIRECTOR

November 14, 2014

Ms. Donna Downing
Office of Water
Environmental Protection Agency
Mail Code 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: Docket ID No. EPA-HQ-OW-2011-0880
Waters of the United States Proposed Rule

Dear Ms. Downing and Ms. Jensen:

The Mississippi Department of Environmental Quality (Department) has the delegated authority to implement in the Clean Water Act in Mississippi. The Department has held that authority since 1974, and has extensive expertise and experience in implementing the Clean Water Act. The Department's mission is to safeguard the health, safety, welfare of present and future generations of Mississippians. With both its mission and experience in mind, the Department offers its comments on the proposed Waters of the United States rule.

Mississippi requests this proposed rule be withdrawn and amended to fully address the comments and concerns that have been expressed since the rule was released. The Department asserts that the implementation of the rule will have negative unintended consequences which have not fully been discussed and weighed. The proposed rule could, in fact, have dire impact on the significant economic drivers in our state, such as agriculture.

Exhibit 2

Testimony of Trudy Fisher

The Department specifically offers the following comments about the proposed rule:

1. **This rule could cause further confusion and expand the scope of jurisdictional waters in Mississippi.** The goal of the rule may have been to simplify and clarify issues caused by recent court decisions, but it has instead created more uncertainty for both the regulated public and the state regulatory agencies. Terms, such as those used in defining

"tributary" on page 22202 in the Federal Registry *(A tributary, including wetlands, can be a natural man-altered, or man-made water and includes waters such as river, streams, lakes, ponds, impoundments, canals, and ditches...),* can be interpreted and applied at the local level in different ways. Field staff from EPA and the Corps of Engineers will be required to evaluate circumstances that could in practice expand federal jurisdictional protection to areas that have never been considered waters of the U.S. In a worst case scenario, for example, there are man-made ditches that may become regulated, where they have never previously been regulated, simply because this ditch eventually drains to a presently defined water of the U.S. Since the rule relies heavily on best professional judgment as to how "less than perennial flow" will be determined, there will be areas regulated that otherwise should not be.

2. **This rule will have a negative impact on the continued implementation of some of the most promising voluntary conservation practices and programs.** The Department is working in partnership with other state and federal agencies and conservation groups, in both the public and private sectors, to address both water quality and water quantity issues in Mississippi. The Nutrient Reduction Strategies and Conjunctive Water Management Strategies include water conservation practices that have demonstrated environmental benefits in the state. The proposed rule through the definition of "tributaries" may, in fact, cause some Best Management Practices widely used in the Yazoo-Mississippi Delta for conservation to come under the jurisdiction of the EPA and the Corps. Subjecting those Best Management Practices to Clean Water Act regulation, and more particularly the financial and other burdens that come with such regulation, would significantly hamper conservation efforts and, ironically, negate years of hard work toward improving water quality.

   For example, tailwater recovery systems allow a farmer to capture the irrigation water applied to the fields and hold this water for recirculation in the irrigation system. These systems may also have an outfall structure to allow water to exit the irrigation pond in the event of a significant rainfall event. This necessary outfall structure creates a potential connection to downstream waters that could possibly be considered a tributary and subject to federal regulation. The rule would thus be a significant obstacle to making meaningful strides to address both water quality and water quantity in the agriculture community of Mississippi. It is imperative that changes be made to the proposed rule to specifically address these types of agricultural conservation practices.

3. **The proposed rule fails to provide a clear definition of a floodplain resulting in more confusion.** Evaluating jurisdictional waters in a floodplain has been weakly defined. Floodplain (pg. 22207 of the Federal Register) means *an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.* Floodplains and flooding events can vary widely even within a state. In addition, floodplains are sometimes altered to reduce the size and frequency of flooding events. The rule does not address how the floodplain is determined and how man-made activities affect the jurisdictional determination over time. The appropriate entities within Mississippi should be consulted to provide specific information on floodplains.

4. **The proposed rule does not address how other Section 404 permitting requirements and processes will be affected should the proposed rule be implemented.** In particular, the rule will affect how the Mitigation Rule is implemented. For example, will tributaries be treated as streams, wetlands, or types of jurisdictional waters for purposes of satisfying the Mitigation Rule in the 404 permitting process? Given the definition of a tributary, it seems that mitigation for tributaries could be achieved through various forms. The rule must address how identifying waters as tributaries affect mitigation requirements as outlined in the Mitigation Rule for Section 404 permits.

5. **There is no regional guidance for the implementation of the proposed rule.** In the absence of regional guidance, it can be assumed that the rule extends federal jurisdiction to area not previously recognized as waters of the U.S. The terrain, landscape uses, and geomorphology vary widely across the nation, and jurisdictional waters have different characteristics in various ecoregions. The rule must recognize the impact that such variation can have in distinguishing the chemical, physical, and biological impacts to waters of the U.S. The development of regional guidebooks is the key to implementation. The rule must recognize that regional guidance is imperative to manage the reach of a jurisdictional determination.

6. **The proposed rule extends federal action into states' jurisdiction.** The EPA and the Corps of Engineers failed to reach out to the individual states to determine what waters have been defined by the states. For example, Mississippi's statutory definition of state waters includes waters defined in the proposed rule as well as waters excluded in the rule such as groundwater. However, the rule applies to *all waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section (*page 22263 of the Federal Register*)*. Adjacent waters (page 22207 of the Federal Register) includes riparian areas defined as *an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.* This definition allows for an interpretation to include groundwater. Because groundwater connections may be used to determine jurisdiction for surface waters, the assumption can be made that the groundwater itself must be regulated to protect water quality in the streams, thus expanding federal jurisdiction beyond what is provided for under the Clean Water Act. The rule must eliminate the potential for overreaching into waters clearly not intended for federal regulation.

7. **Mississippi has statutory authority to establish the minimum flow requirements in waters of the state.** As the rule states: *The agencies specifically seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands....* (page 22203). Mississippi has the sole responsibility and statutory authority to determine the appropriate flow regimes in streams. This is another example of where the proposed rule extends federal action into state jurisdiction. Therefore, the rule as currently proposed should be withdrawn.

8. **Development of the rule failed to acknowledge the need for education and outreach to the regulated public and the regulatory community.** EPA has failed to provide adequate explanation, demonstration, and assurance to either the regulated or regulatory

communities about how this rule will be implemented. Without adequate, detailed education that includes specific examples by region of what will or will not be waters of the U.S., the EPA and the Corps of Engineers risk creating more confusion. Further, by ignoring this important condition of making major changes to the Clean Water Act, the agencies risk perpetuating suspicion and time-consuming delays. The proposed rule should be with withdrawn until this vital missing piece is developed.

9. **The rule poses a financial hardship to the regulated public and the economy of Mississippi.** Significant work and the development of tools are needed to make implementation of a rule feasible. Without the appropriate tools, the amount of time needed to complete a jurisdictional determination will cause an undue economic burden to applicants. Should this rule be implemented in the current form, it will have unnecessary regulatory and implementation costs for both the state and the regulated public. For example, more accurate mapping tools must be developed to ensure that permitting timeframes are not further extended. Development and use of these kinds of tools is important to ensure there is not an even greater economic burden placed upon applicants. Likewise, the states must have adequate resources to implement a burdensome new rule.

Finally, the EPA and the Corp of Engineers did not collaborate with the states in developing the proposed rule. Mississippi and the other states will eventually be responsible for bearing a significant load of the implementation of the rule. Meaningful collaboration among all the agencies, both federal and state, is necessary to develop new rules and to identify the necessary resources to implement them. This was not the case with the waters of the U.S. proposed rule. Given the concerns outlined above, as well as comments provided by others, the rule must be withdrawn and not be reconsidered until there are significant amendments. The Department requests the opportunity to offer further comments once these outlined concerns are addressed.

Sincerely,

Gary C. Rikard
Executive Director

November 14, 2014

Gina McCarthy
Administrator
United States Environmental Protection Agency
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John M. McHugh
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Re: Proposed Rule to Define "Waters of the United States,"
Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Secretary McHugh:

In April 2014, the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) proposed a rule to redefine "waters of the United States" under the Clean Water Act (CWA), 79 Fed. Reg. 22,188 (Apr. 21, 2014). *After* its release, the Agencies reached out to States, the regulated community, and environmental groups in a series of meetings, speeches, and webinars seeking to explain the proposed rule and answer questions. The Agencies' belated efforts to outreach do not support an assertion that the Agencies sought public input.

Such efforts ignore the role States play as co-regulators under the Clean Water Act. The Clean Water Act is based on cooperative federalism. Under Section 303 of the Clean Water Act *all* States identify the designated uses of regulated waters within the State and the criteria to protect those uses. Under Section 401 of the Clean Water Act, *all* States review federal actions and certify whether that action will meet State water quality standards. Under Section 402 of the Clean Water Act, forty-six out of fifty States implement the NPDES permitting program. Under Section 404 of the Clean Water Act, two States implement the dredge and fill permitting program. In addition, States have their own statutes authorizing State water regulatory programs and defining waters of the State in some cases more broadly than the federal definition.

State regulators were not meaningfully consulted *before* the Agencies issued the proposed rule, and therefore were not afforded the opportunity to point out concerns in advance. We recognize that Agency representatives have expressed a willingness to make changes to the rule based on comments received during the comment period. We appreciate that willingness. However, our concerns relate to the legal rationale for the proposal and the implications of that rationale for State programs. Accordingly, we believe that the scope of changes necessary to respond to State concerns will be extensive. In such a situation, it is appropriate to withdraw or suspend a rulemaking and issue a supplemental proposal. This would allow the Agencies to consult with States *before* issuing a new proposal and receive public comment on new legal rationales and a revised jurisdictional scope.

Some of our specific concerns are discussed below.

I. Legal Rationale.

Exhibit 3

Testimony of Trudy Fisher

A. Jurisdiction Based on Ecosystem Connections.

According to the preamble to the proposed rule, the Agencies believe that the federal government can assert jurisdiction over water if they determine that the water has a "significant nexus" to a navigable or interstate water or territorial sea. The Agencies base this belief on language from the opinion of Justice Kennedy in *Rapanos v. United States*, 547 U.S. 715 (2006):

> Because Justice Kennedy identified significant nexus as the touchstone for CWA jurisdiction, the agencies determined that it is reasonable and appropriate to apply the significant nexus standard for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to other waters) to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis. 79 Fed. Reg. at 22,192.

The Agencies also assert a nexus that makes water jurisdictional can be based on use of water as habitat, water supply, or water retention, referring to that nexus as "connectivity." 79 Fed. Reg. at 22,195-96. The Agencies then specifically rely on a report developed by EPA's Office of Research and Development that summarizes studies of connections based on movement of organisms and water storage. *Id*. at 22,196.[1] Based on the Draft Report, the Agencies conclude that the following have a "significant nexus" to a navigable or interstate water or territorial sea:

- All tributaries (defined in the proposal to include manmade channels, ephemeral channels, and channels that flow underground), and

- All water that is "adjacent" (defined in the proposal to include all water located in (1) a "floodplain" (defined as an area formed by sediment deposition from inland or coastal waters under "present climactic conditions" and that is inundated during periods of "moderate to high flows"), (2) a "riparian area" (defined as an area where surface or subsurface hydrology directly influences ecological processes and plant and animal community structure), (3) an area that has a shallow subsurface hydrologic connection (not defined), or (4) an area with a confined surface hydrologic connection (not defined) to such water.

In addition, the Agencies propose to assert jurisdiction on a case-by-case basis over water that is not covered by the tributary or adjacent water categories where the Agencies determine the water has a significant nexus to a navigable or interstate water or territorial sea, alone or in combination with other similarly situated waters in the region. The determination of whether water falls in a category that is *per se* jurisdictional or is an "other water" with a significant nexus is left solely to the best professional judgment of EPA or Corps officials.

This legal rationale places no limits on federal jurisdiction, and accordingly, is a basis for asserting unlimited federal authority over land and water use. The EPA Science Advisory Board

[1] Referring to "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (September 2013 External Review Draft, EPA/600/R–11/098B) (hereinafter Draft Report).

(SAB) panel of scientists that reviewed the Draft Report appears to have concluded that all waters are connected. In fact, their letter dated October 17, 2014 questions why the Agencies do not assert jurisdiction over groundwater, and questions the basis for *any* exclusions from federal jurisdiction.[2]

We do not dispute the validity of scientific connections within an ecosystem. However, we strongly dispute any attempt to use such connections as a valid basis for defining the scope of federal jurisdiction. As noted by the SAB review panel, there are connections among surface water, groundwater, land, birds, insects, and mammals. The Clean Water Act does not, however, grant the Agencies authority to regulate on the basis of such connections.

These concerns arise in particular from the use of water retention, biological connections, and groundwater connections to assert federal jurisdiction. The Clean Water Act protects the quality of navigable water. To provide that protection, it also encompasses other, non-navigable surface water. It does not give the Agencies authority to control the allocation of water, to protect animals or habitat, or to regulate groundwater. Despite this, the legal rationale for the proposed rule suggests that the Clean Water Act includes all of these ecosystem components, giving the statute unlimited scope in contravention of its plain meaning and precedential interpretation.

B. Failure to Recognize the Limits of the Clean Water Act.

Contrary to the legal rationale put forth by the Agencies, the Clean Water Act is a grant of limited authority.

1. There is no Clean Water Act authority to control the allocation of water.

The Agencies propose to assert jurisdiction over water based on retention and flood control functions; however, the Clean Water Act expressly reserves that authority to states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

CWA § 101(g).

Section 101(g) was added to the Act in the 1977 amendments. According to its sponsor:

> This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. Several of the options contained in that paper called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. Those

[2] *See* letter dated October 17, 2014 to Gina McCarthy from Dr. David T. Allen, Chair, EPA Science Advisory Board.

> other purposes might include, but were not limited to Federal land use planning, plant siting and production planning purposes. This State's jurisdiction amendment reaffirms that it is the policy of Congress that this act is to be used for water quality purposes only.

123 Cong. Rec. &. S19677-78, (daily ed., Dec. 15, 1977) (emphasis added) (floor statement of Senator Wallop).

EPA's role in the allocation of water is specified in Section 102(b) of the Act. That role is limited to *recommendations* for storage of water for water quality control in *federal* projects and *federal* licenses issued by the Federal Power Commission. In addition, Section 102(d) directed EPA to consult with States and river basin commissions and submit a report to Congress that analyzes the relationship between Clean Water Act programs (on the one hand) and programs by which of other federal agencies and States that allocate quantities of water (on the other hand).[3]

The statute and its legislative history are clear. The allocation of water is not within the purview of the Clean Water Act. Accordingly, jurisdiction cannot be based on water supply and water retention functions.

2. There is no Clean Water Act authority to regulate birds, mammals, insects or their habitats.

The Agencies propose to assert jurisdiction over water based on its use by birds, mammals, and insects. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159 (2001) the Supreme Court reminded us that the focus of the Clean Water Act is not just water quality generally, but the quality of navigable waters. This case recognizes that the Clean Water Act left many waters subject to State control. The Court held that the rock quarry at issue in that case was a "far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173. In particular, the Court noted its concern that asserting jurisdiction over water based on use by migratory birds had the potential to impose on the States' traditional and primary power of land and water use. *Id*. at 174.

The quality of water to protect aquatic life is important, and States designate water for aquatic life uses and establish water quality criteria to protect those uses. Nevertheless, the fact that a bird, insect or mammal may move from one body of water to another is not relevant to the protection of water quality. If use by birds, insects, or mammals is a basis for establishing federal jurisdiction, there is no water beyond federal authority. Accordingly, we disagree that the Agencies can assert jurisdiction over water that lies wholly within a State on this basis.

3. There is no Clean Water Act authority to regulate groundwater.

The Agencies propose to assert jurisdiction over surface water based on groundwater connections. This basis for asserting federal jurisdiction is overly broad. As discussed below (See II., A.), it will impinge on State authority over both groundwater and land.

[3] EPA developed a draft report in 1979. Section 102(d) was repealed by P.L. 104-66.

II. Impacts of the Proposed Rule on State Programs.

The proposed rule will impact State regulatory programs in ways that the Agencies have not considered.

A. Expansion in the Number of Point Sources and State Budgetary Impacts.

One potential consequence of the proposed rule is the expansion in the number of regulated point sources along with increased State budget impacts.

Although the Agencies disavow the intent to regulate the groundwater itself, they claim authority to regulate water that disappears underground (under the definition of "tributary") and water with "shallow subsurface hydrologic connections" (under the definition of "neighboring" which is a component of adjacency). It appears that, under the rule, the Agencies are treating groundwater as a conveyance. That rationale has significant implications that the Agencies may not have considered or have ignored.

State agencies authorize the location of waste treatment lagoons and solid waste disposal units. If groundwater is considered a conduit to a water of the U.S., then waste disposal into a State authorized lagoon or disposal unit could be considered a discharge into a water of the U.S. that EPA can regulate through a permit under Section 402 of the Act. In fact, some may argue that the water in the lagoon or the leachate from a landfill should be considered a water of the U.S.

In litigation, citizen plaintiffs have taken the position that if a discharge onto land or into groundwater can move through groundwater and reach a water of the U.S. that discharge is subject to regulation under the Clean Water Act. Some courts have agreed.[4] In one case, the Conservation Law Foundation alleged that septic systems are point sources that must obtain NPDES permits because nutrients from septic systems move through groundwater and impact navigable water. In that case, EPA disagreed that the septic systems were categorically point sources, arguing that an NPDES permit can be required for a discharge to groundwater *only* where it is directly and immediately connected hydrologically to surface water. *Conservation Law Foundation et al. v U.S. EPA, et. al*., Case No. 1:10-cv-11455-MLW, Memorandum in Support of Defendants' Motion for Summary Judgment, at 20-21 (also noting that a hydrological connection to surface water via groundwater is a site-specific determination).[5]

In contrast to the position EPA took in its summary judgment motion in the *Conservation Law Foundation* case, in the proposed rule the Agencies take the position that groundwater connections *categorically* form the basis for Clean Water Act jurisdiction. Since the rule was

[4] In *Hawai'i Wildlife Fund v. County Of Maui* , 2014 U.S. Dist. LEXIS 74256, *31 (D. Hawaii, May 30, 2014) the court held that the County of Maui is liable for discharging effluent into a wastewater reclamation facility without a NPDES permit where the effluent went into on-site injection wells to a shallow groundwater aquifer and eventually to the Pacific Ocean. In *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), *cert. denied*, 552 U.S. 1180 (2008), the court held that a manmade pond created to treat sewage was a water of the U.S. due to a groundwater connection and the possibility of flooding.

[5] The court dismissed the case on jurisdictional grounds, holding the plaintiffs did not have standing.

proposed, more cases have been filed relying on this misguided theory. *See Wildearth Guardians v. The Western Sugar Cooperative*, (Case 1:14-cv-01503-BNB) (D. Colo., May 29, 2014) (alleging on-site wastewater ponds are point sources that discharge to waters of the U.S. through groundwater that has a significant biological, chemical and physical nexus to the South Platte River).

As a result, if finalized, the rule could vastly expand the number of waste management units and land-based activities and point sources under the Clean Water Act, greatly increasing the workload and budget constraints of the forty-six States implementing the permitting program.[6] We emphatically note that the Agencies did not acknowledge the impact of this increased workload in their economic analysis of the proposed rule.[7]

B. Expansion of Federal Control Over Land and Water Use.

By asserting jurisdiction over areas of land where water flows in direct response to precipitation, the Agencies are blurring the distinction between nonpoint source runoff and point source discharges. If the area through which water runs is a water of the U.S., then the federal government has control of the use of that area. This is federal land use control that will affect State economic development decisions.

Indeed, all activities that drive economic development in the States would be affected by the proposed rule, including highway and road construction, pipeline projects, transmission line projects, farming, flood control, and public works projects. With federal permitting also comes the potential for a federal veto of State economic development projects.

For example, stream and wetland mitigation costs for state highway projects in the State of Washington can range anywhere from $180,000 to $2.28 million each.[8] The likelihood that roadside ditches would now be included as jurisdictional federal waters would increase those costs exponentially. The proposed rule could also have similar impacts on States that choose to build significant infrastructure related to renewable energy or natural gas projects in order to comply with EPA's proposed guidelines for states to reduce emissions from existing power plants under § 111(d) of the Clean Air Act.

In addition, assertion of jurisdiction based on groundwater impacts directly affects States' authority to allocate water resources. The implications of this rationale became very clear in a recent draft directive issued by the National Forest Service, titled: "Proposed Directive on Groundwater Resources Management" ("Directive"), 79 Fed. Reg. 25,815 (May 6, 2014).

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[6] This increase in the universe of regulated point sources could be the straw that breaks the back of State water quality permitting programs that already are struggling to meet the workload demands of regulating pesticide spraying and implementing new regulations, while funding decreases.

[7] The March 2014 Economic Analysis of Proposed Revised Definition of Waters of the United States fails to analyze or even consider any impacts on section 402 permitting programs and yet concludes that such impacts will be minimal.

[8] Washington State Department of Transportation, WSDOT Project Mitigation Costs Case Studies (May 2003).

Under this Directive, the Forest Service claims the authority to evaluate all applications for groundwater withdrawals not only on Forest Service lands, but also on adjacent lands, due to "hydraulic continuity." As in the proposed rule, the Directive has no clear definition of "adjacent." If, like EPA and the Corps, the Forest Service believes all waters are connected, it could likely claim that all state water rights applications must be evaluated by the Forest Service regardless of the distance from federal lands. Thus, the theory of federal jurisdiction espoused by EPA and the Corps has implications even beyond the Clean Water Act.

C. Failure to Provide Consistency and Clarity.

One stated purpose of the proposed rule is to provide consistency and clarity. See 79 Fed. Reg. at 22,189. However, the Agencies acknowledge geographic differences among the states.[9] In fact, in the same section of the preamble where the Agencies claim that the proposed rule promotes consistency, clarity, and certainty, they acknowledge that the definitions of riparian area and floodplain are not consistent, clear, or certain and will be left solely to the best professional judgment of EPA and Corps officials. 79 Fed. Reg. at 22,209-10.

The definition of tributary poses similar problems. The Agencies acknowledge geographic differences in determinations of whether or not an ordinary high water mark is present. See 79 Fed. Reg. at 22,202. These determinations too are left solely to the best professional judgment of EPA and Corps officials.[10]

We agree with the Agencies that there are geographic differences around the country, but giving federal officials authority to change the scope of federal jurisdiction based on location provides for inconsistency, obscurity, and uncertainty. To avoid this outcome, federal jurisdiction should be limited to water that is clearly subject to Clean Water Act authority based on navigability or a demonstrated ability to impact the quality of navigable water. Regulation of other water may be appropriate depending on location and function, but decisions based on such geographic differences are best left to the discretion of State officials. Federal jurisdiction must be consistent, clear, and certain.

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[9] 79 Fed. Reg. at 22,196 (recognizing differences in degree of connectivity based on geography); 79 Fed. Reg. at 22, 198 (recognizing jurisdiction over other water will vary based on geographic variability); 79 Fed. Reg. at 22,208-09 (seeking comment on placing geographic limits on the use of shallow subsurface hydrologic connections and confined surface hydrologic connection).

[10] There is reason for questioning that judgment. Corps officials admit that the identification of Ordinary High Water Marks (OHWMs) is inconsistent and subjective. See Matthew K. Mersel, U.S. Army Corps of Engineers, Cold Regions Research and Engineering Laboratory, Development of National OHWM Delineation Technical Guidance (Mar. 4, 2014), *available at* http://insideepa.com//index.php?option=com_iwpfile&file=apr2014/epa2014_0760.pdf. Examples were provided in a March 30, 2004, hearing of the Water Resources and Environment Subcommittee of the House Committee on Transportation and Infrastructure on "Inconsistent Regulation of Wetlands and Other Water (House Doc. No. 108-58). In that hearing, one witness testified that a Corps official found that a tributary extended beyond its channel via a manmade ditch and a 25-year old skidder rut to establish a connection to a wetland. *Id*. at 81-82. Under the proposed rule, Corps officials would remain free to conclude that a skidder rut has an OHWM. Alternatively, the proposal would allow them to conclude that the skidder rut is a "confined surface hydrologic connection" that makes an otherwise isolated wetland a water of the U.S.

D. Expansion of the Scope of State Regulatory Programs

Another consequence of the proposed rule that the Agencies have overlooked is the impact on States' water quality standards programs. Like the impacts on permitting programs, the economic analysis accompanying the rule asserts, without analysis, that impacts on water quality programs implementing Section 303 of the Act will be minimal.

Currently, not all States include ephemeral waters in their regulatory programs. In comments on the 2011 guidance, Kansas noted that expanding federal jurisdiction to include ephemeral water would bring approximately 100,000 miles of dry erosion features into their State clean water act program, and Kansas would then be compelled to assign water quality standards and develop total maximum daily loads (TMDLs) for "what amounts to surface depressions that function only during sufficient precipitation."[11] After an extensive stakeholder process, the State of Missouri recently adopted changes to its stream classification program, expanding it to include all streams represented in the 1:100,000 scale of the USGS National Hydrology Dataset.[12] The decision to exclude default classification of smaller streams (those represented at the 1:24,000 scale) was based on an evaluation of the aquatic resources of the state.[13]

This increase is not limited to Kansas and Missouri. Indeed, it would be similar in most States. States are required under Section 305(b) of the Act to submit to EPA a description of the water quality of all federal waters within their borders. The most recent State reports can be found on the EPA's website.[14] Comparing the "waters of the United States" reported by States to recent USGS maps released by EPA shows a 131% increase in federal waters.

The Agencies have failed to quantify the burden on State regulators from this increased federal jurisdiction. EPA's ATTAINS database that tracks TMDL development reports a total of 3,533,205 river and stream miles in the United States based on data reported by States using the National Hydrography Dataset (NHD). The NHD is a database that interconnects and uniquely identifies the millions of stream segments or reaches that comprise the Nation's surface water drainage system and is based on the USGS 1988 1:100,000-scale Digital Line Graph (DLG)

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[11] July 14, 2011 Comments of the State of Kansas on EPA and Army Corps of Engineers Guidance Regarding the Identification of Waters Protected by the Clean Water Act.

[12] *See* 10 CSR 20-7.031(2)(A) (adopting fishable, swimmable standards for: "1. All perennial rivers and streams; 2. All streams with permanent pools; 3. All rivers and streams included within the 1:100,000 scale National Hydrography Dataset (NHD) described in subsection (1)(R) of this rule."). This decision expanded the miles of classified streams in Missouri from 25,025 to a total of 109,870. Missouri Department of Natural Resources, Regulatory Impact Report, In Preparation for Proposing, An Amendment to 10 CSR 20- 7.031, Missouri Water Quality Standards (June 3, 2011), at 26.

[13] Missouri Department of Natural Resources, Regulatory Impact Report, In Preparation for Proposing, An Amendment to 10 CSR 20- 7.031, Missouri Water Quality Standards (June 3, 2011), at 35.

[14] http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2000_06_28_305b_98report_appenda.pdf

hydrography dataset integrated with reach-related information from the USEPA Reach File Version 3.0-Alpha release (RF3-Alpha).[15]

According to EPA's report on "The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest" (EPA/600/R-08/134) (Nov. 2008), even the high resolution NHD "may grossly underestimate the number and length of drainage networks," *i.e.*, ephemeral streams. ("Heine et al. (2004) reported that USGS 1:24,000-scale maps under-represented drainage networks by 64.6 percent in a study in Kansas").

EPA's currently approved Information Collection Request (ICR) (EPA ICR No. 1560.10, Nov. 2011) for both water quality reporting and TMDL development activities estimate the cost to States for those programs at $193,568,080 a year. Of that amount, $21,390,991 is for assessment activities. The remaining costs of $172,267,089 are for TMDL development and EPA assumes 4000 TMDLs a year, averaging $43,000 per TMDL.

If a final rule includes all ephemeral drainages and all "adjacent water" as waters of the U.S., then the cost to States to include these in their water quality programs will increase significantly. While the Agencies have failed to include these costs in the regulatory impact analysis of the proposed rule, some States have provided cost estimates. According to the State of Missouri, if it had to regulate all stream miles discernible at the 1:24,000 scale of the National Hydrology Dataset, it would add an additional 158,565 miles of stream (183,591 miles total) to its existing classified waters network and would more than double the State's monitoring costs from about $11.2 million a year to $24.2 million.[16]

The Agencies may argue that EPA will not require States to set standards for these waters or include them in monitoring programs; however, Section 303 of the Act applies to all waters of the U.S., and citizen plaintiffs could sue EPA for failing to force States to take such actions.[17]

This is a real impact of the rule on State regulatory programs that the Agencies must include in their economic analysis and take into account in the amount of federal funding provided for State programs under Section 106 of the Clean Water Act.

III. Failure to Comply With Executive Order 13121.

We note that the U.S. Small Business Administration Office of Advocacy recently sent a letter requesting the Agencies to withdraw the rule due to the failure to evaluate impacts on small

[15] EPA's ATTAINS database also reports a total of 107,700,000 wetlands acres.

[16] *See supra* n.12 at 25, 35. If existing standards do not apply to the newly regulated waters, States also will have to incur significant costs developing new water quality standards.

[17] Indeed, such a lawsuit was filed in Missouri. *Missouri Coalition for the Environment v. Lisa P. Jackson*, Case No. 10-04169-CV-C-NKL. In that case, the court agreed with EPA that imposing federal standards was a discretionary action. However, the same issue currently is being litigated in the Fifth Circuit in *Gulf Restoration Network v. EPA*, Case No. 12-cv-677.

businesses as required under the Regulatory Flexibility Act.[18] Similarly, the Agencies have failed to evaluate the federalism impacts as required under Executive Order 13132.

The Agencies have certified that: "This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." 79 Fed. Reg. at 22,220 We disagree. Under the Executive Order, federalism implications include "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." As discussed above, the proposed rule will have these effects.

We acknowledge that the Agencies held some briefings for State and local governments on the subject of the proposed rule in 2011. Nevertheless, given the new direction the Agencies have taken with their reliance on ecological connections, water retention, and groundwater to establish federal jurisdiction, and the resulting impact on State authorities, we urge you to fully comply with Executive Order 13132 and conduct a meaningful dialogue with State governments.

In particular, we ask that the Agencies fully comply with the "Fundamental Federalism Principles" of section 2 and the "Federalism Policymaking Criteria" of section 3 of the Executive Order. The Agencies should strictly adhere to constitutional principles and statutory authority, providing States with maximum administrative discretion and relying on State policies to the maximum extent practicable. To do so, the Agencies must develop a supplemental proposal.

Before issuing a supplemental proposal, we ask the Agencies to work with States to identify the problems you are seeking to address and to focus the rulemaking on solving those problems. An after-the-fact explanation of a federal agency proposal is not sufficient. States support the goals of protection of water quality and clarity and want to work with the Agencies on the development of a rule that achieves those goals while recognizing geographic differences. An after-the-fact explanation of the intent of a proposed rule does not appropriately recognize the role that the Clean Water Act designates to States.

Only by working with States as co-regulators will the Agencies be able to fully comply with the Federalism Executive Order. Specifically, the dialogue we are requesting is necessary for the Agencies to be able to develop "a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met."

Conclusion

In summary, the proposed rule would fundamentally alter the ability of States to make decisions regarding the use of land within our borders. Such an expansion would also impact our ability to convey water supplies. Finally, such an expansion would impose significant costs on States by

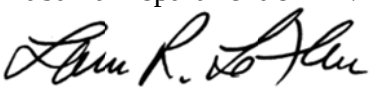
[18] Letter dated October 1, 2014 from Winslow Sargeant, Ph.D., Chief Counsel for Advocacy.

requiring States to designate the uses and assess the conditions of more waters, to develop total maximum daily loads for waters not meeting their uses, and to issue permits for more activities. Given the fact that States often regulate more waters than are encompassed by the current definition of "waters of the United States", it is not clear what benefit this expansion of federal authority is designed to achieve. It appears that the Agencies did not even consider existing State authorities when developing the proposed rule.

For all of these reasons, we request that the Agencies withdraw or suspend this rulemaking and work with States to develop a supplemental proposal.

Sincerely,

Alabama Department of Environmental Management



Lance R. LeFleur
Director
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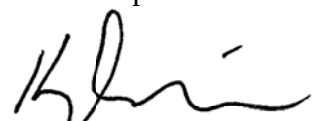
Arizona Department of Environmental Quality



Henry R. Darwin
Director
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Indiana Department of Environmental Management

Thomas Easterly
Commissioner
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Kansas Department of Health and Environment

John W. Mitchell
Director
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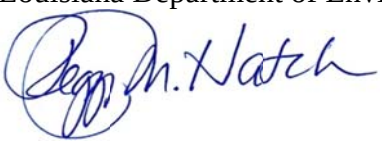
Louisiana Department of Environmental Quality



Peggy M. Hatch
Secretary
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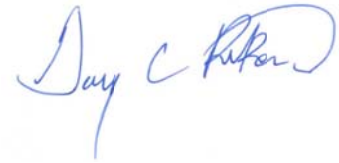
Mississippi Department of Environmental Quality



Gary Rickard
Executive Director
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Oklahoma Department of Environmental Quality

Scott Thompson
Director
***

Wyoming Department of Environmental Quality

Todd Parfitt
Director
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cc: Ken Kopocis, EPA