

# POTENTIAL IMPACTS OF PROPOSED CHANGES TO THE CLEAN WATER ACT JURISDICTIONAL RULE

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(113-73)

## HEARING BEFORE THE SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT OF THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES ONE HUNDRED THIRTEENTH CONGRESS SECOND SESSION

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JUNE 11, 2014

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Printed for the use of the  
Committee on Transportation and Infrastructure



Available online at: [http://www.gpo.gov/fdsys/browse/  
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U.S. GOVERNMENT PUBLISHING OFFICE

88-239 PDF

WASHINGTON : 2015

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U.S. House of Representatives**

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June 6, 2014

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**SUMMARY OF SUBJECT MATTER**

**TO:** Members, Subcommittee on Water Resources and Environment  
**FROM:** Staff, Subcommittee on Water Resources and Environment  
**RE:** Hearing on “Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule”

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**PURPOSE**

On Wednesday, June 11, 2014, at 10:00 a.m., in 2167 Rayburn House Office Building, the Subcommittee on Water Resources and Environment will receive testimony from the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (Corps), and several stakeholder representatives on a joint EPA and Corps proposed rulemaking to redefine the regulatory term “waters of the United States” under the Clean Water Act.

**BACKGROUND**

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

The Clean Water Act prohibits the discharge of any pollutant by any person, unless in compliance with one of the enumerated permitting provisions in the Act. The two permitting authorities in the CWA are section 402 (the National Pollutant Discharge Elimination System, or “NPDES”), for discharges of pollutants from point sources, and section 404, for discharges of dredged or fill material. While the goals of the Clean Water Act speak to the restoration and maintenance of the “Nation’s waters,” both section 402 and 404 govern discharges to “navigable

waters,” which are defined in section 502(7) of the CWA as “the waters of the United States, including the territorial seas.”

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

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

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

#### **HISTORICAL SCOPE OF CLEAN WATER ACT JURISDICTION**

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

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

*“Waters of the United States” or “waters of the U.S.” means:*

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;*
- (b) All interstate waters, including interstate “wetlands;”*
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or*



*natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:*

- (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;*
- (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or*
- (3) Which are used or could be used for industrial purposes by industries in interstate commerce;*
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition;*
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;*
- (f) The territorial sea; and*
- (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.*

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

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

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

#### **SUPREME COURT CASES ON CWA JURISDICTION**

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

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

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

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<sup>1</sup> See 474 U.S. 121 (1985).

<sup>2</sup> See 531 U.S. 159 (2001).

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

#### **ADMINISTRATIVE INTERPRETATIONS OF THE SUPREME COURT CASES**

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

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

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

Subsequent to the Supreme Court decision in *Rapanos*, the agencies developed interpretative guidance on how to implement the *Rapanos* decision. In June 2007, the agencies issued a preliminary guidance memorandum aimed at answering questions regarding CWA regulatory authority over wetlands and streams raised by the Supreme Court in *Rapanos*. (See Joint Legal Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007).) Then in December 2008, the agencies issued an updated guidance memorandum on the terms and procedures to be used to determine the extent of federal jurisdiction over waters, building upon the previous guidance issued in June 2007. (See Updated Joint Legal Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008).)

The December 2008 guidance provided that CWA jurisdiction over navigable waters would be asserted if such waters meet either the Scalia (“relatively permanent water”) or Kennedy (“significant nexus”) tests. According to the 2008 guidance, individual permit

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<sup>3</sup> The Supreme Court granted *certiorari* in both *Rapanos v. United States*, No. 04-1034, and *Carabell v. Army Corps of Engineers*, No. 04-1384, and consolidated the cases for review. *Rapanos v. United States*, 126 S.Ct. 2208 (June 19, 2006).

applications must, on a case-by-case basis, undergo a jurisdictional determination, based on either the Scalia or Kennedy tests. The 2003 and 2008 guidance remains in effect today.

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

#### **THE AGENCIES' PROPOSED REVISED CWA JURISDICTION RULE**

On April 21, 2014, EPA and the Corps published in the Federal Register a proposed rule on the regulatory definition of the term “waters of the United States” under the CWA. (*See* 79 Fed. Reg. 22188.) Under the proposed rule, which is currently undergoing a 90 day public comment period, the Corps and EPA would define the term “waters of the United States” as follows:

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

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

- (1) *All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;*
- (2) *All interstate waters, including interstate wetlands;*
- (3) *The territorial seas;*
- (4) *All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this definition;*
- (5) *All tributaries of waters identified in paragraphs (a)(1) through (4) of this definition;*
- (6) *All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this definition; and*
- (7) *On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this definition.*

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

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

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

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

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

*(5) The following features:*

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

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

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

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

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

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

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

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

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

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

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

**WITNESSES**

**Panel I**

The Honorable Robert W. Perciasepe  
Deputy Administrator  
U.S. Environmental Protection Agency

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

**Panel II**

J. D. Strong  
Executive Director  
Oklahoma Water Resources Board  
[On Behalf of the Western Governors Association  
and Western States Water Council]

Mark Pifher  
Manager, Southern Delivery System  
Colorado Springs Utilities  
[On Behalf of the National Water Resources Association  
and Western Urban Water Coalition]

Dusty Williams  
General Manager/Chief Engineer  
Riverside County, California Flood Control & Water Conservation District  
[on Behalf of the National Association of Counties  
and the National Association of Flood & Stormwater Management Agencies]

Bob Stallman  
President  
American Farm Bureau Federation

Kevin Kelly  
President  
Leon N. Weiner & Associates, Inc.  
2014 NAHB Chairman of the Board  
National Association of Home Builders

Eric Henry  
President  
TS Designs  
[on Behalf of the American Sustainable Business Council]



# **POTENTIAL IMPACTS OF PROPOSED CHANGES TO THE CLEAN WATER ACT JURISDICTIONAL RULE**

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**WEDNESDAY, JUNE 11, 2014**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON WATER RESOURCES AND  
ENVIRONMENT,  
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 10:05 a.m., in Room 2167, Rayburn House Office Building, Hon. Bob Gibbs (Chairman of the subcommittee) presiding.

Mr. GIBBS. The Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure will come to order.

Today we are having a hearing on the impacts of a proposed rule by the U.S. EPA and the Army Corps of Engineers on waters of the United States.

A couple housekeeping issues here first. We have received numerous requests for written testimony to be submitted to the record. I ask for unanimous consent that all written testimony be included and the hearing record be kept open for 30 days after this hearing in order to accept these and other submissions of written testimony.

Any objection? Hearing none, so ordered.

Welcome to our first panel. After a couple of opening statements, we have the Deputy Administrator of the U.S. EPA and the Assistant Secretary of the Army for Civil Works, Assistant Secretary Darcy.

Then after the first panel we will have a second panel of six individuals representing various Government entities and associations and the challenges that they see with the proposed rule and the impacts.

I yield myself time here to provide an opening statement.

First of all, I would again like to welcome everybody to the hearing today on the potential impacts of proposed changes to the Clean Water Act Jurisdiction Rule, which aims to redefine the term “waters of the United States.”

On April 21st of this year, the EPA and the Army Corps of Engineers published a proposed rule in the Federal Register that, according to the agencies, would clarify the scope of the Federal jurisdiction under the Clean Water Act. After reviewing the proposed

rule, I have serious concerns about the rule and the process the agencies are following to develop it.

Since 1972, the Clean Water Act has been instrumental in dramatically improving the quality of our Nation's waters. Fundamentally, to that progress, it has been the Federal-State partnership which recognizes that not all waters need to be subject to Federal jurisdiction, and that the States should have the primary responsibility of regulating waters within their individual boundaries.

However, I am concerned that this rule will undermine the Federal-State partnership and erode State authority by granting sweeping new Federal jurisdiction to waters never intended for regulation under the Clean Water Act, including ditches, manmade ponds, flood plains, riparian areas and seasonally wet areas.

In promoting this rule, the agencies are implying to the public that massive amounts of wetlands and stream miles are not being protected by the States, and that this rule which will essentially Federalize all waters is needed to save them. However, nothing is further from the truth. States care about and protect our waters.

I also am concerned how the proposed rule misconstrues and manipulates the legal standards announced in their *SWANCC* and *Rapanos* Supreme Court cases, effectively turning those cases that placed limits in Clean Water Act jurisdiction into Federal justifications for the agencies to expand their assertion of Federal authority over all waters nationally.

The agencies have had an opportunity to develop clear and reasonable bright line rules on what is jurisdictional versus not, but they instead chose to write many of the provisions in the proposed rule vaguely, in order to give Federal regulators substantial discretion to claim Federal jurisdiction over almost any water or wet area. This is dangerous, because this vagueness will leave the regulated community without any clarity and certainty as to their regulatory status and will leave them exposed to citizens' lawsuits.

In addition, since many of these jurisdictional decisions will be made on a case-by-case basis, as they have stated, and this will give the Federal regulators free reign to find jurisdiction, this rule, in essence, will establish a presumption that all waters are jurisdictional. Thus, the burden of proving otherwise will shift to property owners and others in the regulated community.

This rule sets a very high bar for the regulated community to overcome. Nevertheless, the agencies continue to claim that no new waters will be covered by the rulemaking. The agencies cannot, through guidance or rule, change the scope and meaning of the Clean Water Act as they are trying to do here. I also am troubled that the sequence and timing of the actions of the agencies that have been taken to develop this rule are undermining the credibility of the rule and the process to develop it.

First, instead of initiating a rulemaking process by soliciting input from and developing consensus with the general public, scientific communities, the Federal and State resources agencies on how to identify the appropriate scope of jurisdiction, the agencies rushed ahead on their own and developed the draft guidance that would by the agencies' own admission increase significantly the scope of the Clean Water Act's jurisdiction over more waters and more provisions of the act.



Then after facing substantial bipartisan opposition to the expansive new guidance, the Agency proceeded ahead again on their own with a rulemaking that is simply based on the expansive guidance.

And to hide the inadequacies of the rulemaking process that the agencies have embarked on, EPA decided to develop a so-called scientific study that is supposed to provide a basis for determining the reach of Federal jurisdiction on the Clean Water Act.

It is disturbing that the EPA intentionally precluded from the study a review, and discussion of the scientific concepts that are highly relevant to determining which waters should be subject to the Clean Water Act coverage. The interconnectedness of the science and the policy issue here warrants rigorous, scientific peer review prior to the ruling's crafting. However, instead of waiting until the science study was completed, the agencies wrote the rule long before the study's report was peer reviewed and finalized.

The Agency also took steps to hide the regulatory impacts of the rulemaking by preparing a fraud economic analysis that did not comprehensively assess all the cost and benefits. This is very troubling because this rule, if not carefully crafted, will have sweeping economic and regulatory implications for the entire Nation, by impacting nearly all sectors of the economy, threatening jobs, increasing compliance costs, restricting the rights of landowners, inviting costly litigation and undermining the ability of States and local governments to make decisions about their lands and waters. Regulations on the Nation's waters can and must be done in a manner that responsibly protects the environment without unnecessary and costly expansion of the Federal Government.

Finally, I am pleased to hear the agencies have just announced a 91-day extension of the public comment period of the proposed rule. However, the agencies should extend the comment period on the proposed rule until after the EPA Science Advisory Board has completed its review of the science study and the study's report is thoroughly vetted to ensure that any final rule is based on the final peer reviewed report.

I look forward to that testimony from our witnesses today, and I would recognize Chairman Shuster of the Transportation and Infrastructure Committee for any statement or comments he may have.

Mr. SHUSTER. Thank you, Mr. Chairman.

The President's public proposed rule, which of course Mr. Gibbs did a great job of going through it, will dramatically extend the reach of the Federal Government when it comes to regulating ponds, ditches and wet areas and I don't believe anybody is going to dispute that. I mean, we may attempt to hear that today, but that is what is going to happen.

But this is another example of this administration seeking to use executive action, brute force by bypassing Congress, ignoring Supreme Court rulings of the past. Unilaterally broadening the scope of the Clean Water Act and the Federal Government's reach into everyday lives, will adversely effect the Nation's economy, threaten jobs, invite costly litigation and restrict the rights of landowners, States and local governments to make decisions about their own lands.

This massive Federal jurisdictional grab was the subject of failed legislation in the 110th and 111th Congress and I know my colleagues over there were in the majority at the time, and I hope we can join together to fight back on this. Because once again, this is going to be Congress seeding power to the executive branch, and if we do that, if we allow this to go forward, we will never get that back and I don't care if it is a Republican President or a Democratic President, we give it up and they will never give it back to us.

So this is a fight we need to have, and we need to win. In the 110th and 111th Congress, it was strong bipartisan support to prevent those bills from moving forward, and as I said, the administration is now doing an end around Congress to try to gain that Federal power expansion through this rulemaking. The rule supposedly aims at clarifying water bodies subject to Federal jurisdiction under the Clean Water Act, but as I said, I am concerned that there is serious flaws in this rule and the executive branch will take power away from the Congress.

Twice this Supreme Court has told the Agency that there are limits to the Federal jurisdiction under the Clean Water Act and they had gone too far in asserting their authority. Now the administration appears to be cherry-picking those Supreme Court rulings, picking out language in attempt to gain this expanded authority, rather than heeding the directive of the Court.

It is the responsibility of Congress, not the administration, to divide the scope of the jurisdiction under the Clean Water Act. This rule will have sweeping economic regulatory implications for the entire Nation, and I believe that the agencies will be better off correcting the deficiencies in this rulemaking and develop a rule that is credible, reasonable and consistent with the law.

Regulation of our Nation's waters must be done in a manner that protects the environment without unnecessary and costly expansion of the Federal Government. We can continue to protect our waters without unreasonable and burdensome regulations on our businesses, farmers and families.

So, again, I have tremendous concern. This is something that I know that those of us on our side of the committee are going to fight to make sure this doesn't move forward and that we as Congress, and I would, again, encourage my Democratic colleagues to look at this as a fight between the executive branch and the legislative branch. This is our constitutional duty, and they are going to take it away from us.

And I said to you, if this were a public administration, I would be saying the same thing and fighting it just as hard. So I encourage you all to keep an open mind as we go through this and let's fight to keep Congress relevant in this process.

I yield back.

Mr. GIBBS. At this time, I recognize the ranking member of the full Transportation and Infrastructure Committee, Mr. Rahall.

Mr. RAHALL. Thank you very much, Mr. Gibbs. I appreciate you as chairman holding this hearing, and I appreciate very much our witnesses being with us today on both panels.

This is an excellent opportunity to examine and question the regulations that are pouring out of the Environmental Protection

Agency. We are told that this latest regulation defining waters of the United States, is an attempt to address the muddled mess of what waters are subject to the permitting processes of the Clean Water Act.

Certainly, the most recent Supreme Court decisions on the matter have only left the question increasingly murky, opening a legal void that is begging to be addressed. Unfortunately, from all that I have seen and heard to date, this latest proposed rule has only further muddled the waters. I have heard many times from proponents of this rule that the intention in crafting it was to provide certainty, so that businesses and individuals before setting off on some undertaking would know whether or not they needed to go through the lengthy and expensive permitting process.

On that score, I have to give credit where credit is due. This proposal certainly does provide certainty, the certainty that if you want to undertake an activity whatsoever that may involve so much as a puddle, you must seek a permit. So I confess, I am terribly frustrated. I represent a State that has been brutally beaten up by the barrage of regulations gushing out of the EPA.

We feel we are under siege from an agency so power hungry that it is gobbling up jurisdiction and taking power away from our States, away from other Federal agencies, and ultimately, away from the people, and any serious person looking at this agency would have to question if it has bitten off more than it can chew already.

The EPA likes to cultivate the impression that science and pragmatism govern the day and that it is not swayed by ideology. But I see it differently. I see an agency that is so hard over against coal that it will gloss over the science in doing so, and if doing so, helps to stop the construction of coal-fired power plants. I see an agency that is so blinded by an anti-coal philosophy that it will stonewall efforts to provide coal-field residents with modern sewer systems and safer water. It is an agency that is willing to block construction of a major national highway at huge savings to the American taxpayers if it would involve the mining of a little coal.

This committee is right to view this new proposal with skepticism. We must look candidly and matter of factly at the cost of this latest EPA proposal on the waters of the United States and its effects on our jobs, on our economy and on the course of our Nation.

So I thank the chairman for allowing me these opening comments, and I thank him again for having this hearing today.

Mr. GIBBS. Thank you.

At this time, I recognize my Ranking Member Bishop for any comments he may have.

Mr. BISHOP. Thank you very much, Mr. Chairman, and thank you for holding today's hearing.

Let me take a moment to frame out the context of today's hearing and try to highlight some of the factors that brought us to where we are today. The starting point of all of this was Congress' passage of the Clean Water Act in 1972, which was approved by a veto override by a 10-to-1 margin over President Nixon's veto.

In that law, the Congress broadly defined the scope of the act as the navigable waters, meaning the waters of the United States and

the territorial seas, and directed the agencies before us today to fill in the details. For almost 30 years, the agencies' regulatory definition of those terms were the law of the land and since enactment of the Clean Water Act, we have seen dramatic improvement in the number of water bodies that are safe for fishing and swimming, up from one-third of the Nation's waters in 1972 to approximately two-thirds of the Nation's waters today. I hope we can all agree that is a good thing, and I hope we can also all agree that that improvement would not have happened were it not for the Clean Water Act.

Then in 2001, a stakeholder challenged on the act's application with respect to an Illinois landfill, resulted in the Supreme Court questioning the application of these definitions. Later, in 2006, the Supreme Court again questioned the application of these rules to two wetlands in the State of Michigan. In the latter case, the *Rapanos* case, Chief Justice Roberts wrote that the core and the EPA needed to do a better job in defining the scope of the Clean Water Act. So if this is, in fact, a conflict between branches of Government, perhaps the conflict is between the judicial branch and the executive branch.

This is something that has been attempted by the last two administrations. The administration of President George W. Bush and the current administration. In 2003, the Bush administration initiated a public rulemaking to define the term "waters of the United States" consistent with the rulings of the Supreme Court as well as took public comment on whether other regulatory definitions on the scope of the Clean Water Act jurisdiction also needed clarification.

In response, several outside stakeholders, including some of the groups represented here this morning, recommended that the Agency used the rulemaking process as a means of providing increased clarity to the, quote, "hodgepodge of ad hoc and inconsistent jurisdictional theories," closed quote, as well as to define other terms in the regulations including such terms as "tributary" and "adjacent."

The 2003 rulemaking attempt by the agencies never reached its conclusion. Following in the footsteps of the *Rapanos* decision, the Federal agencies released two interpretive guidance documents, one in 2007 and a second in 2008, the latter of which remains in force today.

Now, let's fast forward to 2014. The list of stakeholders publicly recommending that agencies carry out a rulemaking has expanded and now includes groups ranging from the National Wildlife Federation to the Waters Advocacy Coalition. In response, earlier this year, the administration initiated its own rulemaking to do just that, to clarify the scope of the Clean Water Act consistent with the parameters laid down by the Supreme Court over the years.

Now, I am not naive enough to expect that the various groups following this proposed rule would agree on how to clarify the scope of the Clean Water Act or where the bright lines of jurisdiction should lie. However, I do believe it is reasonable for the agencies to be allowed to continue this open process in providing the clarity that these stakeholders have demanded over the years.

If the stakeholders have concerns or recommendations for changes to the proposed rule, that is what the public comment period was created for, and I strongly encourage all interested parties to utilize this open process to make their views known. However, I do not support throwing out the entire rulemaking process simply because there is disagreement with the initial draft.

Going back to the legal state of play. In the past 30 years, the Supreme Court has issued three rulings that directly address the scope of the Clean Water Act, the *Bayview Homes* case, the *SWANCC* case and the *Rapanos* case. Each of these decisions outlined a piece of the puzzle for defining the scope of the Clean Water Act.

In the *Bayview Homes* case, the justice unanimously agreed that certain wetlands fell within the protections of the Clean Water Act. In the *SWANCC* decision, the five-to-four majority of the Court ruled that the presence of migratory birds on a water of the United States could not be the sole basis for determining jurisdiction.

Finally, in *Rapanos*, the Court issued a four-one-four decision where four justices lead by Justice Scalia outlined a relatively permanent waters test for determining jurisdiction, while Justice Kennedy established a complimentary test, the so-called significant nexus test for determining jurisdiction, and the remaining four justices agreed with the Agency's current authorities. These three decisions outline the four corners of the Supreme Court's interpretation of the scope of the Clean Water Act.

So in my view, the question becomes, how does the April 2014 proposed rule compare with tests on the Clean Water Act scope as outlined by the Supreme Court? This will be the area of questioning that I will focus in on today as this hearing progresses. If the stakeholders today suggest a different approach, I welcome their input, as well.

Mr. Chairman, I hope that all involved with today's hearing will use this hearing as a learning experience about what this rulemaking does, and as important, what it does not do.

I welcome the witnesses here this morning. I look forward to your testimony.

And I yield back.

Mr. GIBBS. If any other Members have opening statements, they can submit their written testimony for the record.

At this time, we will recognize our panel 1. We have the Honorable Robert Perciasepe, the Deputy Administrator for the United States Environmental Protection Agency; and we also have the Honorable Jo-Ellen Darcy, who is the Assistant Secretary of the Army for Civil Works.

Mr. Perciasepe, I will recognize you first. The floor is yours. Welcome.

**TESTIMONY OF HON. ROBERT W. PERCIASEPE, DEPUTY ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY;  
AND HON. JO-ELLEN DARCY, ASSISTANT SECRETARY OF THE  
ARMY (CIVIL WORKS)**

Mr. PERCIASEPE. Thank you, Mr. Chairman, and Members, Ranking Member, thank you so much for inviting us today.

Mr. GIBBS. Can you pull your mic up a little bit closer?

Mr. PERCIASEPE. I apologize. I think we all agree, and I have heard this already, that we want clean and safe waters for ourselves, our economy, our environment, our children, our future. I also want to express my appreciation to my colleague and friend, Assistant Secretary of the Army Jo-Ellen Darcy for her leadership and commitment to protecting the Nation's waters.

We are undertaking a process to clarify the geographic scope of the Clean Water Act and to improve a regulation that has been in place for nearly 30 years. The proposed rule will help provide families, manufacturers, farmers, sportsmen, energy producers and the American people with the clean water they depend on.

The written testimony that I have submitted will provide more details about the proposed rule, including the Agency's goal to respond to the request from stakeholders across the country to make a process of identifying waters protected under the Clean Water Act easier to understand, more predictable and more consistent with the law and peer-reviewed science. We believe this rule-making will minimize delays, costs, and improve predictability, clarity, consistency for everyone who may or may not need a Clean Water Act permit.

I will focus my opening remarks this morning on some of the misinformation that exists regarding the potential effects of this rule, and I am concerned that incorrect information may have the effect of distracting the attention from the legal policy and scientific underpinnings of the proposed rule.

The agencies are meeting with Americans across the country including farmers, energy companies, small business, State and local governments, sportsmen, developers and many others to solicit their comments, because, remember, this is a proposal, and to answer their questions about it.

We are hearing from a public directly and personally about how to improve the rule and how to make it most fair, flexible and effective for everyone, in addition to providing valuable insights to our discussions are also revealing an unfortunate pattern of misinformation.

For example, I have heard in my discussions with stakeholders that this regulation will require farmers to get permits for their cows to cross a stream; that this legislation will make dry washes that carry water only once in a thousand years protected under the Clean Water Act; that this rule will make entire flood plains subject to the Clean Water Act jurisdiction, and I can tell the committee that categorically, none of these are correct statements.

In contrast, here are some of the examples about what the proposed rule does and does not do. In adherence with the Supreme Court, it would reduce the scope of waters protected under the Clean Water Act compared to the existing regulations on the book. It would not assert jurisdiction over any type of waters not previously protected over the past 40 years.

The rule does not apply to lands, whole flood plains, backyards, wet spots or puddles. It will increase transparency, consistency and predictability in making jurisdictional determinations and reduce existing cost confusion and delays. It represents the best peer-reviewed science about functions and values of the Nation's waters. The agencies will not finalize this rule until the Science Advisory

Board completes its review, which you have mentioned, Mr. Chairman.

It would reduce Clean Water Act jurisdiction over ditches compared to the previous 2008 guidance. The rule will maintain all existing Clean Water Act exemptions and exclusions. In addition, the agencies also identify agricultural conservation practices conducted in waters that do not require a 404 permit. We want to encourage conservation work on agricultural land.

We have published a proposed rule not a final rule. We are currently taking public comment, and we have extended the comment period, as you have already heard. We expect a tremendous amount of public response from a broad range of interests, and we are actively working to meet with a wide range of stakeholders. This outreach has already been tremendously helpful to us in understanding the concerns and discussing effective solutions. We are going to continue to work hard and listen more effectively and learn more and better understand.

Let me just conclude by emphasizing my strong belief that what is good for the environment and clean water is also good for farmers, ranchers, foresters, manufacturers, homebuilders, small businesses, communities, energy producers and all Americans.

We look forward to working with all stakeholders to reflect this important goal in the final rule in defining geographic role of the Clean Water Act.

And I thank you, and I look forward to your questions.

Mr. GIBBS. Assistant Secretary Darcy, welcome. The floor is yours.

Ms. DARCY. Thank you.

Good morning, Chairman Gibbs, Ranking Member Bishop and other members of the committee.

Thank you for this opportunity today to discuss the proposed rule clarifying the definition of waters of the United States under the Clean Water Act. Once implemented, this rule will enable the Army Corps of Engineers to more effectively and efficiently protect our Nation's aquatic resources while enabling appropriate development proposals to move forward.

Clean Water Act jurisdiction applies to "navigable waters," defined in the statute as "waters of the United States including the territorial seas." Our 1986 regulations define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of the waters in the United States, tributaries, the territorial seas and adjacent wetlands.

The U.S. Supreme Court has addressed the scope of waters regulated under the Clean Water Act in three occasions, specifically the *Riverside Bayview Homes* case of 1985, the *SWANCC* decision in 2001, and the *Rapanos* decision in 2006. The Court's decisions significantly altered the regulatory landscape, and although the Corps and the Environmental Protection Agency have done a fine job adjusting their regulatory activities in response, a critical need exists for this rulemaking.

We receive many comments from Congress, from organizations, from stakeholders, from the public, urging the agencies to pursue notice and comment rulemaking, including Chief Justice Roberts

himself, and the *Rapanos* decision strongly recommended that the agencies initiate a rulemaking.

We have been working for several years now to develop a science-based rule that will provide the clarity needed, the transparency, as well as the efficiency. Under the proposed rule, the process of identifying waters of the United States will become less complicated and more efficient as to which waters are and which waters are not jurisdictional. Our proposal does not assert jurisdiction over any new category of waters; however, we do expect that there will be a small increase in jurisdiction over the existing 2008 guidance, but the extent of jurisdiction is less inclusive than the 1986 regulations.

Our decision to propose to regulate by rule, all tributaries and adjacent waters and wetlands is scientifically based and is consistent with our understanding that these waters, alone or in combination with similarly situated waters in the watershed, have a significant nexus to jurisdictional waters. Other waters may be determined jurisdictional only upon a case-specific determination that a significant nexus exists between the jurisdictional water. This is consistent with our current practice.

The proposed rule will also exclude certain waters and erosional features. Waste treatment systems and prior converted croplands remain excluded. We anticipate receiving meaningful comments on the proposed rule, and as you know, the comment period has just been extended until October 20 of this year.

Mr. Chairman, and members of the committee, I am happy to answer your questions and look forward to this hearing. Thank you.

Mr. GIBBS. At this time, Mr. Chairman of the committee, Bill Shuster, do you have—OK. He yields to former chairman Mr. Young from Alaska.

Mr. YOUNG. Thank you, Mr. Chairman. I want to thank the witnesses.

I have a personal feeling about the EPA. I want you to know what you have done in Alaska to me is a disgrace. Without any input from the State of Alaska, any cooperation with the State of Alaska, any understanding of the effect upon individuals in the State of Alaska, preempting a State-owned property without consulting, total arrogance on part of another agency.

The second thing, Mr. Perciasepe, is the influence you have, Ms. Darcy, on your agency where we just now have a Corps request of a new way to allow family mining to take place, and I have information it was submitted by the Corps for permitting because of the EPA. That is not right. You are a separate agency, you should have the ability to make decisions based upon other than, I call, a policy of an EPA that doesn't understand that there is economics, there is a human life that is involved, and that is the last of my statement.

But I would like to just ask the question to the EPA. In this bill, you indicated costs were underestimated. Are you doing anything about that? Are you looking at the cost of this legislation upon the economy and upon the individual States?

Mr. PERCIASEPE. Thank you for the question. We have a draft economic analysis that accompanies the proposal. Our draft eco-



conomic analysis does identify the costs, and it does identify the benefits that we anticipate——

Mr. YOUNG. But is it true you underestimated the cost in this proposal?

Mr. PERCIASEPE. We do not believe we have underestimated the cost.

Mr. YOUNG. So you are not doing anything about it?

Mr. PERCIASEPE. Well, it is a proposal so we are taking comment on the economic analysis, and if we do get comment that demonstrates any modification or improvement that we can make on it, we will obviously take that into account before we do any final——

Mr. YOUNG. Did you consult with any of the States involved or any of the States in the United States on this proposal?

Mr. PERCIASEPE. We have had discussions, ongoing discussions with the States, and we continue to have ongoing discussions.

Mr. YOUNG. Have you found one State that supported this proposal?

Mr. PERCIASEPE. I don't have a polling of the States.

Mr. YOUNG. So you really didn't consult. Because I don't believe there is one of the 50 States that support this proposal.

Mr. PERCIASEPE. I couldn't say that one way or the other.

Mr. YOUNG. Well, you are the Agency. You should know that if you are consulting them. There should be somebody, one State saying this is a grand idea, and if you don't know, that means you didn't consult with them.

Mr. PERCIASEPE. We did consult with them.

Mr. YOUNG. Well, no, because you didn't do it well enough. You didn't write it so the States could accept it. You got 50 States that say they don't like this program. Fifty States sir, and you represent 50 States supposedly as an agency.

Mr. PERCIASEPE. I don't believe 50 States have said that, sir.

Mr. YOUNG. Oh, well, do you believe they said in one State? Give me one State.

Mr. PERCIASEPE. The way we——

Mr. YOUNG. One State.

Mr. PERCIASEPE. I am sure they will——

Mr. YOUNG. You have not one State.

Mr. PERCIASEPE. I don't have one State?

Mr. YOUNG. You have not one State that supports this proposal?

Mr. PERCIASEPE. All right. You won't let me answer, so go ahead.

Mr. YOUNG. No. I am asking you a question. You can't do it?

Mr. PERCIASEPE. All right. Well, you have to stop talking so I can answer.

Mr. YOUNG. You can't do it. You can't do it. Now, that is what bothers me. Now, if I have a private piece of property under the Constitution is mine——

Mr. PERCIASEPE. Yes, correct.

Mr. YOUNG [continuing]. And I have water on it, can you under this rule go in and tell me I cannot make a difference in the water that is on my property? I cannot drain my pond under this rule?

Mr. PERCIASEPE. If those waters are jurisdictional under the Clean Water Act, you would have to get a permit to do it.

Mr. YOUNG. The question is very simple. I have a pond of water. It is on my private land. It is my water. Is that not true, it is my water?

Mr. PERCIASEPE. It is on your land.

Mr. YOUNG. Is it my water?

Mr. PERCIASEPE. That varies from State to State on water rights.

Mr. YOUNG. I ask you as Federal. State has not proposed this. It is my water. It is on my property, and I want to drain it. Can I do that without your permission?

Mr. PERCIASEPE. The United States Congress has enacted a law that requires a permit to do work in waters that are jurisdictional under the Clean Water Act. So if it is, and I have no idea whether it is or not because I don't know which water you are talking about, it would require a permit.

Mr. YOUNG. It is my property. This is my ranch.

Mr. PERCIASEPE. It would require a permit if it is jurisdictional. If it isn't jurisdictional, you won't need a permit.

Mr. YOUNG. Mr. Chairman, if I say so in the committee, this is an example, under the Constitution you have a right on your property to protect your property. If I want to drain it because I have got, what do you call these fish that walk across the water on the land and get in the other area and I want to kill those fish and I can do it by draining it, and now I have to get a permit from you and your agency says, no, you can't do it because we have not given you a permit. You are taking from my right to run my land. That is unconstitutional. And you, both of you swore to uphold the Constitution.

Mr. PERCIASEPE. That is correct.

Mr. YOUNG. And you are not doing it if I can't run my land and my water. Mr. Chairman, that is an example of giving the overstepping of this Government. I have watched this for 81 years. We have a Government today, Mr. Chairman, that is taking away the right of individual's rights, and I say to the Agency, no. That people are going to stand up one of these days and say, no more. That is enough. You are not going to go against the Constitution. And my time is done. Let the chairman do it. Let everybody else start asking these questions.

Mr. GIBBS. Thank you. Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman. I will try to be a little tamer.

Mr. Deputy Administrator, as we all know, the coal industry, coal-mining jobs, crucial, vital to my home State. It is our livelihood. Coal literally keeps the lights on, and when we have downturns for a variety of factors or a variety of reasons contribute to those downturns in the industry as we are in now. There are layoffs, layoffs of law enforcement personnel by county commissioners who cannot find the funding to keep officers on the street or even keep the lights on in their courthouses or keep staff employed.

So there is a lot of families watching these proposals in my district as they did the recent proposals announced last week and they are worried about their jobs. They are receiving warn notices as we speak. Again, there is a variety of factors for this downturn. I recognize that. Everybody recognizes that.

But in these downturns in the past, we have always felt the Government is trying to help us get out of these downturns in the coal industry. That is not the feeling now. As a matter of fact, just the opposite. I think our Government is trying to keep us in a downturn and trying to finish us off during this current down cycle.

So, you know, as I say, everybody is worried about everything that comes out of EPA in the district I am honored to represent. Several years ago the agencies went through an extended exercise to align various definitions of fill material that has a lot in the industry concerned. My question to you would be, is the EPA planning now to revisit that and redefine what is fill material?

Mr. PERCIASEPE. Congressman, we absolutely have no plans to revisit that.

Mr. RAHALL. OK. Let me ask you another question. On the issue of properly permitted ditches on mine sites that are in place to address stormwater runoff, is the rule expected to capture these on-site draining systems?

Mr. PERCIASEPE. Looking specifically, for instance, at a permitted coal mining site, we would expect that the waste treatment exclusion in the rule that we are continuing in this same way it has always been there, we will continue, which covers many of those. Any stormwater ditches or ponds that were constructed to convey or deal with stormwater control on mining sites would not be covered, and we are not changing the water treatment or the waste treatment system exclusion rule, the imposing of the rule.

So with those clarifying points, which are reinforcing the fact that the answer is no, that we would not have jurisdiction over those treatment facilities that are on a permitted mine site.

Mr. RAHALL. So the industry could continue to rely upon your longstanding Agency interpretations—

Mr. PERCIASEPE. Yeah, exactly.

Mr. RAHALL [continuing]. Regarding these uses?

Mr. GIBBS. Madam Secretary.

Ms. DARCY. Yes, those exclusions will stay in place under this proposed rule.

Mr. RAHALL. OK. Thank you.

I yield back, Mr. Chairman.

Mr. GIBBS. I have some questions.

First of all, you are absolutely right. We need to make sure we bring certainty to our businesses and our farmers and everybody out there, but there is so much vagueness, and when I hear your testimony, and I actually read the testimony of the next panel, I hope you are able to stay around to hear the next panel since you are the regulators and see what their concerns are. So I really would appreciate if you are able to stay around and hear their testimony because they are really concerned about that, too, and they have a little different take on that.

First of all, some of the things you, Mr. Perciasepe said, I hope that you can put that in writing because sometimes saying things, we like to see it down in writing for the official record.

But Ms. Darcy, we are talking about vagueness. In your testimony, it says, "The agencies proposed that waters outside of the riparian and flood plain areas would be jurisdictional only if they have confined surface or shallow subsurface connection to the tradi-

tional navigable waters,” and so on. Would you please explain to me what you mean by the connectivity or the surface or a shallow subsurface connection? Because you say you are not expanding the scope of your jurisdiction, but I don’t know what that means.

Ms. DARCY. Congressman, what it means is that if there is a connection between that and the flood plain, and if the flood plain is a navigable water, then a significant nexus determination would need to be made.

Mr. GIBBS. Any connection or significant connection? I don’t mean to de minimis anything, but—

Ms. DARCY. No, significant connection, and we define significant nexus in the rule as to how significant that would be. It has to be able to impact—

Mr. GIBBS. OK. Would you explain to me how you define significant?

Ms. DARCY. Pardon me?

Mr. GIBBS. Would you explain to me how you define significant?

Ms. DARCY. I will read you the definition, if that will help.

“Significant nexus means that a water, including a wetland, either alone or in combination with other similarly situated waters in the region in that watershed significantly affects the chemical, physical or biological integrity of a water identified as a jurisdictional water.”

Mr. GIBBS. So for example out West, I have been out West, I have seen areas where they might get water flowing through an area during a once-in-a-year rain event and you know, it is dry beds, would that be significant?

Ms. DARCY. That, again, would be an individual case-by-case determination depending on the circumstances in that area. For example, some of those kinds of waters, if they are determined to be a tributary, which is defined as a water body that has a bed, a bank and ordinary high water mark and—

Mr. GIBBS. So let’s say in my farm last month I had a washout, and I went out there and I fixed it. It was probably 200 feet long. It washed out. It was close to 2 feet deep, 2 feet wide. You know, I had to fill that in, and I planted grass and tried to do the right thing to fix that.

Now, if you came out, the Corps came out, would they say that was a water bed? Or would I be able to fix that without getting a permit?

Ms. DARCY. Congressman, what you have described would be an erosional feature. That would not be subject to a jurisdictional determination.

Mr. GIBBS. OK. I read through the testimony of the next panel. There is a lot of concern that the States haven’t been consulted, local governments haven’t been consulted, so I just wanted to make you aware of that, Mr. Perciasepe, that there is concern about that.

Also there is a huge concern of local governments, road ditches, because you talked about, I think you used significant, the bed. So I think you could define that as a ditch now on the new definition as a tributary. Does that mean when they are doing a dredge or clean out the ditch that they are going to have to get a permit?

Ms. DARCY. Congressman, for the first time, we are excluding in this rule ditches and if you would like, I can give you the two examples of what kinds of ditches.

Mr. GIBBS. Well, I guess there is some controversy if you really are or not, and I think the trust factor here, we have seen some of the things that the EPA has done in the past with the revocation of permits and veto of permits and preemption of permits that I think there is a high level of distrust out there, and I am really concerned about how we move forward on that area.

OK. I am just about out of time. I think I will turn it over to Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chairman.

Assistant Secretary Darcy, first off, thank you for reading the definition of significant nexus. Am I correct in understanding that the language in the significant nexus definition as included in the proposed rule, is lifted almost verbatim from Justice Kennedy's ruling in the *Rapanos* case?

Ms. DARCY. I believe that to be the case and also, I would just like to reiterate that the definitions are also part of what is being proposed in this rule as being open for public comment.

Mr. BISHOP. OK. But you are staying wholly within the confines of Justice Kennedy's definition of significant nexus in this proposed rule; is that correct?

Ms. DARCY. That is correct.

Mr. BISHOP. And is it also correct that Justice Scalia in his definition of relatively permanent connection to traditional navigable waters suggested a hydrological connection in his ruling, and is it not the case that your proposed definition adheres to Justice Scalia's definition; am I right about that?

Ms. DARCY. That is correct.

Mr. BISHOP. Thank you. Now, let me ask you this, there are these two rules or two tests, the relatively significant nexus tests and the relatively permanent connection test. Is there any way in which any aspect of your proposed rule extends jurisdiction beyond the four corners of those two definitions?

Ms. DARCY. No.

Mr. BISHOP. Mr. Perciasepe, do you agree with that?

Mr. PERCIASEPE. I do, and, in fact, I would just augment slightly that in addition to the definition that the colloquy just discussed here, the discussion on the words in the Supreme Court Judges, we actually are using this rulemaking to, by rule, exclude certain things. So even with that test, some, notwithstanding if they would pass that test or not, they are excluded.

Things like, to go back to the Chair's question, ditches that are excavated wholly in uplands, that drain only in uplands and that have less than perennial flow, which is virtually most of the highway drainage ditches in the country. You know, they are not draining a wetland. They are not draining a stream. They are just draining dry land when it rains. Those are excluded in the definition of the rule. So I just wanted to add that to Assistant Secretary Darcy's comment.

Mr. BISHOP. But just to be clear, this has been described as a power grab. It has been described in other ways somewhat even more pejorative than that. Your definitions are definitions that hue

precisely to the definitions suggested by the two Supreme Court rulings?

Ms. DARCY. That is correct.

Mr. BISHOP. Thank you. Let me move to another area.

The operative guidance that we have right now is the 2008 guidance. The 2008 guidance asserts jurisdiction over dry land ditches that flow less than year-round, yet your proposal limits jurisdiction by requiring water year-round. Am I correct, therefore, in determining that jurisdiction over fewer ditches would be asserted under your ruling than is currently the case today?

Ms. DARCY. That is correct.

Mr. BISHOP. OK. So it limits, rather than expands the scope of the Clean Water Act in that particular case. Am I right about that?

Ms. DARCY. That is correct.

Mr. BISHOP. All right. Let me just ask one more question. Are there any examples where the proposed rule expands the definition of jurisdictional waters that is currently the case under the 2008 guidance?

Ms. DARCY. No.

Mr. BISHOP. Mr. Perciasepe, do you agree with that?

Mr. PERCIASEPE. I do. There is no expansion.

Mr. BISHOP. And does it, in fact, limit some of the jurisdiction?

Mr. PERCIASEPE. It does. In fact, some of those limitations, as I mentioned, have to be done through rulemaking.

Mr. BISHOP. OK. So those who are proposing that we prohibit the use of Federal funds to allow this rulemaking to go forward or to enforce that rule, this might be a falling under the heading of be careful what you hope for because the 2008 guidance is more restrictive than what this rule is proposing? Is that a correct interpretation?

Ms. DARCY. In some instances, that is correct.

Mr. BISHOP. Mr. Perciasepe, do you agree with that?

Mr. PERCIASEPE. I do.

Mr. BISHOP. OK.

Thank you very much. I will yield back.

Mr. GIBBS. Mr. Shuster.

Mr. SHUSTER. That you, Mr. Chairman.

You know, some words have been used here: "Flexibility." Flexibility is a great thing when both parties get to use flexibility. My concern is that when you talk about flexibility, the stakeholders seem to never get the flexibility to come under a rule and be able to mitigate the problem themselves in a way that it would work.

What typically happens that I see is when you talk about flexibility, it allows the EPA and the Corps the flexibility in different districts, in different regional offices across the country to interpret these things differently.

And we see that in Pennsylvania on the Marcellus gas play where the Corps office in Baltimore is treating Pennsylvania and wherever else, the other places it has jurisdiction differently than what happens in Arkansas and other places in this country because the local office is interpreting these rules and regulations in a different way.

For instance, also the word "significant." Significant, what it means to me and what it means to you is different. I am not a sci-

entist. I am not a geologist. You don't have specifics in there as to really what significant is. It requires a measurement of some sort, then I can understand it, or measurement that a farmer or a developer can understand.

So you have got all these nice terms in here but when you look at how you have made these definitions, tributary, adjacent, flood plain, neighboring waters, they are very vague to my understanding and so when we talk to the stakeholders today and have been talking to them, they are very vague to them.

So can you tell us now what waters would definitely no longer be regulated by the Federal Government under this proposed rule?

Ms. DARCY. We have a series of exclusions that are defined here, and if you would like, I can read those to you. It is under section B1 of the definition of the rule. It is, waters that are not going to be considered are wastewater treatments, prior converted cropland, ditches that are excavated wholly in uplands, ditches that do not contribute flow either directly or through other waters to a water, and artificially irrigated areas that would revert to uplands, artificial lakes. This whole list. Do you want me to continue?

Mr. SHUSTER. So if the water somehow seeps into a body of water that is flowing because of a flood or something occurring, some extreme weather event occurs, will that enable the regulators to change the definition of that ditch or that pond to fall under the Federal jurisdiction?

Ms. DARCY. Congressman, if the water body contributes to the flow of a tributary, then that would be considered a jurisdictional—

Mr. SHUSTER. So we get a 100-year storm and floods with typically irrigated field and a diversion ditch on a farm which never really, it never flowed into the river that is close by. If that event occurred, then, would that come under Federal regulation?

Ms. DARCY. Congressman, it sounds as though you are describing a flood event and the runoff from that flood event, and that kind of runoff would not be considered a jurisdictional water of the United States.

Mr. SHUSTER. When you talk about waste treatment—yes, sir.

Mr. PERCIASEPE. Just to add in, because I think this gets at some of the potential need for continued dialogue. We are using the term "flood plain" to try to get at the issue of adjacency which has been in a number of the Supreme Court cases.

But just because it is a flood plain doesn't mean it is jurisdictional. It still would have to be a water in the flood plain, you know, standing water or a wetland with the hydric soils and the vegetation or an actual running stream through a flood plain area. But the flood plain is an area that can help identify, and that is what we are proposing to take comment on that it is adjacent to the other traditional water.

So, I want to be really clear that the entire flood plain, which may flood, is not jurisdictional and, in fact, I want to remind that, agriculture is exempt from having to get permits in that area regardless of whether it has got a wetland in part of it.

So I wanted to just add to the Assistant Secretary's comments on that.

Mr. SHUSTER. And, of great concern to me, because I have seen it happen firsthand in Pennsylvania, where I just talked about the Corps, we have a, I believe it is an EPA field office up in State College Pennsylvania, that is staffed with, well, used to be staff with, I don't know who is there today presently, with people that are extreme environmentalists and they will interpret the law differently than the folks in Washington.

And I said with the Corps what is happening in Baltimore versus what they do in Arkansas or other places of the country doesn't conform to what the rule is necessarily. It is an interpretation, and that happens, I think, I am willing to bet that everybody in this room has faced that before where the local office, whether it is the regional or the district office, is looking at things differently.

And so how can you protect the stakeholders against that occurring?

Mr. PERCIASEPE. Well, I will let Assistant Secretary Darcy answer for the Corps, but we both have regional structures, as you point out, and it is important for us to develop consistency and predictability there. That is a high priority for both of us, and we view the work we are doing in this rule and when we get it finalized to help us provide that consistency and predictability.

Mr. SHUSTER. Have you experienced that in the EPA where you have seen regional directors look at something very, very differently?

Mr. PERCIASEPE. Well, to the extent that we can practically—I mean, there is always difference of opinions in any organization. Our objective is always to try to reconcile.

Mr. SHUSTER. That is my point. What you are trying to do is what we always try to do in Washington is a one-size-fits-all, and then what you have is you have got differences of opinion and that causes tremendous problems for people out there trying to earn a living and farm the ground and run their businesses.

Mr. PERCIASEPE. You have hit the nail on the head of that. We have to find a way to have enough predictability and consistency so that there isn't vagaries of different opinions all over the country. But at the same time, we can't be so constrained, you know, in a one-size-fits-all world.

So what we are trying to do is get that right, so we have definitions here and practice that will be established that can deal with the different situations in the country.

Mr. SHUSTER. Well, and I know I have extended my time, but just a final point, because I think Chairman Young made a very good point, or a very good question, when he asked you, is there one State out there that has said this is really good, we embrace it? And I will let you finish answering the question.

Mr. PERCIASEPE. I am sorry about that before. I really apologize. But let me just say draining a pond does not require a permit, just, if I could have answered.

But filling it would require permit under the Federal law. The State organizations have been very supportive, you know, the Environmental Council of the States, some of the other water organizations that represent State water. They have been supportive as we have been building this, but we have yet to get any specific comments on the rule from States.



So I can do a polling of them but I haven't done that polling yet because we plan to do significant continued outreach with them between now and when the comment period is over, and I want to point out that we treat States differently than normal commenters because they are coregulators with EPA. So, we are going to be working with them differently, although they will be submitting comments.

Mr. SHUSTER. Again, our DEP in Pennsylvania over the past couple years hasn't seen eye to eye with the Corps or EPA, and back when there was a different administration they saw eye to eye. So again, a problem that we are going to face is this rule is going to go into place with all these, there are a lot of vague terms in there, and what is going to happen is these stakeholders, and we are going to have them up next here, talk about the damage it is going to cost them.

And again, to your point about you don't have to get a permit to drain the pond, can you put that in the rule to make sure we are clear on that? So when Chairman Young tries to drain his pond he doesn't have to come get a permit.

Ms. DARCY. I think we can make that more clear.

Mr. SHUSTER. I yield back. Thank you, Chairman.

Mr. GIBBS. Mr. Perciasepe, just to make a comment. What we are hearing from the State EPAs is that they are concerned because they haven't been consolidated enough in this proposed rule. So a point of information.

Mr. Nolan here, do you have questions?

Mr. NOLAN. Yes. Thank you.

Thank you, Mr. Chairman, and thank you to the panel.

First of all, I would like to respond to my good friend of over 40 years, Don Young, who is so shy and reticent about expressing an opinion. I, too, have a farm, and we have a little pond on it that my wife and I created. It is quite beautiful, right alongside the house. I suspect that would not be covered by jurisdiction and the courts have ruled that we don't have unlimited control over those waters that are navigable.

So we have a river, flows through my farm, as well, and the courts have ruled that we have no right to dump toxic substances and other things into that river that would be harmful to people downstream. So with all due respect, to my good friend, there are some constitutional restrictions and limitations.

As to the proposed rule, I will reserve final judgment until I have heard all the facts, but I do want to applaud you to the extent that you do try to give us some predictability and some consistency here. That would be very, very helpful to many parties. I have a couple of quick questions. I will try to be quick with them and please be quick with your answers so I can get as many of them in as possible.

First of all, is I have a company that is talking about investing \$3 billion in my congressional district, and my question of you is, how do you think that the jurisdiction that is proposed in this rule, combined, you know, combined with EPA's retroactive and preemptive 404 authority and action, how do you think that impacts a company looking at making a rather substantial investment?

Mr. PERCIASEPE. Well, I don't know if what they are proposing is going to impact water or not.

Mr. NOLAN. Pretty hard to do anything in Minnesota without impacting water.

Mr. PERCIASEPE. So I am just going to say at a high level, I think the Army Corps of Engineers through the permitting process has authorized over 2 million permits and activities under this section of law and 13 have been involved with the so-called veto, which is essentially EPA designating a section of water that can't have a discharge of the fill into it. So, it is an extremely rare occurrence that that gets used, and there is a significant amount of work and process that goes on for it.

So, I would think in the normal realm of activities you are talking about projects that go through the permitting process, they get permitted, they may have to do mitigation, that is some of what our economic analysis has shown, that there may be some of that. But generally speaking, I don't see that as a deterrent to business.

Mr. NOLAN. Well, as someone who spent that last 32 years of my life in business, I can tell you the prospect of that has a very chilling, dampening effect on anyone considering any kind of a substantial investment with regard to the Constitution. It all raises the whole question of due process for companies in that kind of a situation.

My next question is with regard with the trail systems, snow mobilers, cross-country skiers, snow shoers and on frozen water ways and wetlands that provide some multiuse recreational opportunities for individuals. How would these regulations impact them?

Ms. DARCY. I don't believe the proposed rule would change the current status of what would be required under the current law for those.

Mr. NOLAN. Is that your understanding, as well?

Farmers continue to ask, who is ultimately in charge of enforcement? The EPA? Army Corps? Who is going to do the enforcement here?

Ms. DARCY. If someone has a Department of the Army permit for an action and is in violation of that permit, it would be the Army Corps of Engineers' responsibility to ensure that that permit is being undertaken as agreed to, so it would be our responsibility.

Mr. NOLAN. Well, what if the EPA determines it is part of their jurisdiction? I mean, who does the enforcement, then?

Mr. PERCIASEPE. Obviously, these things get very case specific. We have somewhere in the vicinity of 30 to 40 cases or so a year that we end up getting involved with, as well.

Mr. NOLAN. Well, what do you do in those cases where, you know, the Army Corps has one definition and the Natural Resources Conservation Service has a different definition and you are compliant with one and noncompliant with another? I mean, what kind of methodologies or matters for resolving this do you have in place?

Ms. DARCY. Could I just explain about the interpretive rule that accompanies this proposed rule that deals with the National Conservation Service regulations and practices.

We are exempting about 56 of those practices from any kind of Clean Water Act permitting requirement in the interpretive rule that we have put out at the same time as the proposed rule.

So it would be the Natural Resources Conservation Service and those local agents who would be responsible for assuring that the practices undertaken by that farmer or silviculture or rancher were being complied with.

Mr. NOLAN. OK. And lastly, what kind of outreach do you have planned to help get the word out of what, in fact, all this is and isn't?

Ms. DARCY. We have conducted a number of conference calls, webinars, over 64 to date since the issuing of the proposed rule and will plan to continue to do that throughout now. Now that this comment period has been extended, we may try to increase those outreach efforts between now and then.

Mr. NOLAN. And then my last question, we heard a lot of questions here about the States, what do you think these actions or how they will impact the ability the State and local governments, to exercise their authority with respect to land use management and planning?

Ms. DARCY. These jurisdictional determinations do not impact their local authorities other than if they are looking to do any kind of development in a water of the United States. They would need to look to see whether that water is jurisdictional and what sort of permit would be needed by the——

Mr. NOLAN. Will they supersede State plans in any manner, shape or form?

Ms. DARCY. Not land planning, no. That is local, planning and zoning.

Mr. NOLAN. OK.

Thank you, Mr. Chairman. I yield the balance of my time.

Mr. GIBBS. Mr. Crawford.

Mr. CRAWFORD. Thank you, Mr. Chairman.

Assistant Secretary Darcy, you stated earlier in the course of answering one of the questions that one of my colleagues asked in the proposal we define, and you have also used personal possessive pronouns. I am a little confused. Whose proposal is this?

Ms. DARCY. It is the administration's proposal.

Mr. CRAWFORD. The administration?

Ms. DARCY. Yes.

Mr. CRAWFORD. So have you been working with the administration to develop the proposed rule?

Ms. DARCY. Yes, EPA and the Corps of Engineers have developed this rule together.

Mr. CRAWFORD. OK. But this is ultimately, this an EPA proposed rule, correct?

Ms. DARCY. No, it is the administration's rule.

Mr. CRAWFORD. The administration is proposing now?

Ms. DARCY. Yes.

Mr. CRAWFORD. OK. But you have been collaborating with the Corps, I mean, with EPA rather?

Ms. DARCY. Yes, sir.

Mr. CRAWFORD. OK. We are currently in the public comment period, correct?

Ms. DARCY. Yes.

Mr. CRAWFORD. Have you submitted public comment?

Ms. DARCY. No.

Mr. CRAWFORD. OK. Do you intend to submit public comment?

Ms. DARCY. No, we intend to review the public comment with the EPA.

Mr. CRAWFORD. Collaboratively?

Ms. DARCY. Yes.

Mr. CRAWFORD. OK. I was just a little confused by that.

Deputy Administrator, can you define a ditch? I just want to get some clarity. I apologize if I am repeating myself, but could you give me some clarity on what a ditch is.

Mr. PERCIASEPE. Well, I mean, what we have tried to do in our proposal is make it clear that ditches that are built on land that is normally dry and somebody puts a ditch through it to drain it from rain or some other wet event and it has got water in it some-time, that these are not covered no matter what.

Mr. CRAWFORD. OK. So here is the problem I have with that.

Mr. PERCIASEPE. OK.

Mr. CRAWFORD. Ultimately, that ditch is designed to drain water. It is going to drain into something. At some point it drains into a body of water that is regulated and then therefore becomes regulated; is that not correct?

Mr. PERCIASEPE. So the reason we are doing the rulemaking—

Mr. CRAWFORD. I have only got 5 minutes. Is that correct?

Mr. PERCIASEPE. I understand, but let me answer, please. If you just look at the definition of “significant nexus,” you might start getting into those kinds of thoughts.

But, so what we did in the rulemaking is we specifically by rule are excluding those no matter whether they meet a test or not, and I think that is a key important factor.

Mr. CRAWFORD. We had in the last 2 or 3 days in my hometown, we have had about 14 inches of rain. Got a neighbor, got a swimming pool, swimming pool overflows, can’t handle too much. Water flows into a ditch, ditch flows into a regulated body of water. How far back, does that swimming pool become a regulated waterway?

Mr. PERCIASEPE. It does not. It is not a wetland nor is it—

Mr. CRAWFORD. You don’t think that is much of a stretch, though, do you, I mean, to think that—

Mr. PERCIASEPE. No. I think it is a stretch.

Mr. CRAWFORD. Do you really?

Mr. PERCIASEPE. We are—

Mr. CRAWFORD. The ambiguity that I am hearing from all of this is so great that I don’t think that is a stretch at all.

Mr. PERCIASEPE. Artificial lakes, ponds, swimming pools, they are specifically excluded. We are writing them in the pool.

Mr. CRAWFORD. Up to the point that they overflow into a ditch that drains into a regulated body of water at which point they become connected, correct?

Mr. PERCIASEPE. Go ahead.

Ms. DARCY. I would say that is not a significant nexus.

Mr. CRAWFORD. OK. Well, I am not sold on that, but at any rate, so what about flooded rice fields? At some point in time they are going to drain into—

Mr. PERCIASEPE. Flooded?

Mr. CRAWFORD [continuing]. Flooded rice fields.

Mr. PERCIASEPE. Rice fields are not included.

Mr. CRAWFORD. Well, I think what is going on here is an effort to create such ambiguity that you are given ultimate regulatory authority on a whim; and that, there is really no recourse for those folks that are affected and fining that is going to come through, and farmers and other businesses the cash flow that it is going to impact and there has not been any economic analysis to address that.

And let me ask you one more thing about public comment. Will you be entertaining public comments from other Federal agencies?

Ms. DARCY. Yes.

Mr. CRAWFORD. You will. And you think that is appropriate?

Ms. DARCY. Yes. Most rulemaking—

Mr. CRAWFORD. Are they more heavily weighted than public comment from, say, some of the relevant stakeholders in the private sector?

Ms. DARCY. No, sir.

Mr. CRAWFORD. Our friends at Farm Bureau, for example, National Association of Counties, will they be given equal weight, their public comments?

Ms. DARCY. Yes, they will.

Mr. CRAWFORD. I think you will find when you hear their public comments, and I would also echo the sentence of the chairman, encourage you to stay around and hear their comments and find that they probably agree with me that there is significant ambiguity in this to cause great concern not just in the agriculture industry, but to homeowners to business owners and anybody that has even a view of water from where they are standing.

So with that, I yield back.

Mr. GIBBS. I am going to take 14 of your seconds just for clarification. We talk about the vagueness, the ambiguity. That is what you are saying, but doesn't this open for citizens' lawsuits, how they interpret the rule and litigation?

Mr. PERCIASEPE. Here is where we can work together. We have tried to list these things specifically in the rule. Rice growing is specifically listed as excluded. Normal agricultural activities are excluded.

Mr. GIBBS. We will get into that later.

Mr. PERCIASEPE. So if we can, yeah, we expect to hear from the stakeholders during this proposal and comment period time if we have not done that enough here and then we can sit down and talk to them.

Mr. GIBBS. OK.

Mr. PERCIASEPE. But our intention is to get it in here so that—

Mr. GIBBS. We will talk later about this. The rest of this Clean Water Act affects other than 404 permitting.

Ms. Edwards.

Ms. EDWARDS. Thank you very much, Mr. Chairman.

And thank you very much to our witnesses today and especially for your honorable public service. I think there are many of us in the public who really appreciate both the work of the EPA and the

Army Corps in protecting our water and making sure that it is clean. So thank you.

I just want to clarify. The notice of the proposed rule was issued on April 1st. My understanding is that, because you heard from agricultural groups and other stakeholders that there wasn't enough time to respond adequately to the rule, that that—the response time for comments has been extended to October 10th. Is that correct?

Ms. DARCY. Actually, it has been extended an additional 91 days till October 20th, because 90 days falls on a Sunday.

Ms. EDWARDS. Thank you.

So hearing from the stakeholders, you took that into consideration and you have extended the rule—

Ms. DARCY. Yes.

Ms. EDWARDS [continuing]. The comment period? Thank you.

And then—so is it a surprise to you that you have not yet heard formally from States whether they support or oppose the rule because they haven't—there hasn't been a chance yet and that it is probably preliminary to qualify, quantify or to characterize the supporter opposition to the proposed rule at this stage?

Ms. DARCY. I think that is correct.

Ms. EDWARDS. Thank you.

And then, Mr. Chairman, I have three letters to this committee urging us—urging the Congress to enable the EPA and the Army Corps to go through the process of the rulemaking rather than create legislation that is unnecessary to respond to what has been, you know, a very—you know, an environment in which people have been quite uncertain about what it is that their responsibilities are for permitting, and I would like to introduce those into the record.

It is a letter from Trout Unlimited and 15 sportsmen and conservation groups supporting the process and saying themselves that they probably plan to submit comments.

Mr. GIBBS. So ordered.

Ms. EDWARDS. Thank you.

[The information follows:]

Rep. Donna F. Edwards MD-4  
June 11, 2014

AMERICAN FLY FISHING TRADE ASSOCIATION · BACKCOUNTRY HUNTERS  
AND ANGLERS · B.A.S.S., LLC · BERKLEY CONSERVATION INSTITUTE · BULL  
MOOSE SPORTSMEN'S ALLIANCE · INTERNATIONAL FEDERATION OF FLY  
FISHERS · IZAAK WALTON LEAGUE OF AMERICA · NATIONAL WILDLIFE  
FEDERATION · NORTH AMERICAN GROUSE PARTNERSHIP · PHEASANTS  
FOREVER · QUAIL FOREVER · SNOOK AND GAMEFISH FOUNDATION · THE  
NATURE CONSERVANCY · THEODORE ROOSEVELT CONSERVATION  
PARTNERSHIP · TROUT UNLIMITED

June 3, 2014

The Honorable Mike Simpson, Chair  
Subcommittee on Energy and Water  
Development  
Committee on Appropriations  
Room H-305, The Capitol  
Washington, DC 20515

The Honorable Ken Calvert, Chair  
Subcommittee on Interior, Environment,  
and Related Agencies  
Committee on Appropriations  
Room H-305, The Capitol  
Washington, DC 20515

The Honorable Marcy Kaptur, Ranking Member  
Subcommittee on Energy and Water  
Development  
Committee on Appropriations  
Room H-305, The Capitol  
Washington, DC 20515

The Honorable Jim Moran, Ranking Member  
Subcommittee on Interior, Environment,  
and Related Agencies  
Committee on Appropriations  
Room H-305, The Capitol  
Washington, DC 20515

Dear Representatives:

As sportsmen-conservation organizations representing millions of hunters and anglers nationwide, we ask you to oppose any legislation that would block the administration's very deliberate and vital action to clarify and restore longstanding Clean Water Act protections for headwater streams and wetlands across the country.

America's 47 million sportsmen rely on clean water for access to quality days in the field hunting, angling, and enjoying other outdoor-based recreation. When wetlands are drained and filled and streams are polluted, we lose the ability to pursue our passions and pass them 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.

Since its enactment, the Clean Water Act has been highly successful at improving water quality and stemming the tide of wetlands loss. However, Clean Water Act safeguards for streams, lakes and wetlands have been eroding for over a decade because of a pair of Supreme Court decisions (*Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers* (2001) and *Rapanos v.*

*United States* (2006)) that cast doubt on more than 30 years' worth of Clean Water Act implementation. As a result of the decisions, 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.

There is widespread agreement that action is necessary to clear up the confusion caused by the *SWANCC* and *Rapanos* decisions. Stakeholders on all sides of the issue and the Supreme Court have called on the U.S. Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) to conduct a formal rulemaking to clearly define which waters the Act protects. Fortunately, the administration is doing just that. On March 25, 2014, the Corps and EPA jointly proposed a rule for public comment.

Members of our organizations, who include farmers, ranchers, landowners as well as conservationists, seek pragmatic, common sense solutions to restore protections for the nation's wetlands, streams, and other waters that existed prior to the *SWANCC* decision. We also recognize the need to maintain existing exemptions that have been in the Act since 1977, including those for standard agricultural and silvicultural practices. The current rulemaking is the best chance in a generation to restore protections for streams, wetlands and other waters critical to our sporting traditions and outdoor economy, give greater certainty to the regulated communities and shore up longstanding agricultural exemptions.

We strongly oppose any legislation that would bar the administration from proceeding with the rulemaking, because it could prevent the public from commenting on and improving the proposed rule and it would perpetuate existing confusion over one of our bedrock conservation statutes and the inefficient implementation thereof. After more than a decade of confusion, we are finally in an open, public process to restore critical Clean Water Act protections for waters important to sportsmen, and it needs your support.

We know you understand the value of wetlands to waterfowl nesting, of headwater streams to trout and salmon spawning, of coastal estuaries to scores of food and gamefish, and of other waters to high-quality aquatic habitat critical to the success of hunters and anglers in the field. Therefore, we ask you once again to oppose any legislation that would scuttle the current Clean Water Act rulemaking.

We look forward to working with you in the months ahead to safeguard our waters, habitat, and the hunting and angling traditions that are important to so many Americans.

Sincerely,

American Fly Fishing Trade Association  
Backcountry Hunters and Anglers  
B.A.S.S., LLC

Berkley Conservation Institute  
Bull Moose Sportsmen's Alliance  
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Izaak Walton League of America  
 National Wildlife Federation  
 North American Grouse Partnership  
 Pheasants Forever  
 Quail Forever

Snook and Gamefish Foundation  
 The Nature Conservancy  
 Theodore Roosevelt Conservation  
 Partnership  
 Trout Unlimited

CC: The Honorable Harold Rogers, Chair, Committee on Appropriations  
 The Honorable Nita Lowey, Ranking Member, Committee on Appropriations  
 Members, Energy and Water Development Subcommittee  
 Members, Interior, Environment, and Related Agencies Subcommittee



## The Clean Water Rule: Protecting America's Waters

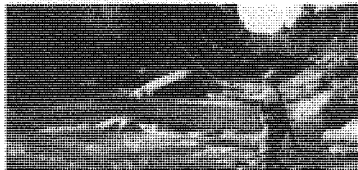
The U.S. Army Corps of Engineers and the Environmental Protection Agency have proposed a landmark rule clarifying longstanding Clean Water Act protections for many — but not all — streams, wetlands, and other waters critical to sportsmen and our hunting and fishing heritage. Many of these waters have been at increased risk of pollution and destruction for more than a decade — and it has taken its toll. For the first time since the 1980s, annual wetland losses are on the increase: the rate of wetland loss in 2004-2009 increased by 140 percent over 1998-2004.

This rule, which voices on all sides of the debate and the Supreme Court have called for, relies on the best scientific understanding of stream and wetland science to clarify the scope of the Clean Water Act, reinforce the Act's legal and scientific foundation, provide greater long-term regulatory certainty for landowners and enhance protection for America's streams, wetlands, and other waters.

### What It Does

#### The Rule Restores Clean Water Act Protections to Many Streams and Wetlands.

The proposed rule ensures that the Clean Water Act once again safeguards many streams, lakes, and wetlands that have been at increased risk of pollution and destruction following Supreme Court decisions in 2001 and 2006. Extensive peer-reviewed scientific evidence shows that the waters covered by this rule have a significant impact on the quality of downstream waters and, therefore, deserve Clean Water Act protection. In addition to providing valuable fish and wildlife habitat, these waters are an effective buffer against floods, and filter pollutants out of water that otherwise would have to be treated at great expense to cities and towns.



The rule definitively restores Clean Water Act protection to two major categories of waters:

1. **Tributaries to waters already covered by the Clean Water Act** — For example, intermittent headwater streams that have a defined bed and bank and flow to a water already covered by the CWA; and
2. **Wetlands, lakes, and other waters located adjacent to or within the floodplain of these tributaries.**

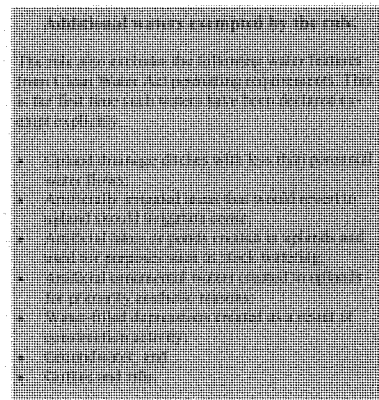
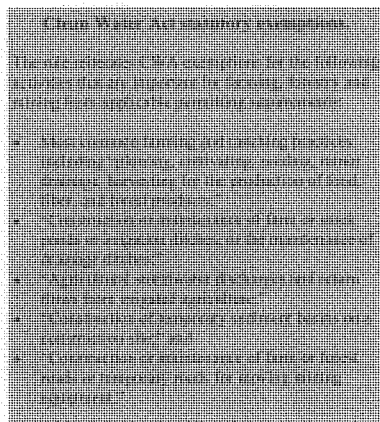
#### The Rule Gives Greater Certainty to Regulators and the Regulated Community.

Since the first Supreme Court decision confused Clean Water Act jurisdiction in 2001, farmers, land owners and businesses have been unsure whether to seek Clean Water Act permits for their activities that affect water; sportsmen have been stymied in their efforts to protect water resources; and federal and state water quality personnel have struggled to consistently apply the law. After more than a decade, this rule finally provides clear and predictable protections for many streams, wetlands, and other waters, giving greater certainty to the regulated community and better guidance to federal and state regulators, which will streamline the permitting process.

## **What It Does Not Do**

While the 2001 Supreme Court decision confused Clean Water Act jurisdiction, it did signal an upper bound by rejecting one of the grounds for finding jurisdiction. Therefore, the proposed rule does not – and cannot – restore protections to all the wetlands and other waters that were protected for almost 30 years prior to 2001.

Additionally, the rule specifically lists which waters do not receive Clean Water Act protections. It preserves the existing exemptions for farming, forestry, mining and other land use activities, such as the exemption in the existing regulation for many wetlands converted to cropland prior to 1985, as well as exemptions written into the Clean Water Act itself that cannot be changed by administrative action. The rule also – for the first time – explicitly excludes many upland water features important for farming and forestry.



## **Many Important Waters Remain At Risk**

The rule allows that Clean Water Act protections may apply to wetlands and small lakes located beyond river floodplains, but only in limited circumstances. Federal regulators must still decide on a more localized basis whether these waters, which include millions of acres of wetlands that provide fish and wildlife habitat, important flood storage, and water filtration, deserve Clean Water Act protection.

**Now is the time for sportsmen to stand up and protect our sporting heritage. Support a strong Clean Water Act rule that restores protections to those waters we care about the most.**

### **For more information, please contact:**

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Ms. EDWARDS. I have a question, Mr. Perciasepe.

Can you describe the exemptions that exist in the act and in your proposed rule for discharges associated with agricultural activities.

And in the event that certain agricultural activities don't qualify for an exemption, am I correct that the Army Corps has a fast-track nationwide permit that authorizes an assortment of discharges associated with agricultural activities that cause the loss of less than half an acre of water bodies?

Ms. DARCY. Yes. That is our nationwide permit program, and that is correct.

Mr. PERCIASEPE. Yeah. And I—just as a general matter, the normal agricultural activities of—I mean, essentially, for me, I could say, if you can—if you are on a piece of land and you can plow it, plant it and harvest it, you—under—now you can do it under this rule. There is nothing in here that is going to change that.

Ms. EDWARDS. Thank you very much.

We recently enacted—in fact, the President just signed yesterday our Water Resources Reform and Development Act, and we included for the first time provisions that I have been quite a champion of, using innovative green and low-impact technologies.

We may hear testimony later that suggests that somehow those green infrastructure activities would then fall under the purview of this rule.

Do you have a sense of that?

Mr. PERCIASEPE. We don't believe that that will happen and it is not our intent. And, of course, we are going to be interested in comment on that.

But most green infrastructure that I am familiar with in an urban setting is going to be built in a place that is normally dry and you are moving drainage to it.

There are going to—there may be instances where somebody wants to utilize an existing stream or a lake as part of that, and then we would have to look to see whether that is part of the waste treatment exemption or whether or not there would be some—but, again, you don't have to worry about this unless you are discharging fill or pollution into that water.

If you are not discharging pollution into the water, you are—you know, you are not going—or fill, you are not going to have to get a permit or be under this jurisdiction.

So we would think and it would—certainly is our intent that drainage in an urban area for—and how it is altered to have green infrastructure and low-impact development would not become jurisdictional and would not be jurisdictional, just as we were talking about ditches earlier. So—

Ms. EDWARDS. And so, obviously, those kinds of activities are actually designed to filter the water, not to contribute to the pollution.

Mr. PERCIASEPE. We absolutely want to encourage conversation work on agriculture land and we want to encourage low-impact development in urbanized areas, including green infrastructure. Absolutely want to do that.

Ms. EDWARDS. Thank you.

And then, lastly, I understand the rule, if it is finalized, would protect roughly 3 percent more waters than are protected today,

but almost 5 percent fewer waters than were protected prior to the Supreme Court's 2001 decision.

Is that correct? And does that sound like an unprecedented radical expansion to you?

Ms. DARCY. Those numbers are correct. And, in my view, it is not a radical expansion.

Ms. EDWARDS. Thank you.

Mr. GIBBS. Mr. Denham.

Mr. DENHAM. Thank you.

Like the gentleman from Minnesota, I am also a farmer, but, unlike him, I cannot hope and wait to see what you guys are going to come up with. I can't take hope to the bank. And so I am very concerned about this.

It affects the livelihood of our community, of our State, the largest ag State in the Nation that is feeling some of this pain already due to Army Corps and some of the challenges they have already put on some of the fallowed fields that are now having some water on those fields.

And I am concerned that this year, because of Government, when water gets shut off to the Central Valley, 1 million acres of farmland could be lost.

Now, it might rain next year and we may have with—the fallowed fields may have some puddles that—or ponds that—or even some streams that end up going through 1 million acres of lost productivity, of lost jobs. So, yeah, I have got a lot of questions about this.

Let me start with you, Ms. Darcy. Because of the ambiguity of this rule, do you think it is going to encourage third-party lawsuits?

Ms. DARCY. I actually think that this proposed rule will bring additional clarity to the jurisdictional determinations that are necessary under the Clean Water Act. So I think, with additional clarity, there will be fewer lawsuits.

Mr. DENHAM. So you think that this new rulemaking will create less lawsuits?

Ms. DARCY. I do.

Mr. DENHAM. And greater clarity?

Ms. DARCY. I do.

Mr. DENHAM. Now, the permits that are going to be required—how long do you think it will take to issue a permit?

Ms. DARCY. Congressman, it depends on what the permit's being asked for, that determines how much information we need upfront for that particular permit. It does vary. It varies from region to region.

We have individual permits. We have nationwide permits. Nationwide permits usually go more quickly than individual permits because individual permits usually require more data and more information.

Mr. DENHAM. If it is an area of farmland that has been historically farmed, but may have sat fallow for a year or two and now is required to do a permit, how long do you think it would take to do a permit?

Ms. DARCY. Congressman, what you have described would be prior converted cropland. That is exempt from the Clean Water Act.

Mr. DENHAM. Well, I will circle back around to you, because I have got a number of constituents that have these very same concerns today that are unable to farm, that are losing a season of planting, that can't go back through and farm that property and, again, seeing that job loss in our community.

Let me ask you about the Clean Water Act. In 1974, when this was originally done, it was then navigable waters with ebbs and flows—ebbs and flows of the tide. Now we are seeing ebbs and flows on our riverbanks because of discharges from Government forcing discharges.

What we see in the Central Valley are these pulse flows. These pulse flows not only go down the river, but they overflow into the farmland that is adjacent to it.

Sometimes it goes into the crops, sometimes forming a pond or a puddle or a mudhole that now could be under this very same thing.

So my question is both on navigable waters as well as intrastate waters where now EPA and the Corps would have jurisdiction over.

Ms. DARCY. Under current law, we have jurisdiction over navigable waters.

Mr. DENHAM. Intrastate waters?

Ms. DARCY. Yes.

Mr. DENHAM. What about groundwater?

Ms. DARCY. No.

Mr. DENHAM. Mr. Perciasepe, you talked about pollution.

Is fertilizer a pollution?

Mr. PERCIASEPE. Properly applied, no.

Mr. DENHAM. Properly—what about pesticides?

Mr. PERCIASEPE. Pesticides require—have to be applied according to label, and they would fall under a general permit if they apply it on water.

Mr. DENHAM. So, again—

Mr. PERCIASEPE. But not in—not when a field is flooded, if I can think where you are going. That would not be—

Mr. DENHAM. That is exactly where I am going. That is the concern that a number of our farmers have.

Mr. PERCIASEPE. It would not change—that would not change because a flooded field during—is not—is not jurisdictional.

Mr. DENHAM. Yeah. But if you fallow a field and you are unable to plant for a year or 2 years or 4 years and a pond or a small—something that is already covered under your own definition now gets pesticides or herbicides or fertilizer in it, that would be a pollutant; would it not?

Mr. PERCIASEPE. Boy. The general permit for pesticide application under the Clean Water Act requires the avoidance of spraying directly on waters. If there is a crop and you spray on the crop, it does not need a permit—or it does not fall under that.

Mr. DENHAM. So it would fall under that if you were spraying your crop and it went into that water—even though it is not into a river or a stream, but it was considered an adjacent water on a farmer's field?

Mr. PERCIASEPE. Water on a farmer's field is not jurisdictional.

Mr. DENHAM. Not if it is flooding.

But if it is accumulated water, it is under this definition; would it not?

Mr. PERCIASEPE. I don't think so.

Mr. DENHAM. Well, then, why couldn't you answer Mr. Young's question about a pond? I mean, we are talking about farmland here.

Mr. PERCIASEPE. I would have answered Mr. Young's question, but I didn't get a moment. That is all. I don't mean any—anything by that. He could drain his pond if he wants to. It doesn't require a permit from—under the Clean Water Act.

Mr. DENHAM. Thank you, Mr. Chairman. I have got a number of other questions, but I will wait for the next round.

Mr. GIBBS. Ms. Napolitano.

Ms. NAPOLITANO. Thank you, Mr. Chairman.

And I am glad that we have such great agencies that help our communities, especially in California, where we really need you.

Deputy Administrator Perciasepe, it was indicated that the proposed ruling does not impact ephemeral waters that may exist only when the rainstorms occur, especially like in southern California.

But the concern specifically is, if the water that may fall as rain is temporarily captured in groundwater retention areas, would that water be classified as jurisdictional?

And this is really an important issue because of the drought and the fact that we are trying every methodology to capture more water and infuse it back into the aquifer.

Mr. PERCIASEPE. First of all, we explicitly make sure to mention that groundwater is not included here. So—but, second, there is no change from the existing law. So if it goes back—

Ms. NAPOLITANO. Well, that is for groundwater. I am talking about captured water for replenishment.

Mr. PERCIASEPE. Right.

So if this activity is currently going on, whichever way it is, we are not changing any existing jurisdiction in that regard. So we want to encourage, you know, good capture and recharge.

Ms. NAPOLITANO. Well, there is so little rainfall in California, the episodes may be very few and far between.

Mr. PERCIASEPE. Yes. I think both of us are pretty familiar with the—

Ms. NAPOLITANO. Thank you.

And, also, does the wastewater exemption clearly include water recycling projects? Is there or should there be a clear exemption granted for water recycling projects, especially in the Western States where the drought is so critical?

Mr. PERCIASEPE. So we don't think water recycling projects that are existing today are covered, and we are not trying to change that.

But—so if it is not regulated today, it won't be regulated under this rule. But if your folks have comments on this so that we can be clear about that, we would work on that.

Ms. NAPOLITANO. Well, we certainly do hope that we would be able to clarify that, because this is one of those issues that is not

going to be ignored in southern California or in California or the Western States.

The other area that I have a concern about is the stormwater discharge regulations that are going to be imposed on communities by EPA.

Mr. PERCIASEPE. Stormwater?

Ms. NAPOLITANO. Yes. The discharge going into the stormwater and catch basins going down to the ocean.

Mr. PERCIASEPE. So under another part of the Clean Water Act, areas that have stormwater runoff are required to get a permit and—under the—under section 302 of the Clean Water Act.

And most of them have those permits that require either green infrastructure or some other maintenance activities to make sure that pollutants are minimized, but there is no change to that in this rule.

Ms. NAPOLITANO. OK. Well, I may want to clarify that later, if I may—

Mr. PERCIASEPE. OK.

Ms. NAPOLITANO [continuing]. Because there is an issue that some of the cities have raised concern—it is an unfunded mandate for them to be able to ensure that nothing—no contaminants go into the drain systems for stormwater release.

Mr. PERCIASEPE. OK. We are—I am happy to follow up with you on that, but we are not trying to change the stormwater rules in this regulation. But if there are issues with stormwater, I would—I would—

Ms. NAPOLITANO. If you wouldn't mind, yes.

And I certainly want to thank Ms. Darcy. Your folks are tremendous in my area. They work with all my agencies, and we have been able to clarify and work forward on many of the issues that have—issues in my area.

Thank you, Mr. Chair. I yield back.

Mr. GIBBS. Just some housekeeping.

I ask unanimous consent that Mr. Duncan from Tennessee, who is not on this subcommittee, be included at today's hearing.

Without any objection, so ordered.

Mr. Mullin.

Mr. MULLIN. Thank you, Mr. Chairman.

And thank you both for being here. I know we have met actually on separate occasions, not always on the best terms, but we are all fighting for the same thing, hopefully, this country and the right to still be entrepreneurs.

I think what the biggest fight is here, though, is that we see, as business owners, as farmers—as I sit in front of you, I am farming the same land that now is the fourth generation. And it seems like every time we turn the corner what we are doing is we are asking more and more permission to just simply do the same job that we have always done.

I think you are going to find it very hard to find somebody that has got more interest in their water than the person that is on that land since before statehood, but the way the definition is written with navigable waters, I am finding it very hard to understand, ma'am—and maybe you can clear it up for me—how a stream gets into that.



I may be just a simpleminded individual from Oklahoma that has been blessed enough to be able to be a congressman. Navigable waters would be at least something you could put a canoe on.

Ms. DARCY. Congressman, navigable waters, since the inception of the Clean Water Act, had a great deal of attention and litigation as well as court decisions.

Mr. MULLIN. I am well aware of those. But I am just trying to figure out why you guys feel like you have to come out with clarification when it is pretty clear itself and what we are doing is we are going farther up the streams and making a definition even more confusing and we are taking rights away from the States.

Sir, you had made a comment that you said the State water boards, you felt like, was on board with you, if I understood that. Because the question that the chairman and Congressman Young had asked you was what States support you, and you made a statement that the water boards of the States support you.

Mr. PERCIASEPE. I said that the—some of the organizations that represent States, their water—water associations have supported doing a rule.

Mr. MULLIN. Who?

Mr. PERCIASEPE. We don't have—

Mr. MULLIN. Because I have got our—the gentleman from Oklahoma that is going to be testifying on the second panel, and no one contacted them.

So who is it that you said is supportive of you?

Because if we are—if we are going to try really taking in the waters and having the best interests of the landowners, the people who pay the tax to own that land, the people who live in that State, wouldn't you think you would take the time to comment before you made this, not requiring them to come out afterwards and make comments?

I find it almost laughable when you guys are going to have these comments out, which really isn't going to have that much impact. You might add a thing or two, but the rule is already out.

You have already made your mind up what you are going to do; otherwise, you would have consulted them beforehand. Is that not correct?

Mr. PERCIASEPE. We did talk to States. I can't say we—

Mr. MULLIN. Who?

Mr. PERCIASEPE [continuing]. Talked to every State.

Well, here is a list of State associations who have asked us to do a rulemaking. They don't necessarily support this rulemaking yet because we don't know what their position is yet and we are going to work with them before we finalize.

Mr. MULLIN. Then, you should have had that before you went out with it. That is what I am trying to understand.

Now, let's go back to the farming just for a second. The way I read this is you guys are going to except existing permits. It is not going to change existing permits. Is that not correct, ma'am?

Ms. DARCY. That is correct.

Mr. MULLIN. OK. So, now, what about that existing permit? What happens—does it stay with the land or does it stay with the holder of the permit?

Say my—say my father—which I am not hoping he does, by any chance—but say my father owned the permit and he passed away and it had be transferred to myself. Is that considered an existing permit still yet?

Ms. DARCY. If it is applied to the land that it was permitted on. But if you are talking about——

Mr. MULLIN. But the land has essentially changed hands; so, the permit will change hands, too.

Ms. DARCY. I believe it goes with the land.

Mr. MULLIN. You believe? Because it doesn't read that way.

Ms. DARCY. Well, then, that clearly——

Mr. MULLIN. It doesn't read that way at all, and there needs to be clarification on that. Because I can tell you I have read it and the way I read it is that every time we lose a generation and a farm changes hands—which you know farms are generational—we are going to lose farms as they happen—as this happens.

Ms. DARCY. Congressman, most agricultural practices are exempt from the Clean Water Act.

Mr. MULLIN. Most. Ma'am, there are still permits because you had enough worry about it that you put in it that—existing permits, existing permits. You—the—it specifically says existing permits.

So we keep using this, that most are exempt. Actually, what was first said was—sir, you said that all ag is exempt. Now we are to most.

Mr. PERCIASEPE. All normal agricultural activities.

Mr. MULLIN. Normal. What is considered normal?

Mr. PERCIASEPE. Sir, the plowing——

Mr. MULLIN. Because what I do is plowing.

Mr. PERCIASEPE [continuing]. Is considered normal.

Mr. MULLIN. You guys already came into my land and said we couldn't spread chicken litter anymore. That was on my property.

You guys came in on my property and said we couldn't spread chicken litter anymore, effectively killing the chicken industry around for the small business owners. So I don't want to hear that anymore about normal.

Normal is what? How many farms have you been on? How many times have either one of you guys worked on a farm?

Mr. PERCIASEPE. I went to an ag college, sir.

Mr. MULLIN. What is normal in Washington, DC, sir? There isn't one thing in Washington, DC, that is normal, not one.

Mr. PERCIASEPE. Well, I am not talking about——

Mr. MULLIN. So I don't want to hear the normal. What I want to know is how are we going to protect generational farms.

Ms. DARCY. Congressman, if there is ambiguity in the proposed rule about existing permits and how they will be transferred between either the current permit holder or the future of that land, I think that is something we need to clarify.

Mr. MULLIN. Yes, we do. Please, if you could, get with me on some clarification language on that. Thank you.

Mr. GIBBS. Mr. Garamendi.

Mr. GARAMENDI. It is interesting that we ended with chicken manure.

Mr. Perciasepe and Assistant Secretary Darcy, I personally thank you for your efforts to clarify a longstanding controversial issue that has been with this country for well over 40 years now, and that is the application of the Clean Water Act.

You have had a very, very difficult task. Because of the Supreme Court interpretations of the law, you have been left with the necessity to provide clarification.

And it is my understanding that this effort, this proposed, proposed, rule, is a result of the necessity to clarify the application of the Clean Water Act.

If I am correct, would—am I correct? And could you briefly describe—very briefly describe how it is that we came to this proposed rule and its purpose.

Ms. DARCY. Congressman, the purpose of the proposed rule is to clarify the ambiguities, many of which resulted from the Supreme Court decisions and the Supreme Court directing us to develop a rulemaking for this purpose.

We coordinated between the agencies, EPA and the Corps of Engineers, to develop what we think is a proposal that will do just that, to give people clarity, hopefully, more efficiency in this permitting program, and the ability for people to know what is jurisdictional and what is not.

Mr. GARAMENDI. So the purpose and the goal is to provide clarity?

Ms. DARCY. Yes, sir.

Mr. GARAMENDI. Apparently, that has not yet been achieved, at least among the members of this committee and a good portion of the public.

How are you working now, beyond explaining to this committee, the process of achieving clarity? We are in the midst of a rulemaking. Can you describe to all of us what you would expect the public to do if they believe there is uncertainty in your regulation.

Ms. DARCY. Through the public comment period, which now goes until October 20th, we would anticipate that concerned citizens who have comments on this rule, whether it is not clear enough or the definitions aren't what they believe to be representative of how we should be regulating waters in the United States, we anticipate that to come through the public comment process via the Web site set up for public comment.

We also are having webinars and conference calls with interested stakeholders and groups around the country to get their input and get their comments that way as well.

Mr. GARAMENDI. Mr. Perciasepe?

Mr. PERCIASEPE. Well, we are also doing more—we are also doing additional specific outreach. And I think one of the things we are developing now with the extended time period is additional, more focused outreach as well.

We have met with a lot of people. We have a round table with Small Business—with the Small Business Administration coming up on June 24th.

We are going to have a specific project—process with our co-regulators at the States in terms of the implementation of the Clean Water Act.

Because once you decide where it is jurisdictional, all the implementation—a lot of the implementation takes place at the State level as well.

So we expect to have quite a bit of additional outreach through the summer.

Mr. GARAMENDI. OK. Does your Web site provide specific opportunities for various locations in the country for people that are concerned about the lack of clarity in the rule to make comments?

Ms. DARCY. Yes.

Mr. GARAMENDI. OK. Can you provide to the committee those specific sites and locations?

Ms. DARCY. Yes, we can.

Mr. GARAMENDI. And efforts that you are making to reach out to agriculture, chicken growers or whomever, as well as—I don't know—wastewater and drainage systems across this—across the Nation.

Finally, I just—it is important that we understand that we are in a rulemaking process. You have proposed a rule. Is it the final rule?

Ms. DARCY. No, sir.

Mr. GARAMENDI. OK. You—are you committed to listen carefully to the objections, some of which you have heard here today, others of which I suspect you will hear in your process, to take them into account and to modify, where appropriate, the ambiguities and to clarify? Is that your commitment, to do that?

Ms. DARCY. Yes.

Mr. GARAMENDI. Mr. Perciasepe?

Mr. PERCIASEPE. Yes, sir.

Mr. GARAMENDI. OK. And you are representing both the Corps of Engineers and the EPA. Is that correct?

Ms. DARCY. Yes.

Mr. PERCIASEPE. I am EPA. She is the Corps.

Mr. GARAMENDI. I got it.

Now, it is important for all of us to realize where we are in this process. You know, I have got a lot of folks in my district.

I have a large agricultural district. I have got plenty of water, like 200 miles of the Sacramento River Valley, including the river, and a lot of questions.

When my constituents come to you with—asking for clarification, will you listen to them and will you take that under advice and, if appropriate, make modifications?

Ms. DARCY. Yes, sir.

Mr. GARAMENDI. Now, finally, clarification is one thing. There is the law and there are certain thresholds that you will have to follow, I suspect.

That then becomes a court question, is that correct, a question for the court to answer?

Ms. DARCY. As to whether the rule complies with the underlying law? Yes, ultimately.

Mr. GIBBS. Your time's up.

Mr. GARAMENDI. Mr. Chairman, thank you very much.

Mr. GIBBS. Mr. Meadows.

Mr. MEADOWS. Thank you, Mr. Chairman.

Thank you both.

I do want, Ms. Darcy, to give you a chance to respond in terms of those permits that supposedly transfer. I assume you have counsel here. I would give you a chance to revise your statement because I can tell you, from real experience, I don't think that your testimony was accurate.

If you have got counsel in terms of if there is a transfer of lands, transfer of permit, you know, perhaps you want to do that.

Is that your counsel leaving?

Ms. DARCY. No.

Mr. MEADOWS. OK. All right. Well, you can get back to the committee.

Ms. DARCY. OK.

Mr. MEADOWS. I have got limited time. But it is not accurate, and I would just encourage you to get together and perhaps change that. But let me go on.

Ms. DARCY. As I responded to Congressman Mullin, that if it is not clear, we need to make it clear. And maybe I need to be clear.

Mr. MEADOWS. Well, it is clear that it doesn't transfer. And so—and your counsel's nodding his head “yes.” So I would just encourage you to revise your statement.

The other part of that is we are implementing these rules for the health and safety of the American people. Is that correct?

Ms. DARCY. Yes.

Mr. MEADOWS. OK. So, Mr. Perciasepe, do you have adequate funding to make sure that the current rules and regulations that we have are implemented and carried out to provide for that health and safety, current funding? Yes or no? Do you have adequate funding?

Mr. PERCIASEPE. Yes.

Mr. MEADOWS. For the current regulations?

Mr. PERCIASEPE. The current—the one on the books?

Mr. MEADOWS. Everything that is on the books, without a change.

Mr. PERCIASEPE. Yes.

Mr. MEADOWS. So everybody should be safe today?

Mr. PERCIASEPE. I am not exactly sure what—I mean, we implement a lot of different laws that Congress has passed, but—

Mr. MEADOWS. OK. Well, let me go on further, then.

With this rule, any rule that an agency makes is really for the sole purpose of carrying out the intent of Congress' law. Would you both agree to that?

Ms. DARCY. Yes.

Mr. MEADOWS. OK.

Mr. PERCIASEPE. Yes.

Mr. MEADOWS. So since the administration came up with this, at what point did someone in the administration realize that the intent of Congress under a previous law was not being carried out?

Who made that decision, that the original intent of Congress when they passed the Clean Water Act is not being carried out? Who made that decision?

Ms. DARCY. Well, the purpose for doing this rule is to provide clarity on what we think, as a result of the Court decisions, we needed to do.

Mr. MEADOWS. OK. So it is your agencies that decides the intent of what Congress originally passed as law?

Mr. PERCIASEPE. Well, let me just—

Mr. MEADOWS. Because I am a—I am part of a body of 435 people, and every day I am confused as to the intent of this body.

So it is amazing how somebody at your agency could figure out what the original intent of those who passed the law would be.

Mr. PERCIASEPE. I think what is—what we were responding to is decisions that were made in the past that went to the Supreme Court.

And the Supreme Court has a number of different positions or opinions that they have issued, and what we have done, looking at those opinions of the Supreme Court which have come out in the last decade, that the existing regulations that we had on the books from the 1970s need to be modified.

Mr. MEADOWS. All right. So you are ignoring Justice Alito's concurring opinion, then, because he said that, really, Congress needs to clarify what the waters would be. And so you are taking Justice Kennedy's sole opinion and ignoring the other four justices?

Mr. PERCIASEPE. Well, I—

Mr. MEADOWS. So who is—

Mr. PERCIASEPE. I believe—I believe the chief justice has opined on the fact that the—that the executive branch should do something about this.

Mr. MEADOWS. And that Congress needs to weigh in as well.

Mr. PERCIASEPE. No. I think Justice Roberts said the—that the executive branch—

Mr. MEADOWS. So you are taking—

Mr. PERCIASEPE [continuing]. Has had an opportunity to do that.

Mr. MEADOWS. So you are taking Justice Kennedy's and Roberts' opinion?

Mr. PERCIASEPE. Well—

Mr. MEADOWS. OK. I think my point is made.

And, really, the whole point is that Congress should be the one that is fixing that, not administrative law, because I am very concerned that you continue to make rule after rule after rule and arbitrarily decide what is good for the American people when there are 435 in this body—elected officials—to make that decision. Would you not agree?

Mr. PERCIASEPE. I don't agree that it is arbitrary, because I think we interpreted the law that Congress passed in 1972. We put out those rules back in the 1970s.

Those are the rules that the Congress—the Supreme Court never said they were unconstitutional or the law that the Congress passed was unconstitutional. They just said—

Mr. MEADOWS. So you just passed—

Mr. PERCIASEPE [continuing]. The executive branch—

Mr. MEADOWS [continuing]. Unclear rules and we are just clarifying it, is what you are saying.

Mr. PERCIASEPE. Well, people brought a case and it went to the Supreme Court. The Supreme Court said we should modify.

Mr. MEADOWS. Let me close because I am out of time.

A little over 30 days ago I brought up with you, Mr. Perciasepe, an issue with contamination in my district. I have yet to hear from you. Have you checked into all of that?

We have gotten no response from you. And if you are really concerned about the health and well-being of the American people, I would have thought that a followup phone call with egregious violations within the EPA would have been appropriate. Wouldn't you?

Mr. PERCIASEPE. Yes, sir.

Mr. MEADOWS. OK. When can we expect a response from you and get that cleaned up?

Mr. PERCIASEPE. You will get a—you will get something from me before the end of the week.

Mr. MEADOWS. Thank you, sir.

I will yield back.

Mr. GIBBS. Mr. Jolly.

Mr. JOLLY. Thank you.

Assistant Secretary Darcy, you mentioned that this was the administration's proposal. Is that correct?

Ms. DARCY. Yes.

Mr. JOLLY. Who else within the administration has had input on this?

Ms. DARCY. Well, it was developed with EPA and the Army Corps of Engineers.

Mr. JOLLY. I understand that.

But you—you deferred, then, to call it the administration's proposal.

Has somebody from the Domestic Policy Council been involved in the creation of this proposed rule?

Ms. DARCY. No. But the Office of Management and Budget has reviewed the proposed rule.

Mr. JOLLY. From a policy perspective, has anybody from the White House been involved in this proposed rule?

To refer to it as the administration's proposal is an interesting choice of words. It is as though you deferred some of the responsibility of this to the administration collectively as opposed to just the EPA or the Corps.

Ms. DARCY. We are part of the administration. So as I have stated, this has been also reviewed by the Office of Management and Budget, which is an arm of the President and an arm of the administration.

Mr. JOLLY. To the extent of your knowledge, was the Domestic Policy Council involved at all in the proposed rule? Yes or no?

Ms. DARCY. I don't believe so.

Mr. JOLLY. OK. Is that your understanding as well, Mr. Deputy Administrator?

Mr. PERCIASEPE. I can't know specifically. But when we do a rulemaking jointly or individually as agencies, it goes through an interagency review under an Executive order that has been in existence since many, many administrations ago.

And in that interagency review run by the Office of Management and Budget, all the agencies get a chance to participate and comment on proposals before they go out as a proposal.

So I don't have the details on everybody who may have responded or put input into that, but it—opportunity was availed to every agency.

And we actually did some work with the Department of Agriculture to try to clarify conservation practices that would be not—be clear that they are not falling—they would not be affected by this rule.

Mr. JOLLY. So in drafting the proposed rule, was there any contribution of language from the White House?

Mr. PERCIASEPE. I don't have any specific information. I am put—you know, interagency includes the Department of Energy, everyone else.

Mr. JOLLY. OK. So you also mentioned that this is a result of some confusion from the Supreme Court decision. Is that correct?

Ms. DARCY. Yes.

Mr. JOLLY. OK. You seem to rely on Justice Kennedy's significant nexus definition, though, as having provided some clarity.

Why the need to expand on his definition? Why not just take it as written, if you are relying on that?

Mr. PERCIASEPE. Well, I think in our definition we did include significant language from Justice Kennedy, but we also recognized that some—we wanted to make it clear that some—in addition to that, we wanted to make it clear that some activities and waters were not going to be included.

We talked about the ditch already. So we wanted to clarify that in the rulemaking, that, you know, dry—ditches that are in these—roadside ditches types of ditches would not be included—

Mr. JOLLY. OK.

Mr. PERCIASEPE [continuing]. As an example, or groundwater or any number of other things. So were not specified in his definition.

Mr. JOLLY. The curiosity is because, Assistant Secretary Darcy, in your written testimony today, you refer to the confusion created by regional application.

And I find your written testimony interesting because it is as though the Corps embraced regional decisions as being closest to the community, best understanding the issues of the community following *SWANCC* and *Rapanos*, and, yet, now either the Corps, the EPA or the administration broadly is stepping away from that regional application, because in your written testimony it is now suggesting that what was the answer, to use regional application, actually created confusion, and that is now why you are issuing this.

Ms. DARCY. Well, there will be regional distinctions between other waters, but in order to have more clarity overall, I think that the clarity that this rule will provide will give direction to each of our regions as well as our divisions and our districts about how to apply this overall.

Mr. JOLLY. OK. And the last question.

Part of the efficiency it says that you will be creating is by reducing documentation. Can you explain that.

I think that is the heart of the concern of a lot of people who have concerns within their district, that now this will be a less-documented, less-justified, less-explained decisionmaking authority



coming from Washington and, in fact, the regional office will now have less ability to address specific regional concerns.

Ms. DARCY. An example of less documentation would be in the instance of the definition of tributaries, that people will now know that a tributary is a jurisdictional water of the United States.

Previous to this rule, there were instances where we would have to go out on the ground to make a determination as to whether a tributary was actually a navigable water.

So, in this instance now, we have defined tributary so an applicant or the Corps will not have to go out and look and say, "OK. Yes. It is a tributary."

So that is one piece of the documentation that will be alleviated by this rule.

Mr. JOLLY. And you are confident that streamlining is a better system?

Ms. DARCY. I do. I do.

Mr. JOLLY. All right. Thank you very much. I appreciate it.

Mr. GIBBS. Mr. Rice.

Mr. RICE. I want to thank you all for being here today.

I have certainly learned a lot. I think the problem here is just the expansion of the—of the bureaucratic authority here and the stifling effect it has on our economy and our freedom.

And I wasn't here in 1972, but I sure think we are regulating as waters of the United States things that would not have been considered in 1972.

And everybody's very fearful that this new rule is an attempt at further expansion, and particularly with the administration's expansion of environmental protection in other areas currently.

I look at this list of—I take it the purpose of this rule is to more clearly define what the waters of the United States are. Correct?

And then I am looking at the proposed definition here, and there are six defined categories. And then, on the seventh, it says, "On a case-by-case basis, other waters, including wetlands, provided that those waters have a significant nexus to a water defined in paragraphs 1 through 3 of this section."

And then, as you said earlier, the word "significant" is defined. And it says, "The term"—you know, that is where the—that is where the play comes in here, what does "significant" mean.

"The term 'significant nexus' means that a water, including wetlands either on or in combination with other similarly situated waters in the region, significantly affects the chemical, physical or biological integrity of the water." Is that correct?

Ms. DARCY. Yes.

Mr. RICE. All right. So you are defining "significant" as whatever is significant. Right? You are saying that it has to have a significant connection. It has to have a significant effect.

Ms. DARCY. Yes.

Mr. RICE. Well, how does that clarify the rule, I mean, at all? Who determines—who determines what significant effect of chemical, physical or biological integrity? Who makes that determination?

Ms. DARCY. That would be a determination that would be made by a regulator on the ground.

Mr. RICE. So either the EPA or the Army Corps. Right?

Ms. DARCY. Or the Army Corps.

Mr. RICE. So what you are saying, then, is that a Federal—federally controlled body of water is anything that we determine is significant?

Ms. DARCY. It has—

Mr. RICE. That is very clearly what this rule says. And even if you don't read it that way, other people get involved in this, other groups get involved in this, and they want this enforced to the letter of the law. Am I correct? These outside groups can bring lawsuits based on this proposed rule. Right?

Ms. DARCY. Yes.

Mr. RICE. So—

Ms. DARCY. Well, the final rule.

Mr. RICE [continuing]. If they determine that it has some significant effect, then they can hold up commerce, they can invade our freedom further. I mean, that is the way I see this.

Here is what worries me. All this expansion of authority absolutely affects commerce. The people making these decisions have no skin in this game. There is no cost to them.

And what I worry about is we make ourselves less and less competitive in the world with every one of these additional rules, and I don't see this rule clarifying anything.

I mean, you are saying a water is federally controlled if it is significant and it is significant if we determine it is significant. So I don't see that clarifies anything. And that goes right to the crux of the rule.

So here is my question to you. Do y'all have kids?

Ms. DARCY. No.

Mr. PERCIASEPE. I do.

Mr. RICE. OK. You got kids? You got grandkids?

Mr. PERCIASEPE. Not quite yet. My daughter's getting married next week.

Mr. RICE. Here is what I am worried about—because I have got kids, too. I am worried that, when these kids get out of college—because we are telling them, "Go to school and get a great education"—your grandkids get out of college, that we are going to so stifle our economic freedom here that there is not going to be anything for them.

I am worried that they are going to have less quality of life rather than better quality of life because of these rules.

I think, you know, everybody certainly wants to protect our groundwater, but I think we have gone so far in doing this that the marginal cost is so much greater than the marginal benefit.

And I would hope that, when you actually—OK. I hear you say, "These aren't final rules. We are just putting this out for discussion." Well, my opinion is this doesn't clarify anything. I think my office could come up with a better draft than this.

Mr. PERCIASEPE. Can I just add a couple of points?

Mr. RICE. Sure.

Mr. PERCIASEPE. Because I— you are on to the issue we are trying to deal with. And I just want to point out that earlier on in the definition section it says notwithstanding whether they meet the terms of the following paragraphs, including number 7, these things are excluded.

And so it has a list that we have talked about a number of times already, you know, some of the ditch issues—

Mr. RICE. OK. You have specifically excluded a few things. I understand that.

Mr. PERCIASEPE. So then, when you get into the rivers and the streams, the—there is a—there is a definition in here that, if it doesn't have a normal bank—and these are defined in the science of hydrology—a bank or a streambed or a high—ordinary high water mark, then it is not included.

So the—if it—so, at some point, you know, whether—there has to be enough water occasionally in there. You know, even seasonally, it is even—even—you know, all the members of the Supreme Court pretty much agreed with there is a seasonal component to this.

So there are—and for it to be a wetland—somebody was mentioning earlier about water flowing out of a pool and across the yard and into something else. Well, if it isn't a wetland, if it doesn't exhibit the hydric soils or the—

Mr. RICE. Look—

Mr. PERCIASEPE. But I am just pointing out that there are other factors that are involved as to whether or not—

Mr. RICE. OK. And here is—just from a big-picture perspective—and I am way over my time—I understand other factors and exclusions and all that, but here is where we are.

It takes 15 years to get permission to dredge the Port of Miami, which has been dredged umpteen times before. It takes—is going to take 5 years to get permission to dredge the Port of Charleston, which has been in a constant state of being dredged for the last 20 years. It takes 10 years to get permission to build a road.

We can sit here and dance on the head of a pin for days, and it doesn't change the fact that our regulatory expansion is completely out of control and we need to be reining it in rather than continuing to grow it.

Thank you very much.

Mr. GIBBS. Mr. Webster.

Mr. WEBSTER. Thank you, Mr. Chairman, for having this hearing.

I do have one question of EPA.

How is EPA planning to distinguish between groundwater and shallow subsurface connections?

Mr. PERCIASEPE. First of all, I—

Mr. WEBSTER. I mean, I am asking that because Florida is kind of a—it is a unique State in a lot of ways. I mean, most of Florida is a wetland and the water is close to the surface.

Anyway, what do you think?

Mr. PERCIASEPE. We are trying to stay out of groundwater with this rule. So if we are not achieving that, that is—I hope we will get some comment on that, because we are trying to exclude groundwater from being considered.

We are also trying to make sure that, you know, drainage is not included as well. So—

Mr. WEBSTER. But in staying out of it, don't you have to distinguish between the two?

Mr. PERCIASEPE. I—I—well, one—you are talking about a constructed underground system? I am not—

Mr. WEBSTER. Well, just—there is shallow subsurface connection, and I assume that that is not the same as groundwater.

And what I am asking is: Will there be some sort of distinction between the two?

Mr. PERCIASEPE. There—there obviously is. I am just going to read from the definitions. “Excluded from this is groundwater, including groundwater drained through subsurface drainage systems.” That is excluded. So there—

Mr. WEBSTER. So would—would pollutants introduced into a shallow subsurface connection be in need of a permit in order to do those discharges?

Mr. PERCIASEPE. I don’t know the—it would be improper for me to try to answer, not knowing the issues.

I mean, you can inject—you can inject things into the ground for disposal, but it does require a permit under the Safe Drinking Water Act.

If you are disposing pollutants or other things into the ground, there are—there are—there are places that do this all over the country, but they—they do require a permit under the Safe Drinking Water Act.

Mr. WEBSTER. OK.

Yield back.

Mr. GIBBS. Mr. Massie.

Mr. MASSIE. I just want to start with a commonsense question. I think it is common sense. This comes from my homebuilders.

But, first, let me ask: What is the cost of implementing this new rule? Just quickly give me a range.

Mr. PERCIASEPE. We—our economic—our draft economic analysis, which is out for public comment, estimates between—I can look up the exact numbers, but somewhere between \$100 million and \$200 million.

Mr. MASSIE. \$100 to \$200 million.

So are my homebuilders going to have to get more permits or fewer permits after this rule?

Mr. PERCIASEPE. This is based on—

Mr. MASSIE. Or do the permits just get more expensive?

Mr. PERCIASEPE. This is based on the observation that Assistant Secretary Darcy said earlier, that when we went back and looked at the jurisdictional determinations made under the 2008 guidance, we saw that maybe about 3 percent would increase.

Mr. MASSIE. So you are going to increase the jurisdiction of the EPA and the Army Corps of Engineers?

Mr. PERCIASEPE. No. These would be because of the—

Mr. MASSIE. And so that is going to lead to more cost.

Here is my commonsense question. There is a whole industry that tries to deal with these regulations, and I know you spend a lot of your time and resources and money, which is taxpayer money, trying to protect the environment and our waterways.

Wouldn’t it be more effective just to set the guidelines for the homebuilders to follow and not require them to get permits?

Wouldn't that be more cost-effective, to go back to the fundamental principle in this country that you are innocent until proven guilty?

Why don't we assume that they are good actors until you find out otherwise? Why does everybody have to ask "Mother, may I?" to the EPA and the Army Corps of Engineers if they just want to build a home for somebody?

Mr. PERCIASEPE. Well, I would—I would say that, if—well, first of all, we don't expect the jurisdiction to—we are——

Mr. MASSIE. I am done with that question.

Mr. PERCIASEPE. OK.

Mr. MASSIE. What about the idea of just——

Mr. PERCIASEPE. The permit——

Mr. MASSIE [continuing]. Saying the rules and, if the homebuilders abide by the rules——

Mr. PERCIASEPE. The permit that they would need would be the authorization to discharge pollutants or fill into the water.

Mr. MASSIE. Yeah. I mean, I don't——

Mr. PERCIASEPE. And if they don't—if they don't do that——

Mr. MASSIE. The question here is: If they don't discharge pollutants, why do they need a permit?

Mr. PERCIASEPE. They don't.

Mr. MASSIE. OK. So why are my homebuilders waiting for permits?

Mr. PERCIASEPE. Because they want to—they want to fill in—I am guessing because they want to fill in——

Mr. MASSIE. But their fill is not going to cause pollution; otherwise, you wouldn't give them a permit.

Mr. PERCIASEPE. No. The Clean Water Act defines "fill" as a—as a——

Mr. MASSIE. OK. But why——

Mr. PERCIASEPE [continuing]. Requirement——

Mr. MASSIE. If that fill is not harmful and you set up the guidelines and they abide by those guidelines, why do they need a permit?

I am just—what I am testing here is the whole assumption that you are—that I think has been promulgated here, is that these guys are bad actors and you need to rein them in and they have got to get your permission before they can do anything.

Mr. PERCIASEPE. We don't think they are bad actors. We think they do amazing things.

Mr. MASSIE. I don't think they are either. They are building homes, but they can't do it in my district because they are waiting months for permits and some of this is not even developable.

I want to go to Agriculture here. Why did you seek to narrow down to 56 the number of agricultural farming practices? Why can't we just assume the farmer knows how to farm?

Ms. DARCY. Congressman, in the interpretive rule that accompanied this proposed rule, we worked with the Department of Agriculture and the Conservation Service to list 56 practices that are currently on the table——

Mr. MASSIE. So you are working with organizations in Washington, DC. That is great.

But why don't we trust the farmers back home that they know what the practices are and assume there might be more than 56 things you have to do to farm?

Ms. DARCY. Congressman, those 56 things are ongoing conservation practices that we are saying are exempt from the Clean Water Act that we have not said before.

So these are additional new things that have come into being since the passage of the Clean Water Act—

Mr. MASSIE. Can you tell me what is not exempt now?

Ms. DARCY. What is not exempt?

Mr. MASSIE. Yeah. What might a farmer do that is not exempt?

Ms. DARCY. I could not tell you right now what is not exempt because most of the agricultural practices are exempt.

Mr. MASSIE. Here is one thing that I am worried about.

I am a farmer. I farm. I have got ditches. They have all got high—I mean, I could find a bed, a high water mark, a bank on these ditches.

Isn't that—how is that compatible with excluding ditches and then saying, if it has these features, that it is under your jurisdiction?

Ms. DARCY. We have specific exemptions in the proposed rule for ditches.

Mr. MASSIE. Do those exemptions extend to somebody who is spraying their fields and they have got a grassy ditch, for instance, that may flow only occasionally and they are using approved ag chemicals?

Ms. DARCY. That is exempt from the Clean Water Act because it is an ongoing agricultural practice.

Mr. MASSIE. That is comforting to hear, that none of my farmers will have to get a permit—this is what you are saying. Correct?—to spray their fields from either the Corps of Engineers or the EPA?

Ms. DARCY. That is correct.

Mr. MASSIE. All right. Thank you. My time's expired.

Mr. GIBBS. Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chairman.

Thank you, Assistant Secretary Darcy, Deputy Administrator Perciasepe.

I have a couple questions.

Number one, the administration has committed to streamlining and expediting permitting for major infrastructure projects that move energy.

However, it seems that the EPA waters of the U.S. rule will do just the opposite because it creates new subcategories of water that could be subject to Federal jurisdiction.

Is there any way for the EPA, Mr. Deputy Administrator, to guarantee that this rule will not further delay permitting for energy infrastructure projects?

Mr. PERCIASEPE. Our view is that we are not expanding the jurisdiction. So under the—and we are actually excluding some things that may be involved with some energy development projects. So, I mean, I don't see how this will add to the burden.

Mr. DAVIS. OK. I am going to get to a few more questions that I think may get back to this.

We are a little frustrated by what could be the regional approach to some of the permitting issues, and I am going to give you a couple examples in just a second.

But you also mentioned, Mr. Deputy Administrator, that the—in your testimony the EPA and the Corps then worked with the U.S. Department of Agriculture to ensure that concerns raised by farmers in the ag industry were addressed in the proposed rule.

Did you also consult with the EPA Science Advisory Board, which now includes, due to the Farm Bill, an amendment that I introduced, agriculture interests?

Mr. PERCIASEPE. Science Advisory Board, did you say?

Mr. DAVIS. Yeah.

Mr. PERCIASEPE. The Science Advisory Board will be looking at this proposed rule before it goes final, but they haven't completed their review. And we haven't set—they are currently reviewing some of the science documents that go along with this as well.

And one of the reasons, in addition to stakeholder requests, that we have extended the time period for public comment is we wanted to complete the Science Advisory Board's review of some of the science documents so that that review is out there at the same time as the rulemaking docket is still open.

Mr. DAVIS. All right. Another quick question on the energy side that I forgot to ask.

Assistant Secretary Darcy, can you give me any idea how other agencies and industries, you know, subjectively determine what might actually be covered by a Clean Water Act permit?

Ms. DARCY. Under the proposed rule? I mean, how would they comment?

Mr. DAVIS. Yeah. Under the proposed rule.

Ms. DARCY. Under the proposed rule, anyone who believes that they would be impacted by the proposed rule can comment to us.

Mr. DAVIS. So through the comment process they can come in because they might believe that they could be impacted, could be required to maybe self-report, work with their regional offices, et cetera, on an energy infrastructure project?

Ms. DARCY. Yes. Because then they would want to know if they would be subject to the rule. So, yes.

Mr. DAVIS. All right. In your proposed rule, it mentions that waste treatment systems are not included in this—in the definition of the proposed rule of the Clean Water Act of waterways. Right?

Ms. DARCY. Yes.

Mr. DAVIS. OK. Does that change the EPA's jurisdiction over aboveground septic discharge systems that many in my district actually have to utilize because of either soil-type issues or rural living arrangements?

Mr. PERCIASEPE. I don't—oop. I turned it off when I thought I was turning it on.

I don't believe EPA—EPA does not regulate septic tanks.

Mr. DAVIS. You may want to check with your—you may want to check with your regional office that covers my State of Illinois because aboveground septic discharge systems are being regulated by that regional office under an NPDES permit.

And that is part of my frustration of maybe what you see and what you hear in Washington isn't getting to your regional offices.

Because members of ag interests in the State of Illinois met with the U.S. EPA just very recently—it may have been yesterday or this morning—on what are the requirements for sep—aboveground septic discharge permits.

And it said that it is the response—the EPA in the region said it is the responsibility of the potential discharger to determine whether or not his or her system might discharge into a water of the United States.

And it said even during this self-determination—this comes from the EPA's guidance, Frequently Asked Questions on EPA's NPDES general permit for new and replacement surface discharging systems in Illinois, an FAQ sheet.

I will go right to the point. It says, "If so, even though pollutants would not be carried to waters of the United States unless your area experienced an exceptionally wet season, you are still required to obtain coverage under a permit. Only if you are sure that your system would not discharge pollutants to a water of the United States or a conveyance that leads to a water of the United States should you forego obtaining a permit for a surface discharging system. If you do not obtain a permit, but actually discharge, you may be subject to an enforcement action under the Clean Water Act."

This gets to the point of the rule, sir. It specifically—it specifically says wastewater discharge systems will not be subject to the proposed rule and the change, but it—your regional office is basically saying "Self-report. However, we may fine you if you are wrong," because it may actually discharge—according to their own—their own rule or their own guidance, it may discharge into a navigable waterway.

Can you see where we have some problems here when it comes to what you are talking to us about and then what goes back to the region and then has a tremendous impact on the families that I represent and that all of us represent here in this country?

Mr. PERCIASEPE. Well, I am at a loss to determine whether or not, I mean, first of all, this is a proposed rule so the regions are probably not dealing with it now anyway, but we think the waste treatment exclusion has been in existence before this rule. We are trying not to change it.

So I can't answer you here, and I will find out for you why something like that doesn't fall under the existing waste treatment exclusion. I just don't know the answer to it.

Mr. DAVIS. Well, thank you, and I do appreciate your willingness to do so and I am going to end by saying this, because I am out of time: Many rural communities in Illinois, some of the poorest areas in Illinois have to rely upon an aboveground septic discharge system.

And it is an issue where they can't be worried about the EPA determining whether or not there is going to be an enforcement action based on this NPDES permitting process, that seems to be so vague and seems to be in direct contradiction with the proposed rule.

So thank you for getting back to me. Assistant Secretary Darcy, thank you for your time, too. And thank you to both of you for being here today.



Mr. GIBBS. We are going to conclude this first panel. I want to thank you for coming.

I have to comment, it is really amazing to me and really appalling, I guess, that this proposed rule has been put out even though the connectivity study hasn't been completed. When you hear all the questions and everything, what is the jurisdiction, what includes its tributary ditches and all that, wetlands, but the study is not done, that is what creates all the ambiguity and vagueness here.

And I think you really need to be concerned about that and really take note of the comments that are coming in from this hearing, otherwise we are opening up a whole can of worms and, I think, a trial lawyer's dream come true with a lot of lawsuits and we don't want to have litigation to cause more problems, so—

Mr. PERCIASEPE. Our objective is to reduce that, as Assistant Secretary said, and I appreciate what you are saying about the study. I mean, we had the draft study when we did this rule and that is one of the things. We promise we will not—

Mr. GIBBS. I don't believe it was peer reviewed, and I don't think it has come to the finalization.

Mr. PERCIASEPE. It had two prior peer reviews before it went to the SAB. So we can get into that detail. I know you are out of time. But we won't finalize the rule without their final review.

Mr. GIBBS. And I know you have been here for a while, I hope you can stay and at least hear the testimony of the next witnesses because I think they have got some really good comments and raise a lot of questions of where we move forward.

Mr. PERCIASEPE. We look forward to working with them over the next 90 days.

Mr. GIBBS. Thank you and we will take a couple minutes here to get set up for the next panel, too.

[Recess.]

Mr. GIBBS. The committee will come back to order. At this time, we welcome panel 2, and I am going to yield to Mr. Mullin from Oklahoma to introduce the first witness.

Mr. MULLIN. Thank you, Mr. Chairman. And it is a great opportunity I have to welcome Oklahoma's own J.D. Strong, who is the executive director of the Oklahoma Water Resources Board and also a fifth-generation farmer from Oklahoma. He has a very unique perspective. He even got his education at the Oklahoma State University, which as long as it is in Oklahoma, it is pretty good. We keep it at home.

But, you know, J.D. has a very unique story to tell with the challenges at his farm and his family has went through year after year after year and the challenges that each generation has faced. At the same time, he brings a point of view from the State, and it really is important to understand that the State has a lot of stake at this.

And when you have a gentleman that is so deeply rooted in Oklahoma and he is in a position and thought of enough in the State to be appointed to this position, we should really value his opinion. He is bringing it from not only the political standpoint but from a personal standpoint.

So, J.D., it is good to have you here. Wish the hair was a little kinder to you, but, you know, you can't have all things and have the pie at the same time, right?

So thank you for being here.

Mr. GIBBS. I would also like to welcome Mr. Pifher. He is the manager of the Southern Delivery System of the Colorado Springs Utilities. He is testifying on behalf of the National Water Resources Association and the Western Urban Water Coalition.

We also have Mr. Dusty Williams. He is a general manager/chief engineer for Riverside County, California, Flood Control and Water Conservation District. He is also testifying on behalf of the National Association of Counties and National Association of Flood and Stormwater Management Agencies.

We also have Mr. Bob Stallman who is president of the American Farm Bureau Federation and a Texas farmer that I have known for many years. Good to see you, Bob.

We also have Mr. Kevin Kelly. He is president of Leon Weiner and Associates, Incorporated, and also chairman of the board of the National Association of Home Builders.

And we have Mr. Eric Henry. He is president of TS Designs, and he is here on behalf of the American Sustainable Business Council.

Welcome, all. And Mr. Strong, the floor is yours to give your opening statement.

**TESTIMONY OF J.D. STRONG, EXECUTIVE DIRECTOR, OKLAHOMA WATER RESOURCES BOARD, ON BEHALF OF THE WESTERN GOVERNORS' ASSOCIATION AND WESTERN STATES WATER COUNCIL; MARK T. PIFHER, MANAGER, SOUTHERN DELIVERY SYSTEM, COLORADO SPRINGS UTILITIES, ON BEHALF OF THE NATIONAL WATER RESOURCES ASSOCIATION AND WESTERN URBAN WATER COALITION; WARREN "DUSTY" WILLIAMS, GENERAL MANAGER/CHIEF ENGINEER, RIVERSIDE COUNTY, CALIFORNIA, FLOOD CONTROL AND WATER CONSERVATION DISTRICT, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES; BOB STALLMAN, PRESIDENT, AMERICAN FARM BUREAU FEDERATION; KEVIN KELLY, PRESIDENT, LEON WEINER AND ASSOCIATES, INC., AND CHAIRMAN OF THE BOARD, NATIONAL ASSOCIATION OF HOME BUILDERS; AND ERIC HENRY, PRESIDENT, TS DESIGNS, ON BEHALF OF THE AMERICAN SUSTAINABLE BUSINESS COUNCIL**

Mr. STRONG. Thank you.

Thank you, Mr. Chairman, Ranking Member Bishop and members of the committee for this opportunity to testify before you today on behalf of the Western Governors' Association and Western States Water Council, a couple of nonpartisan organizations, independent organizations representing the Governors of 19 Western States.

I serve as chairman of the Water Quality Committee on the Western States Water Council and appreciate this opportunity to discuss concerns regarding the Clean Water Act, waters of the U.S. proposed rule by EPA and the Corps of Engineers.

First, we recognize that the EPA and Corps of Engineers actions have significant affect on States, not just in the West but across the United States; therefore, it is extremely important that States be regarded as full and equal partners, in fact, as coregulators under the Clean Water Act, as Congress intended for both the States and EPA to implement the Clean Water Act in partnership delegating much of the authority to States to administer those laws as they see fit within their respective States.

And in this particular case, the Western States at least are unanimous in their concern for the fact that the States were not adequately consulted in advance of this rule being proposed. While there were communications, status reports, so forth, as coregulators and the ones that will be faced with much of the burden and cost of implementing what happens to waters of the U.S. across the United States, not being involved in that rulemaking process and actually drafting the rule is of great concern to the States and, of course, has led to much confusion here on the back end of the rule-making process.

As we noted repeatedly in our letters from the Western States Water Council, waiting until the public comment period to solicit State input does not allow for meaningful consideration of States views as well as alternative ways the States may have for meeting Federal objectives under the Clean Water Act.

We also urge the agencies to recognize the Federalism implications of this particular rulemaking, particularly noting Executive Order 13132 that requires a higher level of consultation with States where Federalism implications do impact the States.

And, in fact, in the preamble to this rule, the EPA and Corps of Engineers say, I quote, "This rule will not have a substantial direct effect on the States on the relationship between the National Government and the States or on the distribution of power and responsibility among the various levels of Government."

Of course, nothing could be further from the truth because the very goal of this rule is to define where Federal jurisdiction stops and where State jurisdiction begins. Nothing could have more of a direct and substantial impact on the balance of power between the Federal Government and the States.

We reiterate what Governors Hickenlooper of Colorado and Sandoval of Nevada as chairman and vice chairman of the WGA said in their March 25 letter that the Agency should consult with the States individually and through the Western Governors' Association in advance of any further action on this rulemaking; and would also reiterate concerns that the Science Advisory Board that is set up under EPA to help advise this rule does not have State representation, yet there is a great deal of State expertise when it comes to these matters, 27 experts on that panel and not one is a State agency scientist or expert.

Finally, let me just jump to my Oklahoma-specific testimony with the very little remaining time that I have left and say that, on behalf of the State of Oklahoma and not necessarily Western Governors' Association and Western States Water Council, I reiterate the concerns about coregulators not being just stakeholders but, in fact, should have been involved in the rulemaking upfront.

I would also reiterate concerns about getting the cart before the horse in terms of not waiting for the connectivity report to be finalized which can have a significant scientific affect on, I think, informing this rulemaking.

And so it is encouraging to hear some of the words that were expressed today that this will not be finalized until then, and yet it is a mystery to me why you would even propose a rule without having the full vetting of that scientific report that should weigh so heavily on this rulemaking process.

And lastly, a point that has been made in front of panel 1, I think, over and over again: Ambiguity. The point of this rulemaking is to ensure some clarity, which is very important for the States that have to implement the Clean Water Act rules.

And yet, in our view, at least in the State of Oklahoma, we believe that EPA and the Corps of Engineers have simply taken an already fuzzy line of jurisdiction and simply moved it in a different direction, but it is not less fuzzy than it was before. Certainly, it defeats the purpose, I think, of this rulemaking process.

So we look forward to trying to inform and provide additional constructive recommendations going forward that will hopefully clarify instead of make these decisions more ambiguous. At the same time, we think it takes more than a couple of 90-day extensions to the comment period in order for the States to be able to engage in a very meaningful and constructive process of informing this rulemaking.

Instead, we think what we need is more like a timeout and going back to the drawing board. When the train is off the tracks, that is really the only way to get it back on in our view.

So with that, I appreciate the opportunity.

Mr. GIBBS. Thank you.

Mr. Pifher, floor is yours.

Mr. PIFHER. Thank you, Mr. Chairman, members of the committee.

I would also like to thank representatives from the agencies that testified on panel 1 today, because I think they constructively added to the dialogue, but some of the clarifications they made this morning need to be placed in writing and that, I think, would serve all of us very well.

I am here on behalf of the National Water Resources Association which represents urban and rural interests in the reclamation States of the West, as well as the Western Urban Water Coalition which represents large municipal water and wastewater providers and, in fact, serves over 35 million customers in the Western United States.

Both organizations certainly fully support the goals of the Clean Water Act; after all, it protects the resource, the water which our municipal customers depend upon and our irrigators depend upon. So there is no disagreement there.

That said, though, our members are the ones who plan for, design, construct and eventually operate the wastewater and water facilities that are so essential in the West, as well as stormwater control facilities; and it is our customers who foot the bill.

We believe that the West, especially the arid portions of the West, are sort of the Ground Zero, if you will, for the impacts of

this proposed rule, because we are the ones with the dry arroyos and washes that flow only periodically, with the ephemeral and affluent-dependent stream systems, with the intermittent water bodies and the isolated water bodies and the head waters that often flow only in response to precipitation events or snow melt.

So if the rule is going to have an impact anywhere, it is the West, and so we are watching this very closely, and on first reading, we think this is an expansion of Federal jurisdiction. You have now this new category of per se jurisdictional waters that didn't exist previously. You have some new concepts of what adjacency means. It used to be just adjacent wetlands; now it is all adjacent waters.

You have this neighboring concept which encompasses all waters in flood plains and riparian zones, and you have the new significant nexus test that we have heard a lot of testimony about already. But what that allows the agencies to do is aggregate water bodies that individually may be insignificant and all of a sudden they become significant.

So the on-the-ground impact in terms of the membership of NWRA and Western Urban, could be substantial and it could be very time consuming and costly because it results in the need to obtain 404 permits where potentially they weren't necessary in the past; even 402 permits, which are our point source discharge permits; and certainly 401 certifications from our States; and, perhaps most importantly, it can trigger NEPA reviews. And for those of us that have built projects, we know what that means.

Let me give you an example. In the last 8 years, I have worked on two of the major new western water projects either just newly completed or under construction. One is Aurora's Prairie Waters Project. It was \$600 million-plus. It was a 35-mile, 60-inch steel pipeline, three pump stations, a water treatment plant and some diversions off the Platte River. That project was planned, conceived, designed, constructed and in operation in 5 years because we were able to avoid pulling the 404 trigger and avoid a NEPA review as a consequence.

In comparison, Colorado Springs is now constructing an \$800 million reuse project, very similar to Prairie Waters Project, also three pump stations, a treatment plant, in this case, a 50-mile plus pipeline, and a new diversion outlet from the Pueblo Dam. In that case, we couldn't avoid 404, and it took a decade just to get through the planning and permitting process, let alone the 5-plus years of construction and it was tens of millions of dollars in studies and tens of millions of dollars in mitigation. So it does make a difference.

And we are concerned about not only those types of projects but also whether there will be any impact on the implementation of stormwater control measures. I heard what EPA had to say. I think there is obviously grounds for dialogue and discussion with them. What about activities where you transfer agricultural water out of ditches to municipal entities in times of drought?

Because, again, the arid West is the focal point for drought, for fires and post-fire flooding and necessary remediation. We need to build new infrastructure, respond to all those challenges. It will

only become more difficult if we have to go through NEPA and permitting each step of the way.

We are identifying in our written testimony some areas where we think a dialogue with the EPA and the Corps will be constructive. We fully intend to sit down with them and work through some of these issues, and we look forward to a resolution that achieves a reasonable balance. Thank you.

Mr. GIBBS. Thank you.

Mr. Williams, welcome.

Mr. WILLIAMS. Thank you, Mr. Chairman. I am here today wearing two hats. I am representing the National Association of Counties, NACo, and also the National Association of Flood and Stormwater Management Agencies, NAFSMA, where I currently serve as president. We are concerned with the scope of the waters of the U.S. definitional proposal. While the proposed rule is intended to clarify issues, the proposal is significantly broader in scope. It takes Federal jurisdiction well beyond the section 404 permit program and has potential impacts on many of the other Clean Water Act programs.

Key terms used in the definition—tributary, adjacent waters, riparian areas, flood plains and the exemptions listed—also raise important questions. It is uncertain how they will be used to implement the section 404 permit program effectively. While we appreciate that EPA and the Corps are moving forward with a proposed rule rather than a guidance document, our organizations have concerns with the process used to create the proposal and specifically whether impacted State and local groups were adequately consulted throughout the process.

Under Executive Order 13132, Federalism, Federal agencies are required to work with State and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of “waters of the U.S.” imposes only indirect costs, the agencies state in the proposed rule that the new definition does not trigger Federalism considerations.

However, the agencies cost-benefit analysis states, quote, “Programs may subsequently impose direct or indirect costs as a result of implementation,” closed quote. In addition, we are also concerned with the sequence and timing of the draft science report and how it fits into the proposed process, especially since the document will be used as a scientific basis for the proposed rule.

Because of the complexity of the proposed rule and its relationship with the report, the agencies should consider not only extending but suspending the current comment period and rereleasing the proposal with the updated economic analysis after the science-based conductivity report is issued. The approach would be welcomed by local governments.

Both NACo and NAFSMA believe that the proposed rule would increase the number of publicly maintained stormwater management facilities and roadside ditches that would require Clean Water Act 404 permits, even for routine maintenance. Whether or not a ditch is regulated under section 404 has significant financial implications for local governments.

Not only is the determination often very difficult, the multitude of regulatory requirements under the Clean Water Act can take

valuable time and cost substantial dollars, both of which are extremely significant to local agencies. This puts our Nation's counties and flood and stormwater management agencies in a precarious position, especially those that are balancing small budgets against public health and safety needs.

And while the proposed rule excludes certain types of upland ditches with less-than-perennial flow or those ditches that do not contribute flow to waters of the U.S., the key terms like "uplands" and "contribute flow" are not defined. Therefore, it is unclear how currently exempt ditches will be distinguished from jurisdictional ditches especially if they are near waters of the U.S.

Most ditches are not wholly in uplands, nor do they strictly drain in uplands since they are designed to convey overflow waters to an outlet. To assist in visualizing some of these concerns, I would like to highlight a portion of my home county, Riverside County, California, and it should be on the screen.

The blue line shows the current extent of waters of the United States. The second map shows the likely extent of waters of the U.S. under the proposed rule, a significant increase, and not because of flowing rivers or streams but because this area is in the arid Southwest. It is facilities like this that will lead to the dramatic expansion.

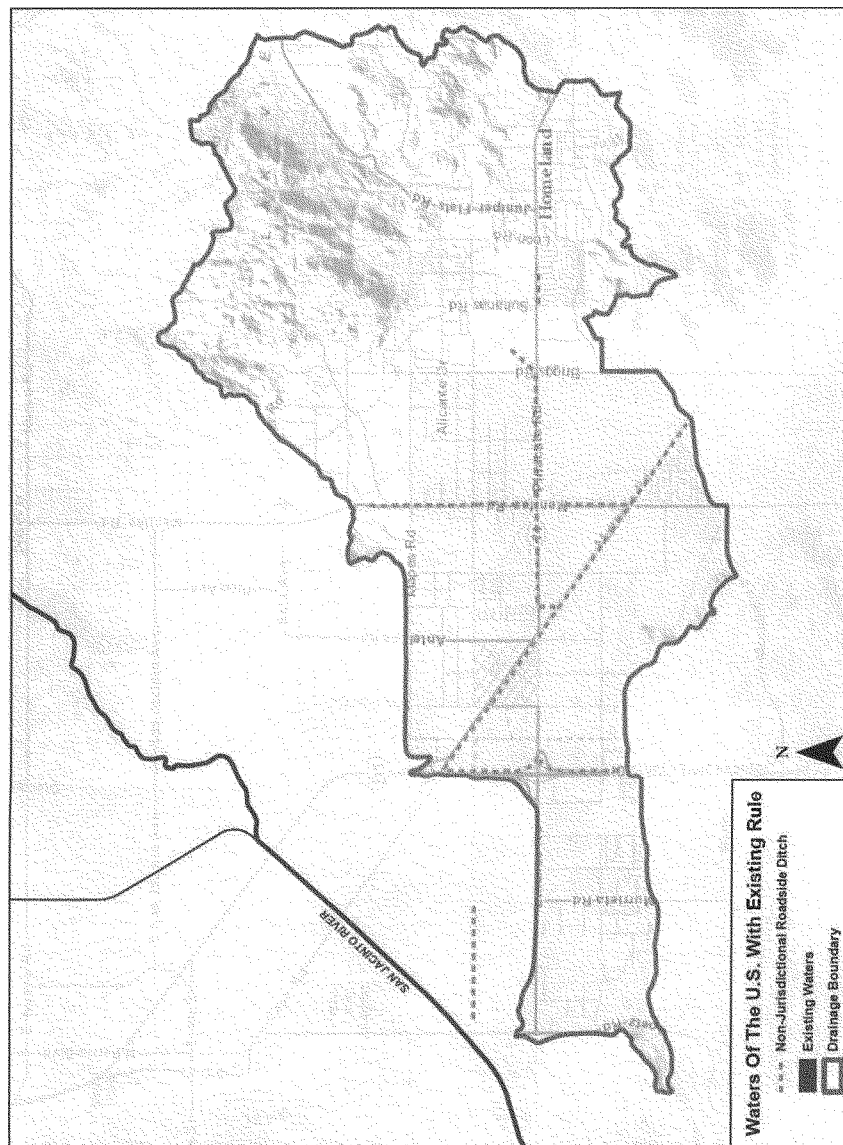
Further, since stormwater management activities are not explicitly exempt under the proposed rule, concerns have been raised that manmade conveyances and facilities for stormwater management could now be classified as waters for the U.S. This would introduce localities to an expanded arena of regulations and unanticipated costs in that a locality will have to regulate all pollutants that flow into the channel including surface runoff rather than at the point of discharge.

If stormwater costs significantly increase due to the proposed rule, funds will be diverted from other governmental services, such as education, police, fire, et cetera. Our members cannot assume additional unnecessary or unintended costs.

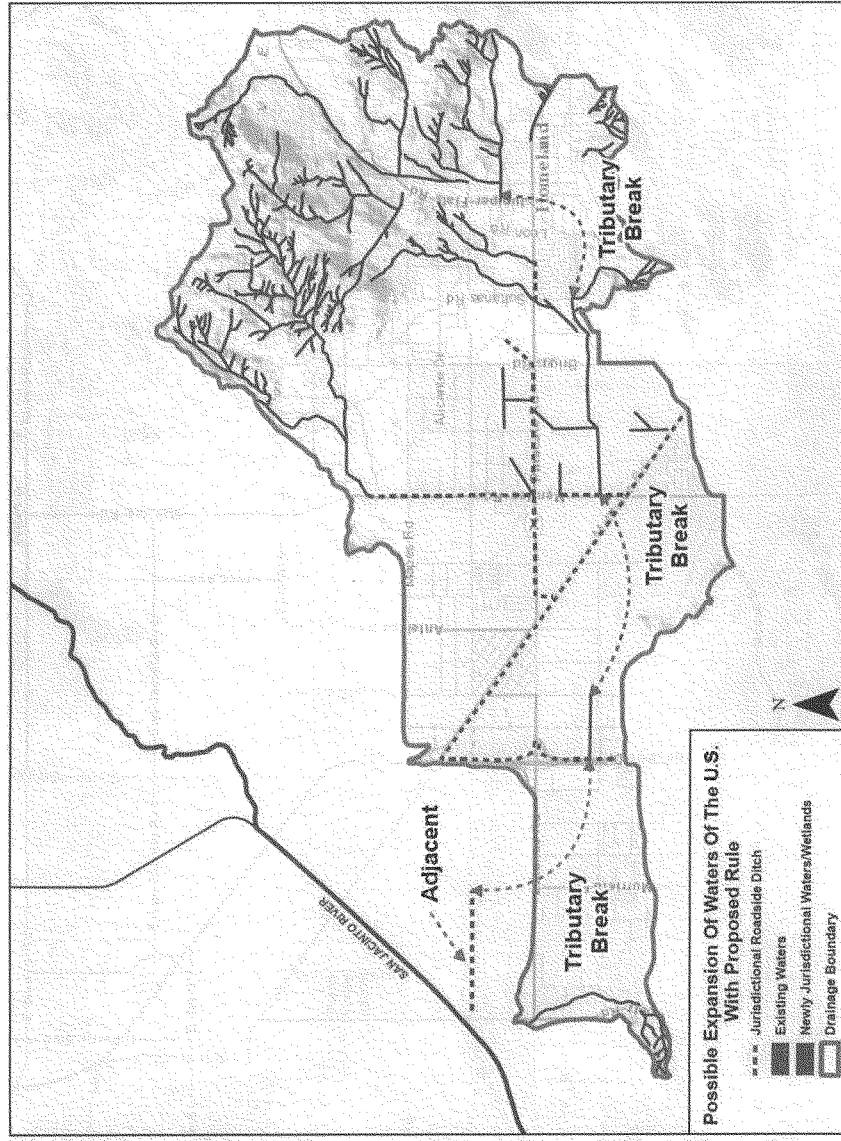
The bottom line is that because of inadequate definitions and unknown impacts, our associations believe that many more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will now be federally regulated. While many of these waters are regulated under current practices, we fear the degree and cost of regulation will increase dramatically if these features are redefined as waters.

I will be happy to answer any questions, sir. Thank you.

[The slides accompanying Warren "Dusty" Williams' opening remarks follow:]









Mr. GIBBS. Mr. Stallman, the floor is yours.

Mr. STALLMAN. Thank you, Mr. Chairman, Ranking Member Bishop for holding today's hearing.

Farm Bureau has carefully analyzed the proposal that the Environmental Protection Agency and the U.S. Army Corps of Engineers published in the Federal Register on April 21. We have concluded that it broadly expands Federal jurisdiction, threatens local land use and zoning authority, and is an end run around Congress and the Supreme Court.

The proposed rule would categorically regulate as navigable waters countless ephemeral Drains, ditches and other features across the country side. Features that are wet only when it Rains and features that may be miles from the nearest truly navigable water. The agencies use scientific sounding terms when referring to these features, terms such as "bed," "bank" and "ordinary high water mark" to give the impression that the proposed rule would apply only to features that are always wet. However, such terms also define a low spot on the land with subtle changes in elevation, land where rain water naturally channels as it flows downhill after rain storms.

EPA calls any such feature a tributary. This land is not even wet most of the time and it is prevalent in farm fields across America. EPA says the rule does not cover ditches. Well, EPA has said a lot of things, and its statement about ditches is simply not true. The proposed rule would categorically regulate all so-called tributaries that ever carry any amount of water that eventually flows to a navigable water. That is a ditch, in my world.

There is an exclusion that is limited to a very narrowly defined and one might even say mythical subset of ditches that are excavated in uplands, i.e., the dry land and drain only uplands, the dry land along their entire reach. Over the last few decades, the Corps has added more and more plants and soils that qualify as indicators so it can classify even more areas as wetlands.

Now, factor in EPA's position that ephemeral Drains, also known as low spots, are also waters and not uplands, and you begin to see that one would be hard pressed to find a ditch that at no point along its entire reach includes waters or wetlands. I have been farming for decades. I have been on thousands of farms all across this country, and I can tell you that ditches are meant to carry water. That is why most ditches will be regulated under this rule.

I should also mention that the agencies proposed to regulate waters and land that are adjacent to any newly defined water of the U.S., and also add a new category of other waters. This could, and probably will, sweep into Federal jurisdiction vast numbers of small isolated wetlands, ponds and similar features, many of which are not waters under any common understanding of that word.

I would like to show a few examples of the types of land features the proposed rule would bring under Federal jurisdiction. Farm Bureau members from all over the country have been sending us photos of low spots, ditches and soils on their land, areas of their land that have the characteristics that would allow EPA and the Corps to assert jurisdiction under this rule.

EPA is deliberately misleading the regulated community about the impacts on land use. If more people knew how regulators could

use the proposed rule to require permits for common activities on dry land or penalize landowners for not getting them, they would be outraged. It is hard to imagine that only 1,300 acres would be affected as EPA claims, when we have more than 106 million acres of wetlands that are currently being used for agricultural purposes, that is defined by USDA.

In fact, Farm Bureau believes that this proposed rule would be the broadest expansion of regulatory control over land use and private property ever attempted by a Federal agency. It takes away land use decisions from State and local governments. It goes against the intent of Congress and the Supreme Court. And it negates your authority as Members of Congress to write the law of the land.

The bottom line for farmers and ranchers is that the proposed rule will make it much more difficult and potentially impossible to farm near these land features. If farmers must request Federal permits to undertake ordinary farming practices on their land, such as pest and weed controls and fertilizer applications, and those permits are far from guaranteed, this is, in effect, a Federal veto over farmers and ranchers use of their land to produce their food, fiber and fuel.

I will conclude by reiterating that the Clean Water Act itself and two Supreme Court decisions have said that there are limits to Federal jurisdiction under the law. Rather than define where there is a significant nexus to navigable waters, the agencies have just hit the easy button and issued blanket determinations that entire categories of water and land are significant.

This results in Federal control over State, local and private land-use decisions, and it is not what lawmakers had in mind when they wrote the Clean Water Act in 1972. I urge Congress not to allow this unlawful expansion of Clean Water Act.

Thank you for your time, and I will be glad to answer any questions you may have.

Mr. GIBBS. Thank you.

Mr. Kelly. Welcome.

Mr. KELLY. Thank you, Chairman Gibbs and Ranking Member Bishop.

I am a home builder and developer from Wilmington, Delaware, and this year I have the privilege and honor of serving as chairman of the board of the National Association of Home Builders. As builders of communities and neighborhoods, NAHB members have a vested interest in preserving and protecting the environment.

Since 1972, the Clean Water Act has played an important role in improving the quality of our water resources and the quality of our lives. Despite these successes, there continues to be frustration and uncertainty over the scope of the act and the appropriate role of the Federal Government in protecting the Nation's waters.

There still is no easy or predictable way to determine if certain types of waters are subject to mandates of the Clean Water Act. Therefore, to better facilitate compliance and improve aquatic environment, the U.S. Corps, and the EPA recently issued a proposed rule intended to alleviate uncertainty and clarify what areas are subject to Federal regulation.

Unfortunately, and as we have heard today, the proposal falls well short of providing the needed predictability and certainty. It

also fails to follow the intent of Congress and Supreme Court precedent. Instead of limiting jurisdiction, the proposal unnecessarily increases Federal power over private property.

Moreover, the proposal rule will provide little, if any, additional protection because most of the newly jurisdictional areas are already regulated at the State or local level. Although the agencies claim the rule does not expand jurisdiction, this is simply not the case. The rule would establish a broader definition of tributaries and include areas not currently federally regulated such as adjacent nonwetlands, as well as low spots within riparian areas and flood plains.

Further, due to ambiguous definitions, the Agency would retain extensive authority to interpret the scope of the act as they see fit. As a businessman, I need to know the rules of the road. I can't play a guessing game of, is it federally jurisdictional? But that is precisely what this proposal would force me to do.

Additionally, despite the fact that the Supreme Court has twice affirmed that the Clean Water Act places limits on Federal authority, the proposed rule would assert jurisdiction over many features that are remote, carry only minor volumes of water or have only theoretical impacts on waters of the United States. In essence, the proposal ignores Supreme Court rulings.

Ultimately, the rule will put more areas under Federal Government jurisdiction which will lead to more litigation and project delay, more landowners needing permits and higher costs of permitting avoidance and mitigation. And these expenses are not insignificant. The cost of obtaining a wetland's permit can range from tens of thousands of dollars to hundreds of thousands of dollars, and that does not include the cost of mitigation or project delay which can be very substantial. As you can understand, the proposed rule will have real impacts on the construction industry and ultimately the cost of developing homes and rental apartments.

To make matters worse, the agencies have not considered the totality of the rule's impact or its unintended consequences. For instance, if the rule is finalized in its current form, builders may, and I underscore "may," may have to obtain permits to perform maintenance on certain standard stormwater management controls because they will now be federally jurisdictional.

Yet, the agencies have all but ignored these realities in their analysis. Equally problematic, the agencies have not completed, as has been said today, the report to serve as the scientific basis for the rule. Although the EPA Administrator recently affirmed the importance of science in guiding the Agency's decisionmaking process, the agencies have pushed ahead with the rule without the necessary scientific data to support their conclusions.

Defining which waters fall under Federal authority is not an easy task. But the Federal Government cannot take the easy way out by illegally asserting jurisdiction over everything. If agencies are interested in developing a meaningful, balanced and supportable role, they must take a more methodical approach, one that is based in fact and common sense and is true to the Clean Water Act's intent and the Supreme Court precedence.

Thank you, Mr. Chairman.

Mr. GIBBS. Thank you.

Mr. Henry, the floor is yours. Welcome.

Mr. HENRY. Thank you, Mr. Chairman, for your time.

My name is Eric Henry. I am from Burlington, North Carolina, where I have lived for 50 years and had a business there for over 30 years. The T-shirt and jeans I wear today are made and grown in North Carolina from a supply chain I helped develop called Cotton of the Carolinas.

I understand the value and importance of clean water to both my business and my community, and I hope you will recognize by protecting the resources that are invaluable to a business like mine. I would also like to add, I think you would get brownie points today by saying that you are connected to a farm. My wife and I moved to a farm 3 years ago, so we understand the value of clean water.

Burlington, where I live, used to be a very large textile town, home to many companies like Burlington Industry which was founded in 1923, one of the largest textile companies in our country. I remember growing up, there was a small stream across from where I live called Willowbrook Creek, where I lived for over 26 years before I finally moved out, or my parents kicked me out.

And I remember going across that stream and seeing blue, red, green, dead fish, dead crawfish, times that it would smell and this was pollution that was coming from the textile mills in our community. That got polluted to the point where it was like a toilet bowl that our community could drop their commercial and residential waste into.

Today the Haw River, which is a critical part of a main tributary that comes through our county, is part of the rebuilding of Alamance County. Old mill communities like Saxapahaw and Glencoe, communities that had been dying out, are now becoming sought-out places to live, work and play. Much of this is due to EPA's clean water regulations. As a small business owner who started business over 30 years ago while attending North Carolina State University, I witnessed firsthand the positive change that comes from bringing clean water back to our community.

My T-shirt and my jeans that I wear today, reflect my business philosophy of a triple bottom line: Of people, planet, profit. This is particular sure of Cotton of Carolinas. We go dirt-to-shirt covering every step of the production process from the farm to the factory while supporting 500 North Carolina jobs in a completely transparent supply chain. You see the product I am wearing and get the benefit of wearing the product today instead of the high-priced suits most of you have to wear today.

As a business owner with the daily focus of meeting payroll and growing sales, I appreciate the value that my Government partner brings to the table, the long-term value of clean water and clean air. I believe we have an obligation not just to protect the water for our communities we live in today but ensure that for future generations that we have access to that clean water.

If protecting future generations truly matters to you, this is how we can show it. This is not a unique perspective among business owners. As part of the American Sustainable Business Council and the polling we have done, 92 percent of small business owners support the idea that there should be regulations to protect air and water from pollution and toxic chemicals, and I would like to point

out that 47 percent of that sample group were self-identified as Republicans.

Clear national water protections are critical to making the waterways safe for families to swim, fish from and depend on for drinking water supply. They will ensure that the playing field stays level and that businesses like mine will be playing by the same rules as everyone else, that are fair and simple.

Some people today only see the higher costs of cleaner water and the impact to their bottom line. They missed the long-term view. What happens when the water is polluted? You now have to look at the impact of the Elk River spill in West Virginia, and the concerns that that spill could have spread downriver into Kentucky. You only need to look at the recent spill in my State, downriver where Duke power and the coal ash fill, tens of thousands of coal ash fills, were discharged into the Dan River.

The companies responsible for those spills don't benefit from them. The Dan River spill is costing Duke Energy millions of dollars, and the company responsible for the Elk River spill, Freedom Industries, filed for bankruptcies. Companies like mine, which rely on a consistent source of clean water, surely don't benefit. The people in these communities, the ones who can't shower, bathe or wash their clothes, they don't benefit.

Our economy doesn't benefit. The Elk River spill cost West Virginia's economy \$19 million a day, according to research at Marshall University. By contrast, the clean water rules you are discussing today would have between \$388 million and \$514 million in annual benefits compared to the \$162 million to \$270 million in costs. There is a strong economic cost for regulations, not against them.

We need to be the world leader in setting the bar for a better world, not just one with a cheaper and more polluted future. That is why I am asking for you to support EPA's move to protect our clean waters. The people you represent and the companies we rely on for jobs and economic growth will thank you. Thank you for your time.

Mr. GIBBS. Thank you.

Thank you all for coming in.

My first question to anybody who wants to answer it: I am really concerned, I believe when the Clean Water Act was passed in 1972, it was set up to be a partnership between the Federal Government and the State governments and I think we have come a long way, especially in point-source pollution and even nonpoint now to protect and enhance our environment and our water quality.

And I am concerned that this proposed rule has potential to erode that State-Federal partnership, because, first of all, I think we heard today that the State EPAs haven't been involved or consulted in the proposal or the drafting of the rule and that doesn't sound like too much of a partnership to me.

Does anybody want to comment about the State's rights of this, about how you think the Clean Water Act has been functioning and how it can function even better if the State's involvement is a partnership? Because I would argue, Mr. Pifher, when you talk about the differences out West, a one-size-fits-all policy in Washington, DC, to me, is a problem.

We have an umbrella here but what happens if the States don't have that, are able to have that input to have that enforcement when we have issues that come up and step in? What is the long-term implications if this proposed rule goes through as it is drafted right now to that partnership?

Mr. PIFHER. Well, if I could start. I think one of the implications is that we won't have the degree of flexibility that is necessary to implement it on a more regional basis, if you will, based on different hydrologic and geologic and climatic conditions that we need to be aware of. In addition, we have different water rights systems. We have a prior appropriations system in the West as compared to the riparian system in other portions of the country and that influences, I guess, the way we address our waters and deal with issues surrounding both discharge of pollutants and what is jurisdictional.

And that partnership does seem to be eroding and we need to find a better balance such that everything doesn't need to be Federalized in order to be—we have to recognize everything doesn't need to be Federalized in order to be protected; that State and local governments, both of which implement the Clean Water Act and the Safe Drinking Water Act, can do a very good job based on the site-specific conditions that they are faced with and the cost constraints they are faced with and we have to trust them to do that job.

Mr. GIBBS. Mr. Strong, if you would.

Mr. STRONG. Yes. No, I would just absolutely agree with what Mr. Pifher said and add that, in fact, as an example, a lot of the success stories in cleaning up water quality in the United States, some of which are featured on EPA's Web site, include projects that were done in the State of Oklahoma on a voluntary basis with our State agencies working in partnership with our landowners and producers to accomplish those great successes in cleaning up water quality in the State of Oklahoma without Clean Water Act regulatory burdens being placed on—

Mr. GIBBS. I think you touched on a very important point I want to make, so anybody who is tuning into this can understand this. I said to Assistant Secretary Darcy in a budget hearing about a month ago that this proposed rule they are putting out, I think about the average citizen out there who has in their mind what navigable means, what I think navigable means, too, but they are implying then that waters that aren't navigable aren't being regulated.

And we all know this isn't the 1960s anymore, and obviously, there have been instances, I know Mr. Henry cited a couple. We have had our challenges and there has to be enforcement that has to happen, but the States are regulating the local governments for that matter, and so all waters are being regulated. My concern is, this rule erodes that partnership and maybe it doesn't enhance or protect the environment or water quality but actually goes backwards. So I am very, very concerned about that.

Mr. Stallman, on the agricultural side, we had the Secretary of Agriculture, Tom Vilsack, testify before the Ag Committee about 2 months ago, and he said normal farming practices are exempt, but then he had to list the 56 that they specifically say that are exempt. Now, I think he was implying, I didn't get a chance to follow



up, that agriculture under those 56, if they are working with NRCS, are exempt for 404 permits.

But I am not so sure. I would like to see your viewpoint on this is, all normal farming practices that the Farm Bureau sees are exempt from 401 and other permitting under the Clean Water Act?

Mr. STALLMAN. I appreciate the opportunity to comment on that, including probably some of Mr. Perciasepe's assertions about the exemptions for farming. The interpretive rule, you have to look behind the curtain and understand what the law is and what the rule actually says.

First, those normal farming and ranching exemptions only apply to section 404, not section 402 which is the NPDES permitting, which is now required for point sources which is a nozzle that applies an agricultural chemical. That is number one.

Number two, it only applies to farming and ranching that has been ongoing since 1977. That was the assertion of the Government in a court case in 1987, *U.S. versus Cumberland Farms of Connecticut*, and that has been the position of the EPA and the Army Corps of Engineers that the normal farming exemption does not apply for those that have not been continuously in operation since that time. That would be a lot of older farmers. I started in 1974.

The other is, is that by requiring compliance within our CS standards, now remember these have been voluntary incentive-based programs in the past, you are actually morphing them into a regulatory program and using those standards as part of a permission process to conduct normal farming and ranching activities.

Two other points: I think, I don't remember if it was Assistant Secretary Darcy or Mr. Perciasepe indicated that those 56 practices were the ones that would help improve water quality. Well, let me tell you what was left out, the practices that were left out that do contribute to water quality in terms of farming: Conservation crop rotation was left out, contour farming, cover crops, nutrient management, terracing and the massive use of no till and minimum till in agriculture today, 96.5 million acres for no till cropland, conservation tillage excluding no till, 76 million acres, that was excluded from these exemptions and I think most farmers today would concur that those are normal farming and ranching practices.

Assistant Secretary Darcy also seemed to indicate you would not need a permit for spraying chemicals on farmland. Well, that is true as long as none of them are identified as waters of the U.S., and that does not mean spraying it in the water. That means the ditch that would be identified as a water of the U.S. that a molecule of chemical could get on. You still need to have a permit.

Mr. GIBBS. We will get back to the ditches, but my time is up right now.

I want to turn it over to Mr. Bishop for any questions he may have.

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

I thank the panel for their testimony. I also thank you for your patience. It has been a long morning.

Mr. Henry, let me first thank you for pointing out the connection between an environment that is maintained at a reasonable, if not the highest possible level in economic growth and economic sta-

bility. I represent the eastern-most 75 or 80 miles of Long Island. The eastern-most part of those 75 or 80 miles has among them the highest property values in the country.

And Mr. Kelly, I will tell you that it has some of the more successful and prosperous builders in the country. And those property values are what they are, and those builders are as successful as they are because of our efforts to protect and preserve the environment, and if the Long Island Sound were not a swimmable or fishable water, or Peconic Bay or Big Fresh Pond or Little Port Pond, we would not have the property values we have.

So I think we all have to agree that we have made great strides with respect to regulating our waters and that in making those strides they have been supportive of economic development as opposed to antithetical to economic development. Having said that, I also think that we ought to, to the greatest extent possible, try to have a fact-based conversation and I think several of your testimony, you each said, many of you said that this regulation is in violation of congressional intent and in violation of, or in antithetical to Supreme Court rulings. That is simply not correct.

In 1972, when the Clean Water Act was debated, it was debated whether or not navigable waters of the United States should be defined as navigable, in fact, and that interpretation was rejected by our predecessors. It was also rejected by the Supreme Court in 1975. In Justice Scalia's opinion in *Rapanos*, he said, and this is in his opinion, I am now quoting, "The Court has twice stated that the meaning of navigable waters in the act is broader than the traditional understanding of the term and includes something more than traditionally navigable waters." This is Justice Scalia.

Justice Kennedy came up with a significant nexus test and then directed, along with Justice Roberts, the two agencies involved to try to define waters that would meet those tests and as Mr. Kelly said, quite correctly, this ain't easy. This is really, really hard, and they are trying to do that, and we now have a process in which stakeholders can influence the outcome of that.

But here is something that I would hope you can guide me or help me with. If this rulemaking fails or if this rulemaking is withdrawn or if we pass the Energy and Water Appropriations Bill and language that is currently in that bill survives into law, that language says that Federal funds may not be used to promulgate this rule, we are left with the 2008 guidance.

Now, I am going to read from something that the American Farm Bureau and the National Association of Home Builders submitted in 2008, and it says, and I am quoting, "The guidance is causing confusion and added delays in an already burdened and strained permit decisionmaking process which ultimately will result and is resulting in increased delays and cost to the public at large."

So my question is, A, does that represent the current position of the authors of that letter; and B, is it your position that the 2008 guidance is preferable with its Flaws and imperfections, as outlined by your two organizations, is it preferable to the regulation that is currently being proposed?

Mr. STALLMAN. The first answer to that, Mr. Bishop, is that we did ask for rulemaking because a guidance is not a rulemaking. A guidance does not allow for public notice and comment.

Mr. BISHOP. And you asked and they are delivering. They don't like the rulemaking but they are, in fact, proposing a rulemaking, right?

Mr. STALLMAN. They are proposing a rule.

Mr. BISHOP. Yeah.

Mr. STALLMAN. Now, getting back to the Supreme Court decisions, the one thing that has not been mentioned here this morning is that Justice Kennedy also wrote that remote and insubstantial waters that eventually may flow into navigable waters would not qualify under his definition of significant nexus.

These proposed rules, definitions and descriptions go far beyond what he says would not qualify. So I am not sure. I think there is a difference of opinion here about whether this proposal is within the boundaries, as you call it, of the Supreme Court cases.

Mr. BISHOP. OK. But if I may, does the statement that I just read, does that represent the current position of the home builders? So my question to be specific, is the 2008 position of the home builders also the 2014 position of the home builders? I am sorry, Farm Bureau.

Mr. STALLMAN. I am the Farm Bureau.

Mr. BISHOP. Farm Bureau. I do know the difference, by the way.

Mr. STALLMAN. We do want a rule that restricts the scope of authority under EPA, based on the Supreme Court rulings that both have said that their scope is not unlimited.

Mr. BISHOP. OK. I want to let Mr. Kelly answer and I don't want to be argumentative, but I want to come back to a point. Mr. Kelly.

Mr. KELLY. The 2008 rule is clearly preferable to the proposed rule, and given the choice, we would live with the 2008 rule.

Mr. BISHOP. With all the imperfections?

Mr. KELLY. With all its imperfections, and we have repeatedly pointed those out, and we have repeatedly asked for a new rule. But this rule is simply unacceptable to us.

Going back to the question you touched on a little while ago about the permitting process. The last time we had figures, when we studied it, an individual permit took about 788 days to acquire and cost north of \$280,000 without the mitigation that might have gone along with it.

A streamline permit, based on again, the most recent information we have, and this goes back more than a decade, cost \$28,000 and took 313 days. This just creates massive costs and uncertainty for homebuilders.

I would also suggest that the current proposed rule may have the effect of creating a pall on land development in this country, and one of the greatest challenges facing the homebuilding industry now is the availability of buildable, developable land. Because, as you can understand, nothing was taken through the pipeline from 2007 to recently. Nothing was brought through.

So our members continue to tell us that they cannot find platted approved land to develop on with this rule in place, for the segment of our industry that specializes in platting and planning land for merchant builders to acquire. They don't know what the rules of the game are at this point in time, and why would they spend hundreds of thousands of dollars on engineering when they have no

idea whether their piece of land will be subject to these very vague and ambiguous rules?

Mr. BISHOP. My time has expired. Thank you very much.

Mr. GIBBS. They are going to call votes shortly, and I will announce when that happens.

Mr. Mullin. They haven't called yet. Go ahead.

Mr. MULLIN. Oh, I was going to say, not that I understand the bells around here nor does anybody else, but I was getting confused there. You have the TV on?

Once again, I appreciate the panel for being here and Mr. Kelly, ironically enough, I have a couple of property companies. We are in the process right now of trying to get about 20 acres platted, and it is absolutely absurd what we are having to go through and the last time I had to go through, and the last time I actually purchased nonplatted land, which is very scary, was 2007, I believe and back then it was tough. Now, I don't even know if—it is a chance to take, and so I do understand with what you are saying.

I want to spend a little time with Mr. Strong. I think that is the first time I have ever called you that. It is always been J.D., but, hey, official titles, right? I want to spend a little bit more time with you on understanding a couple of things.

One, I understand that you have been told, that your agency has been told that the rulemaking is going to be handled on a case-by-case situation; is that accurate in saying that?

Mr. STRONG. Yes, that is accurate. When we, of course, asked some of our regional district offices what the impact of this new rule would be on jurisdiction within our State, we were told essentially that those types of decisions will continue to be made on a case-by-case basis, which sort of begs the question whether or not we are clarifying anything for everybody if every decision has to be made on a case-by-case basis.

Mr. MULLIN. So if you are already being told that, then, the uncertainty that runs just in the State, not to mention by the time it trickles down to the farmers and to the homebuilders and to the other industries that depend on this, but when you are getting asked the questions, are you able to even make a decision now?

Mr. STRONG. No, we are not. We absolutely are not.

And you sure can't tell, I think, from reading the rule. Certainly, the additional questions and answers from this hearing and followup calls that we are having now with the agencies are helping to clarify things. But I think, as Mr. Pifher said, what is important is what is in writing, and so even though we may get some clarification outside of the language of the rule through these types of forums, we need clarification in writing to give folks the finality that they need to be able to plan their businesses, their developments, and, as a State, to be able to implement these important programs to protect water quality in our States.

Mr. MULLIN. So once it is clarified, how much time are you going to need to be able to get your agency spun up to be able to comply with the new rule that may or may not exist until you get a case-by-case clarification on it?

Mr. STRONG. Well, I think if at the end of the day we got enough clarification in the rule that would support the statements made in the earlier panel that this really isn't any expansion of jurisdiction,

then we would expect that it would have really sort of no additional impact on the burden on the States to implement the law.

So really, it all sort of depends on what that clarification looks like. If it does, in fact, change the scope of jurisdiction in any way then it would take us more than 90 days, I can guarantee you that, to figure out what the impact would be on the States and our programs to implement these Clean Water Act programs as well as on our regulated communities.

Mr. MULLIN. Have you guys already identified some, I guess, what is the word I am looking for here? Have you guys identified areas to where the State and the Federal agencies are conflicting with each other?

Mr. STRONG. Well, I think, certainly, you could easily read the rule as it stands right now and identify areas where what we thought before was totally subject to the States jurisdiction could now be under the Federal jurisdiction which essentially removes the flexibility that was discussed earlier that is necessary for us to implement these programs in our States, in our various States with our very unique hydrology that is vastly different from State to State.

Mr. MULLIN. I appreciate your time being here, J.D. It is always a pleasure to visit with you.

Mr. Stallman, I want to go back to you real quick. With the Farm Bureau, the point I made earlier about existing farms, existing permits, have you guys had any clarification on this at all such as what they are referring to?

Mr. STALLMAN. No. Not as was referred to by Mr. Perciasepe and Assistant Secretary Darcy. What we do know is it has been the position of the Corps and the EPA, based on the court case in 1987—

Mr. MULLIN. Right.

Mr. STALLMAN [continuing]. *U.S. versus Cumberland Farms of Connecticut*, that unless from 1977 on you had maintained a continuous farming operation for which you had an exemption there under the law that was passed by Congress—unless you maintained that continuously, you didn't qualify. That means there are no young farmers and ranchers that will be exempt.

Mr. MULLIN. So—and, if you could, just a couple more seconds here.

So the heartbeat of this country being the farming community, in my opinion, is that—is threatened here by seeing permits that are required to do some of the farming that we have to be less available or even nonexistent.

Do you—are you hearing that from your—from your members or is that kind of the assessment you guys are taking on your own?

Mr. STALLMAN. More and more, as the information of the rule has gone out to our members and they understand what—the potential impact it could have on their farming operations, we are hearing that it will just not work.

This law was never designed to regulate on a permitting basis agriculture. Our land is—our property is measured in acres, not in square feet.

Mr. MULLIN. Yes.

Mr. STALLMAN. And the timelines involved in agriculture, the integration of what we do with whatever Mother Nature gives us, you know, we don't have time to get the permits as the timelines are indicated it takes to get one, much less the cost of getting one.

I will be honest with you. If my farm is determined to need a permit to conduct my normal farming operations that have been conducted for over 100 years there, there is not enough profit margin for the cost of permits for me to make an economic decision to seek a permit and continue farming.

Mr. MULLIN. Thank you.

Thank you, panel, for being here.

Thank you, Chairman.

Mr. GIBBS. We are still good on votes. We have 8 minutes; 410 people haven't voted yet. So I want to ask another question.

There is a lot of concern—it is really a concern to me about this ditch issue and the tributaries. I mean, we had the first panel, and it was unclear.

And when you read through the rule and the pre-am and some of the things of the rule, I think you can conclude that—at least I do—ditches can be tributaries and tributaries are not subject to significant nexus test. Tributary ditches, then, are categorically included, and significant nexus does not apply under the rule.

Does anyone want to comment on that? Do you agree? The EPA said today that tributaries are included under the rule and that ditches can be included and then don't have to meet a significant nexus test.

Am I interpreting that right? Anybody want—Bob, do you want to—

Mr. STALLMAN. We agree. These are categorical definitions. And regardless of the assurances and intent expressed by Government officials, the only thing that will make a difference in court and litigation is what do the words of the rule say.

We have seen EPA and the Corps throughout 30-plus years of litigation seek the very strictest definition that gives them the broadest scope of authority.

And so, when you say bed, bank and ordinary high water mark, I can show you several miles of ditches on my farm that have those characteristics and, you know, then they become a regulated water, and they are not today.

Mr. GIBBS. Yeah.

So when I heard the previous panel kind of answer those questions we asked about ditches, they kind of inferred that most ditches would not be included, and I think they even inferred that local governments' road ditches would not be a problem. It would not take a permit if they were going to do any cleaning of the ditches, because I specifically asked that question.

So you are shaking your head, Mr. Williams or Mr. Pifher.

Mr. WILLIAMS. Well, just real quickly, I heard from the previous panel that roadside ditches generally drain uplands and don't go anywhere.

In my county, when we collect the water, we have to take it to an outlet, and that is generally a tributary or some adequate outlet. That, by definition—is their definition, is a roadside ditch.

Mr. GIBBS. So the followup question, then, if it is ruled—if they rule it or it happens through litigation and you have to get a 404 permit to clean your roadside ditches, then you, as a local government entity, are—I would think would be liable for not keeping the integrity of the ditch and—but maybe you couldn't get the permit fast enough.

Can you see a scenario like that occurring?

Mr. WILLIAMS. Very much so. It is time and money. Both of those will be severely impacted. I agree with you.

Mr. PIFHER. I would just add that most ditches, and certainly in Colorado and most areas in the West, at least the arid areas, take water off traditional navigable waters, I mean, by virtue of their water rights decrees.

And then oftentimes they have an obligation even to return the water that they don't consumptively beneficially use to a water of the United States; and, so, therefore, they are jurisdictional.

And most of them have historically been jurisdictional. So, yeah, you can't generalize and say most ditches are excluded.

Mr. GIBBS. Well, me, as an elected representative, I interpret this as either their intent is a good intent or they have a hidden agenda and are not being truthful. I just don't know.

I am really, really concerned about this, because you guys made some good comments and good statements here and some of their statements in the previous panel were, "I don't think so," "I am not sure."

The vagueness and the ambiguousness of the whole issue is really concerning and I think it does open it up to litigation at the very least.

Would everybody concur, that we have really got an issue here in the future if it goes through this way?

Mr. HENRY. Mr. Chairman, can I make a comment, please?

Mr. GIBBS. Yes.

Mr. HENRY. You know, we are talking about ditches. We are talking about cost. We are talking about the lifeblood of societies, the water that goes through that. What I look to the Federal Government for is that long-term vision of the protection of that water.

And I think, if you step away and look at the global implications of water and society, we have got some serious problems ahead of us. So we really have to look—you know, step back.

I mean, this is a very serious problem we are dealing with, and I think we are just—we are getting into the trenches and we are missing the big picture. I mean, you know, destroying our water quality affects the quality of our life. Look what is happening to China right now.

Mr. GIBBS. There are no regulations over there. That is part of the issue. But I would think that—go ahead, Mr. Stallman. You can comment.

Mr. STALLMAN. Well, let me respond to that. Yeah. You know, that is the big-picture stuff, but let me talk about how it works on the farm.

Prescribed grazing is one of the so-called exempt practices for those few farmers that will qualify for it. So the implication is, if you do not qualify for it, then prescribed grazing is not an exempt normal farming and ranching activity.

And, therefore, if you are doing prescribed grazing in a ditch—and you have to understand my country is kind of flat. We have a lot of ditches where we let cows graze to keep them cleaned out where they actually will carry water.

If that requires me to fence off those ditches to keep them from grazing or to get a permit to allow those cows to graze there, you know, once again, I will shut it down because the cost—the economics will not work.

So that is where it gets down to the farm.

Mr. GIBBS. Yeah.

And, Mr. Henry, I don't think anybody on this panel or anybody on this dais doesn't want to do everything they can to make sure that our water quality is improved and we enhance it and protect it, but we can also regulate ourselves to death and actually go backwards.

And the one example I have talked about previous to the hearings with the EPA is my personal example as being a former hog farmer.

The years the hog market went south, we tried to stay in business, pay the employees, pay the bills, and the years we could make some money, then we looked at doing things on the farm to improve grass waterways and do things.

But if we put so much burden and regulation on people like—farmers like Mr. Stallman, the environment is going to suffer. So we have to be reasonable about this. We should never forget that the Clean Water Act was set up to be a partnership between the States and the Feds.

And this concern I have with this rule moving forward is that it is eroding that partnership and we will have degradation of our water quality in the United States and, also, our economy and jobs.

So I need to conclude because we have to go vote. I don't think there is any reason to come back. I think we have pretty much got the message and everybody hit their point.

And I really do want to thank you for coming in and being here for several hours.

So this concludes the hearing. Thank you very much.

[Whereupon, at 1:26 p.m. the subcommittee was adjourned.]



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**Congressman Sam Graves**  
**Opening Statement**

**Committee on Transportation and Infrastructure**  
**Subcommittee on Water Resources and Environment**

***“Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule”***

**June 11, 2014**

Mr. Chairman,

My home state of Missouri is one of the largest producing agriculture states in the nation. North Missouri, which I represent, is made up of 36 counties stretching from the Missouri River to the Mississippi River. The people I represent rely on Missouri farming to earn a living, and it is these activities which support our local and regional economies in the heartland.

In my four years as the Chairman of the House Small Business Committee, I have held more than 20 hearings examining the effects of regulations on small businesses and the economy. However, few regulations are as expansive and as potentially damaging to small businesses and farmers as the EPA’s recently proposed “Waters of the United States” rule.

As currently drafted, this rule would extend the regulatory reach of the Clean Water Act to thousands of small streams, ditches, ponds, and other isolated waters, some of which may contain little or no water.

The EPA claims that the proposed rule will increase clarity as to which waters are subject to Clean Water Act jurisdiction. However, this proposed rule creates more confusion - not less. Terms like “neighboring,” “floodplain,” “riparian area,” “tributary” and “significant nexus” are vaguely defined and fail to clarify where EPA jurisdiction will end.

What I see is the EPA threatening to drown small businesses, home builders, farmers, and families in unnecessary regulatory burdens, higher costs, and bigger headaches.

One of my constituents, Steve Hall of Platte County, Missouri, is trying to build a small pond on his property where no water has existed before. According to Mr. Hall, a dry ditch also on his property would become a “navigable” waterway that is critical to the local ecosystem under EPA rules. If Mr. Hall is ever going to see his pond, he has been told that it is going to cost him six-figures in permitting fees.

Just a couple weeks ago, Tom Woods, a constituent from Blue Springs, Missouri and Owner of Woods Custom Homes, testified before the Small Business Committee about how the EPA's rule is going to hurt home builders. Mr. Woods, who is the former mayor of Blue Springs, fears the significant impact the rule will have on small businesses nationwide, an important notion that both the EPA and the Army Corps chooses to ignore.

While this proposed rule clearly has significant consequences for everyday Americans, the EPA and the Army Corps of Engineers failed to assess these impacts. Had the agencies conducted outreach to small businesses and property owners, perhaps they would have realized the dramatic impact of this rule before it was proposed. For that reason, I call on the EPA and Corps to withdraw the rule and conduct the required small business impact analysis and outreach before proceeding.

A handwritten signature in black ink, appearing to read "Van Lu". The signature is stylized with a large, sweeping initial "V" and a long, horizontal stroke extending to the right.

**TESTIMONY OF BOB PERCIASEPE  
DEPUTY ADMINISTRATOR  
U.S. ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT  
UNITED STATES HOUSE OF REPRESENTATIVES**

**June 11, 2014**

Good afternoon Chairman Gibbs, Ranking Member Bishop, and members of the Subcommittee. I am Bob Perciasepe, the Deputy Administrator of the U.S. Environmental Protection Agency. I am pleased to be here today with Assistant Secretary of the Army for Civil Works, Jo-Ellen Darcy, to discuss our agencies' recently proposed rule which would clarify the jurisdictional scope of the Clean Water Act, (CWA) simplifying and improving the process for determining waters that are, and are not, covered by the Act. The agencies' proposed rule was published in the Federal Register on April 21, 2014, and is available to the public now for their review and comment.

I want to begin by emphasizing that we are discussing a proposed rule that we anticipate will receive tens of thousands of public comments. We look forward to addressing these comments when we finalize revisions that further clarify our regulations and make them more effective in implementing the statute, consistent with the law and sound science. Our goal in revising the rule is straightforward: to respond to requests from stakeholders across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. We believe the result of this rulemaking will be to improve the process for making jurisdictional determinations for the CWA by minimizing delays and costs and to improve predictability and consistency for landowners.

The proposed rule preserves all existing agricultural exemptions under the CWA and in addition, we worked closely with our partners at the U.S. Department of Agriculture to promote additional conservation practices that enhance farming and protect water quality through a companion Interpretive Rule that clarifies which practices are exempt from CWA permitting requirements. We are also working with our partners in the states and tribes to assure their voices are effectively represented as we proceed through this rulemaking. The proposed rule continues to respect states' well-defined and long-standing relationships with federal agencies in implementing CWA programs.

We are working closely with our partners at the U.S. Department of Agriculture to reduce regulatory burdens for the nation's farmers, ranchers, and foresters by promoting practices that enhance farming and protect water quality, and by clarifying that these practices are exempt from CWA permitting requirements. We are also working with our partners in the states and tribes to assure their voices are effectively represented as we proceed through this rulemaking. The proposed rule continues to respect states' well-defined and long-standing relationships with federal agencies in implementing CWA programs.

In my testimony today, I plan to highlight the uncertainty and confusion that prompted stakeholders to ask the agencies to develop a proposed rule. I will then describe the primary elements of the proposed rule and how the rule will provide additional clarity regarding waters that are and are not "waters of the United States." I will discuss our agencies' efforts to improve clarity and preserve existing CWA exemptions and exclusions for agriculture, and the agencies' recently released interpretive rule, which clarifies that certain agricultural conservation practices that protect or improve water quality are exempt from CWA Section 404 permitting requirements. Finally, I will describe our work to improve the scientific basis for our decision-making and to gather public input on the proposed rule.

### **The Importance of Clean Water**

The foundation of the agencies' rulemaking efforts to clarify protection under the CWA is the goal of providing clean and safe water to all Americans. Clean water is vital to every single American – from families who rely on affordable, safe, clean waters for their public drinking water supply, and on safe places to swim and healthy fish to eat, to farmers who need abundant and reliable sources of water to grow their crops, to hunters and anglers who depend on healthy waters for recreation and their work, to businesses that need a steady supply of clean water to make their products. The range of local and large-scale businesses that we depend on—and who, in turn, depend on a reliable supply of clean water—include tourism, health care, farming, fishing, food and beverage production, manufacturing, transportation and energy generation.

In addition to providing habitat, rivers, lakes, ponds and wetlands supply and cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits. Consider these facts about the value of clean water to Americans:

- Manufacturing companies use nine trillion gallons of fresh water every year.
- 31 percent of all water withdrawals in the U.S. are for irrigation, highlighting the extent to which the nation's farmers depend on clean water.
- About 40 million anglers spend \$45 billion annually to fish in U.S. waters.
- The beverage industry uses more than 12 billion gallons of water annually to produce products valued at \$58 billion.
- About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but are critically important to the health of downstream waters.

- Approximately 117 million people -- one in three Americans -- get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams.<sup>1</sup>

#### **Legal Background and Recent Confusion Regarding CWA Jurisdiction**

In recent years, several Supreme Court decisions have raised questions regarding the geographic scope of the Act. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Supreme Court in a 5-4 opinion held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA. Five years after this case, the Court again addressed the Clean Water Act term “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006), which involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. While all Members of the Court agreed that the term “waters of the United States” encompasses waters, including wetlands, beyond those that are navigable in the traditional sense, the case yielded no majority opinion. Neither the plurality nor the concurring opinion in *Rapanos* invalidated any of the agencies’ existing regulations defining “waters of the United States,” but these opinions did raise questions concerning how to determine which waters were jurisdictional pursuant to their regulations.<sup>2</sup>

Following these decisions, there has been a lack of clarity regarding CWA jurisdiction over some streams and wetlands. For nearly a decade, members of Congress, state and local officials, industry, agriculture, environmental groups, and the public have asked our agencies for a rulemaking to provide

<sup>1</sup> A county-level map depicting the percent of the population receiving drinking water directly or indirectly from streams that are seasonal, rain-dependent or headwaters is available at <http://water.epa.gov/type/rsi/drinkingwatermap.cfm>.

<sup>2</sup> Additional background information on these cases is included in the preamble to the agencies’ proposed rule, as well as a legal appendix to the proposed rule, which are available at <http://www2.epa.gov/sites/production/files/2014-04/documents/fr-2014-07142.pdf>.

clarity.<sup>3</sup> This complexity has made enforcement of the law difficult in many cases, and has increased the amount of time it takes to make jurisdictional determinations under the CWA.

In response to these implementation challenges and significant stakeholder requests for rulemaking, the agencies began developing a proposed rule. To help inform the proposed rule, the agencies began reviewing available peer-reviewed science regarding the connectivity or isolation of aquatic resources and effects on downstream waters, a topic I will discuss in more detail later. Consistent with EPA and U.S. Army Corps of Engineers (“the Corps”) policy to promote communications among the agencies, states and local governments, and in recognition of the vital role states play in implementation of the CWA, the EPA undertook federalism consultation for this effort. The EPA held a series of meetings and outreach calls with state and local governments and their representatives soliciting input on a potential rule. During this process, state and local governments identified a number of issues, which the agencies have considered in developing the proposed rule.

#### **Key Elements of the Proposed Rule**

The agencies’ proposed rule helps to protect the nation’s waters, consistent with the law and currently available scientific and technical expertise. The rule provides continuity with the existing regulations, where possible, which will reduce confusion and will reduce transaction costs for the regulated community and the agencies. Toward that same end, the agencies also proposed, where consistent with the law and their scientific and technical expertise, categories of waters that are and are not jurisdictional, as well as categories of waters and wetlands that require a case-specific evaluation to determine whether they are protected by the CWA.

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<sup>3</sup> A list of individuals and organizations who requested clarification of Clean Water “Waters of the United States” by rulemaking is available at [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_request\\_rulemaking.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf).

Specifically, the proposed rule clarifies that, under the CWA:

- All tributaries to the nation’s traditional navigable waters, interstate waters, the territorial seas, or impoundments of these waters would be protected because they are critical to the chemical, physical, and biological integrity of these waters.
- Waters, including wetlands, that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters would be protected because such waters possess a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.
- Some waters would remain subject to a case-specific evaluation of whether or not such waters meet the legal standards for federal jurisdiction established by the Supreme Court.
- Certain waters are excluded, as described below.

The proposed rule also discusses several regulatory alternatives that would reduce or eliminate the need for case-specific evaluations, to provide even greater clarity for the public. The proposed rule retains the agencies’ longstanding exclusions for waste treatment systems and prior converted cropland, from the definition of “waters of the United States.” Moreover, the agencies also propose to clarify for the first time, by rule, that certain features and types of waters are not considered “waters of the United States.” These include features such as certain intermittent and ephemeral ditches; artificially irrigated areas that would revert to uplands if irrigation were to cease; artificial lakes and ponds used for purposes such as stock watering, irrigation, settling basins, or rice growing; and groundwater, including groundwater drained through subsurface drainage systems.

The agencies’ proposed rule continues to reflect the states’ primary and exclusive authority over water allocation and water rights administration, as well as state and federal co-regulation of water quality.

The agencies worked hard to assure that the proposed rule reflects these fundamental CWA principles,



which we share with our state partners. Now that the agencies have released a proposed rule, we look forward to additional opportunities for close collaboration with state and local governments to review the comments we received during our voluntary federalism consultation and to discuss how the proposed rule addresses those comments. The agencies will continue to take input from state and local governments as the rulemaking process continues.

Concurrent with the release of the proposed rule, the agencies published an economic analysis of the benefits and costs of the proposed rule based on implementation of all parts of the CWA. We concluded that the proposed rule would provide an estimated \$388 million to \$514 million annually of benefits to the public, including reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. The public benefits significantly outweigh the costs of about \$162 million to \$278 million per year for mitigating impacts to streams and wetlands, and taking steps to reduce pollution to waterways.<sup>4</sup>

#### **Benefits of the Proposed Rule for Agriculture**

For the past several years, the EPA and the Corps have listened to input from the agriculture community while developing the proposed rule. Using the input from those discussions, the EPA and the Corps then worked with the U.S. Department of Agriculture to ensure that concerns raised by farmers and the agricultural industry were addressed in the proposed rule. The proposed rule does not change, in any way, existing CWA exemptions from permitting for discharges of dredged and/or fill material into waters of the U.S. associated with agriculture, ranching, and forestry activities, including the exemptions for:

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<sup>4</sup> This analysis is available at [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_economic\\_analysis.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf).

- Normal farming, silviculture, and ranching practices, which include plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products;
- Upland soil and water conservation practices;
- Agricultural stormwater discharges;
- Return flows from irrigated agriculture;
- Construction and maintenance of farm or stock ponds or irrigation ditches;
- Maintenance of drainage ditches; and
- Construction or maintenance of farm, forest, and temporary mining roads, where constructed and maintained in accordance with best management practices.

I want to emphasize that farmers, ranchers, and foresters who are conducting these activities covered by the exemptions (activities such as plowing, tilling, planting, harvesting, building and maintaining roads, ponds and ditches, and many other activities in waters on their lands), can continue these practices after the new rule without the need for approval from the Federal government. Additionally, the proposed rule expressly excludes groundwater from jurisdiction, including groundwater in subsurface tile drains. It reduces jurisdiction over ditches, and maintains the existing exclusions for prior converted cropland and waste treatment systems, including treatment ponds or lagoons.

In addition, in coordination with USDA's Natural Resources Conservation Service (NRCS), the EPA and the Corps clarified that certain additional NRCS conservation practices occurring in "Waters of the U.S.", identified by the USDA, the EPA, and the Corps, and implemented in accordance with published USDA conservation practice standards, are exempted from CWA Section 404 permitting as normal farming activities. The agencies did so through an interpretive rule that was published at the same time as the proposed rule and that went into effect on April 3, 2014. Moreover, through a memorandum of understanding, EPA, the Corps, and USDA now have a collaborative process for working together to

implement these exemptions. It will facilitate the periodical identification, review, and update of the list of NRCS conservation practice standards and activities that would qualify under the exemption.<sup>5</sup>

#### **Science and Public Input in the Agencies' Rulemaking Efforts**

The agencies' rulemaking efforts have been informed by the latest peer-reviewed science regarding the connections between aquatic resources and effects on downstream waters. In preparation for the proposed rule, the EPA reviewed and considered more than 1,000 peer-reviewed scientific papers and other data, and the EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of tributaries and wetlands on downstream waters. This draft report, "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*," informed the agencies' development of the proposed rule.<sup>6</sup> Following an earlier external peer review, the Report is currently undergoing peer review led by EPA's Science Advisory Board (SAB). We expect the SAB review to be completed later in 2014. The rule will not be finalized until the EPA develops a final scientific report that considers the results of the SAB review, which will help inform the final rule.

#### **Next Steps**

The agencies published the proposed rule in the Federal Register on April 21, and the public comment period on the proposed rule will be open for 182 days, closing on October 20. During this period, the agencies are launching a robust outreach effort, holding discussions around the country and gathering input from states, local governments, and other stakeholders needed to shape a final rule. We welcome comments from all stakeholders on the agencies' proposed rule. At the conclusion of the rulemaking

<sup>5</sup> The agencies' interpretive rule and memorandum of understanding are available at <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

<sup>6</sup> The draft report is available at [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr\\_activites/Watershed%20Connectivity%20Report](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report).

process, the agencies will review the entirety of the completed administrative record, including public comments and the EPA's final science synthesis report. The comments will be summarized and made publicly available. The agencies will make appropriate revisions to the rule in response to public comments and to recommendations from the Science Advisory Board's review of the scientific report.

**Conclusion**

Thank you Chairman Gibbs, Ranking Member Bishop, and members of the Subcommittee, for this opportunity to discuss the agencies' efforts to provide additional clarity regarding the geographic scope of the Clean Water Act. Assistant Secretary Darcy and I look forward to robust public input on the agencies' proposed rule to ensure that it achieves the goal of providing greater predictability, consistency, and clarity in the process of identifying waters that are, and are not, covered by the CWA.

Thank you again, and I will be happy to answer your questions.

**Questions for the Record for the Honorable Bob Perciasepe  
House Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment  
June 11, 2014**

**Questions from the Honorable Tim Bishop (D-NY)**

**1. Does anything in the proposed rule, or the accompanying documents, limit the existing statutory or regulatory exemptions that apply today for agricultural or ranching related activities, such as those related to normal farming activities or those related to agricultural return flows?**

Response: No. The U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' (hereafter, "the agencies") proposed rule retains all existing Clean Water Act (CWA) exemptions for agriculture and ranching activities. It also maintains all existing regulatory exclusions from the definition of "waters of the United States," including for prior converted cropland. The agencies also proposed to codify for the first time longstanding practices that have generally considered certain features and types of waters not to be "waters of the United States." Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. Under the proposal, the waters identified in section (b) as excluded would not be "waters of the United States," even if they would otherwise fall within one of the categories in (a)(1) through (a)(7). The exclusion includes certain waters on farmland, including artificially created farm ponds or lakes created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, and artificially irrigated areas that would revert to upland should application of irrigation water to that area cease.

**2. Can you distinguish between normal farming activities, which are permitted under section 404(f)(1) and "conversion" activities, which are specifically excluded under section 404(f)(2)? Does anything in the proposed rule, or the accompanying documents, change this distinction?**

Response: CWA section 404(f)(1) provides permitting exemptions for normal farming activities listed in the Act include plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices that are part of an established (i.e., on-going) farming, silviculture, or ranching operation. As provided by the CWA, where the purpose of an activity is to bring waters into a use to which they were not previously subject and where the flow or circulation of those waters may be impaired or the reach of those waters reduced, the discharge of dredged or fill material incidental to that activity would be recaptured under section 404(f)(2) and would require a permit.

Neither the proposed rule nor the 404(f)(1)(A) Interpretive Rule would eliminate or limit any of the 404(f)(1) exceptions or change the application of the "recapture provision" under 404(f)(2). The Interpretive Rule would clarify that certain specific Natural Resources Conservation Service (NRCS) conservation practices fall within the 404(f)(1) exemptions.

**3. There was some debate in the Subcommittee hearing about whether the normal farming activities exemption only applied to specific individuals who have been engaged in these activities since 1977. Therefore, with respect to the continuity of normal farming activities for the purposes of section 404(f)(1), does the same person need to be carry out these activities for the exemption to apply, or does the exemption apply if the same type of activities occur at the site (i.e., not converting the land to a use to which it was not previously subject)? Does anything in the proposed rule, or the accompanying documents, change the application of this exemption?**

Response: There is no set date for a producer to have begun operations (*i.e.* 1977) to be considered “established” for the exemptions in section 404(f)(1) to apply. Further, because section 404(f)(1) is an activity-based exemption, there is no requirement that the same producer continue the operations. Activities which convert a wetland which has not been used for farming or forestry into such uses are not considered part of an established operation, and are not exempt.

Nothing in the proposed rule or its accompanying documents would change the application of these exemptions. The Interpretive Rule would clarify that certain specific NRCS conservation practices fall within the 404(f)(1) exemptions.

**4. With respect to the interpretative rule, it was suggested during Q&A that if a specific agricultural conservation practice is not included as part of the March 2014 Interpretive Rule and Memorandum of Understanding, that these practices would, by inference, be excluded from coverage as a normal farming practice under section 404(f). Is this the case?**

Response: The agencies’ interpretive rule clarifies section 404(f)(1)(A) of the CWA by providing guidance that specific NRCS conservation practices that discharge dredged and/or fill material into waters of the United States and that are designed and implemented to protect and enhance water quality are exempt from permitting requirements under CWA section 404 because they are part of normal farming operations. It is critical to emphasize that this list is in addition to those practices specifically named in the CWA, in addition to “other activities of essentially the same character as named” ( 44 FR 34264).

**5. Can you clarify whether the draining of a waterbody requires a Clean Water Act permit? Does anything in the proposed rule, or the accompanying documents, change this distinction?**

Response: Draining of a waterbody, without any accompanying discharges of pollutants, would not require a Clean Water Act permit. Such an activity would only require a permit if it results in a point-source discharge of pollutants into a “water of the U.S.” The proposed rule does not change the current applicability of the CWA to such an action.

**6. How is the proposed rule helpful to American farmers? Will the rule reduce regulatory burdens on the nation's agriculture producers?**

Response: The agencies’ proposed rule will help provide further clarity for America’s farmers and ranchers regarding where the CWA applies, and where it does not. The proposed rule provides clearer categories of waters that would be jurisdictional, as well as a clearer list of the waters and features that

are not jurisdictional. Providing a clearer regulatory definition will streamline the process of making jurisdictional determinations and provide additional clarity and predictability to this process.

The agencies' propose, for the first time by rule, to exclude some waters and features that the agencies have by longstanding practice generally considered not to be "waters of the United States." With respect to farming and ranching, these practices that would be exempted by rule include, for example:

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow;
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or impoundment;
- Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease; and
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

The agencies met extensively with farmers and ranchers and their representatives during the public comment period, which closed on November 14, 2014. This dialogue has been helpful in identifying additional areas for the agencies to consider for providing further clarity to American farmers as the agencies develop a final rule.

#### **Questions from the Honorable Lois Frankel (D-FL)**

**1. MS4 permittees are currently responsible for direct discharges from their stormwater management systems into Waters of the United States (WOTUS). MS4 stormwater systems include canals, ditches, structures, pump stations, lakes, ponds, wetlands, pipes, swales, and roadways that provide retention, treatment and conveyance of stormwater. Under the proposed rule these facilities will arguably become WOTUS, resulting in the broadening of the number of county maintained facilities that would subject to federal permitting. Under this scenario, MS4 permittees will have their jurisdictional facilities reduced to only the pipe system associated with road drainage. As a result, the number of MS4 permittees, the number of applicable storm water management programs and the size of the MS4 contributing drainage area will be reduced, along with the ability to implement effective restoration programs associated with traditional MS4 programs. The treatment systems constructed to meet NPDES permit requirements will effectively be eliminated. Was it the intent of the EPA and the US Army Corps of Engineers to shrink the size of the MS4 program and, if not, do the agencies intend to propose revisions to the rule to exempt MS4 permitted stormwater systems and associated facilities from the definition of WOTUS? If the agencies do intend storm/surface water management systems to fall under the scope of the rule, where do the federal agencies propose local governments construct treatment systems, particularly in a region such as South Florida where the population is wholly dependent on surface water management and flood control?**

Response: The agencies did not intend to change the jurisdictional status of stormwater systems as a result of their proposed rule, which is currently addressed on a case-specific basis, taking into account the specific characteristics of each system. During the public comment period, the agencies received many comments from representatives of cities, counties, and other entities concerned about how the proposed rule may affect stormwater systems, and the agencies commit to carefully reviewing these comments and considering them to provide maximum clarity in this area.

**2. The Florida Department of Environmental Protection currently regulates surface water management systems under statewide environmental resource permitting programs that additionally provide certification under Section 401 of the Clean Water Act that the systems comply with the applicable provisions of the Clean Water Act. While the proposed rule preserves the existing exemption for wastewater treatment systems from being considered WOTUS, currently permitted surface water management systems could arguably fall within the definitions articulated under the proposed rule. Will the agencies explicitly exempt surface water management systems that are permitted under state law and meet state water quality standards from being considered WOTUS? If not, why not?**

Response: The agencies' proposed rule does not specifically exempt such state-permitted surface water management systems from CWA jurisdiction, and the agencies did not intend with their proposed rule to change the status quo with respect to such systems. The agencies look forward to carefully considering comments from Florida municipalities and agencies and all stakeholders to provide clarity in this area in the final rule.

**3. The proposed rule will additionally require dredge and fill permitting for maintenance activities performed within manmade canals, ditches, stormwater treatment ponds and created stormwater treatment wetlands that already have environmental resource permits issued by the state permitting agencies. In many cases, the maintenance of a storm water management system must be performed in a timely manner to minimize flooding and water quality impacts. The result of requiring additional permitting for maintenance projects will be to increase costs and the amount of time necessary to complete required maintenance projects for local governments. Additionally, the increased permit requirements will increase the number of permits that will require handling and processing by the US Army Corps of Engineers. A local government is liable for maintaining the integrity of its stormwater management system even if federal permits are not approved by federal agencies in a timely manner. Is it the intent of the federal agencies to increase the permitting burden on local governments and are the agencies prepared to handle and process the number of permit applications in a timely manner?**

Response: The agencies do not intend for the proposed rule to change the jurisdictional status of stormwater control features within an MS4, and therefore do not intend to increase the permitting burden on local governments. Parts of an MS4 drainage network that transport stormwater may contain currently jurisdictional waters under existing regulations and guidance, and other parts of the MS4 may not be jurisdictional waters. When a 404 permit is necessary for discharges of dredged and fill material into jurisdictional waters, it might be eligible for coverage under a nationwide 404 permit when such discharges result in minimal adverse effects to the aquatic environment. As noted above, the agencies are aware of this concern and will carefully consider all public comments in determining how to provide greater clarity in the final rule.

**4. A majority of wastewater utilities in Florida have implemented water reuse (recycling) as part of a broader statewide water policy to reduce the impacts on traditional water resources and to "expand" the water pie. Many of those utilities implement their water reuse programs through**



the construction of infrastructure that directly discharges reclaimed water into the existing permitted storm water management systems of golf courses or residential developments. The reclaimed water supplements the existing surface water that is then utilized for irrigation of the golf courses and common areas. The Florida Department of Environmental Protection regulates the reclaimed water network and the utilities are responsible for monitoring intermittent wet weather discharges from the onsite storm water management systems during wet weather events. The continued beneficial expansion of water reuse programs would be significantly curtailed were the receiving storm water management systems to be considered "Waters of the United States." How do the agencies intend to revise the proposed rule to exempt water reuse projects?

Response: The agencies recognize the importance of water reuse projects for addressing water supply challenges in Florida and other states across America. The agencies did not intend to affect the jurisdictional status of such activities through the proposed rule. However, during the public comment period, the agencies heard concerns from many stakeholders regarding water supply and water reuse projects, and the agencies will consider these comments as they work to develop a final rule. Because the agencies have not yet fully reviewed the comments we received on the proposed rule, it would be premature to speculate on the contents of any final rule.

**5. If the agencies feel as though the above concerns currently fit under the existing waste treatment exemption to the "Waters of the United States" rule, please provide citations to existing regulations, guidance documents or other sources to support such a proposition.**

Response: Please see response to Question 4.

#### **Questions from the Honorable Grace Napolitano (D-CA)**

**1. How will the proposed rule apply to western streams which are ephemeral in nature and which may flow only one or two times a year? Will they have to go through the same permitting process as [activities in non-ephemeral streams]?**

Response: In their proposed rule, the agencies seek to provide additional clarity regarding where the CWA applies, and where it does not. With respect to streams, the agencies proposed to define the term "tributary" for the first time in the proposed rule as a water feature that includes a bed and banks and an ordinary high water mark, which are characteristics that are produced by flowing water of sufficient volume and frequency. Water features that meet this definition of "tributary" would be jurisdictional under the CWA when they contribute flow directly or through another water to a navigable water, interstate water, or the territorial seas. In contrast, water features that do not exhibit these characteristics would not be jurisdictional as tributaries. During the public comment period, the agencies welcomed public comments on these proposed definitions to ensure they are as clear as possible for communities across the country, including in the arid West.

The CWA provides states with the lead role in setting water quality standards for their waters. For those non-perennial streams that are jurisdictional, states could set appropriate water quality standards that reflect the characteristics of these waters, which may differ from the standards that states may set for perennial waters.

Streams that only flow seasonally or after rain have been protected by the CWA since it was enacted in 1972. More than 60 percent of streams nationwide do not flow year-round, yet they contribute to the drinking water supply for approximately 117 million Americans. Peer-reviewed science strongly supports the ecological importance of these types of streams.

If the proposed rule were finalized in the form in which it was proposed, activities which discharge pollutants from a point source into jurisdictional waters of the U.S., including ephemeral streams that meet the definition of tributary under the proposed rule, would require authorization, unless they are an exempt activity under section 404(f) of the CWA or otherwise exempted from permitting.

**2. How will storm water drains be addressed in the proposed rule, especially those that feed into ephemeral rivers and streams?**

Response: The agencies did not intend to change the jurisdictional status of stormwater systems as a result of their proposed rule. The jurisdictional status of such systems involves a case-by-case assessment, taking into account the specific characteristics of each system. During the public comment period, the agencies received many comments from representatives of cities, counties, and other entities concerned about how the proposed rule may affect stormwater systems, and the agencies commit to carefully reviewing these comments and consider them to provide maximum clarity in this area.

**3. How will water recycling and reuse programs be addressed in the proposed rule? Will they be subject to permitting requirements? If so, what level or detail? Of particular interest are water recycling programs that result in water that is directed to groundwater recharge areas.**

Response: The agencies recognize the importance of water reuse projects for addressing water supply challenges in California and other states across America. The agencies did not intend to affect the jurisdictional status of such activities through the proposed rule. However, during the public comment period, the agencies heard concerns from many stakeholders regarding water supply and water reuse projects, and the agencies will consider these comments as they work to develop a final rule. Because the agencies have not yet fully reviewed the comments we received on the proposed rule, it would be premature to speculate on the contents of any final rule.

**4. In the West we taking every opportunity to collect rainwater, slow runoff, or direct runoff into groundwater retention basins or groundwater recharge areas. Often these may be flood control reservoirs that are retrofitted or operated to slow down or redirect the flow of runoff. Will these efforts to collect, capture and reuse runoff be subject to the requirements of the proposed rule?**

Response: Please see response to Question 3 above.

**Questions from the Honorable Dina Titus (D-NV)**

**1. Having access to a clean water source is vital to our region's continued economic growth. More than two million area residents and 42 million visitors who frequent our world-class hotels, casinos, restaurants, shows, and shops annually are dependent on our limited water resources.**

**This necessity is all the more challenged by the fact that 90% of our water comes from one source, Lake Mead, which is fed by the Colorado River and in is adversely affected by a extreme drought.**

Response: We agree with you that clean water is both critical for human health and a necessity for sustaining our economy.

**2. Accordingly, I appreciate the hard work of the Administration on proposing a rule to do just that. I applaud the intent of the Administration to protect the waters of the United States, but do have some concerns about your proposed rule and how it will impact communities like mine in the desert Southwest. It is imperative that we get this rule right so there is predictability moving forward.**

Response: We agree that clarifying the scope of the CWA can help promote predictability, and this is one of the primary goals of our rulemaking effort. The EPA and the Corps are committed to reviewing the comments provided by all stakeholders, including those in the desert Southwest, to ensure that we provide such clarity and predictability in the final rule.

**3. The proposed rule (Definition of "Waters of the United States" Under the Clean Water Act), includes for the first time a regulatory definition of "tributary." This language references "sedimentary tributaries" expanding coverage to systems that were not covered under the Clean Water Act before. Can you clarify the intent of this new definition and how systems, in particular ephemeral streams that are common in the desert Southwest, will be impacted?**

Response: In their proposed rule, the agencies are seeking to provide additional clarity regarding where the CWA applies, and where it does not. With respect to streams, the agencies proposed to define the term "tributary" for the first time in the proposed rule as a water feature that includes a bed and banks and an ordinary high water mark, which are characteristics that are produced by flowing water of sufficient volume and frequency. Water features that meet this definition of "tributary" would be jurisdictional under the CWA when they contribute flow directly or through another water to a navigable water, interstate water, or the territorial seas. In contrast, water features that do not exhibit these characteristics would not be jurisdictional as tributaries. During the public comment period, we sought and received public comments on these proposed definitions to ensure they are as clear as possible for communities across the country, including in the desert Southwest.

The CWA provides states with the lead role in setting water quality standards for their waters. For those non-perennial streams that are jurisdictional, states could set appropriate water quality standards that reflect the characteristics of these waters, which may differ from the standards that states may set for perennial waters.

Streams that only flow seasonally or after rain have been protected by the CWA since it was enacted in 1972. More than 60 percent of streams nationwide do not flow year-round, yet they contribute to the drinking water supply for approximately 117 million Americans. Peer-reviewed science strongly supports the ecological importance of these types of streams.

**4. In addition, the rule relies on data from a scientific study that remains preliminary ("Connectivity of Streams and Wetlands to Downstream Water: A review and Synthesis of the Scientific Evidence"). Will the EPA finalize this study and then allow stakeholders to submit public comments on the Proposed Rule prior to the final rule being released?**

Response: The agencies are committed to a rulemaking built on the best-available, peer-reviewed science, and the agencies recognized the importance of ensuring that this supporting science was available to the public as they reviewed and commented on the proposed rule. In order to afford the public greater opportunity to benefit from the EPA Science Advisory Board's reports on the proposed jurisdictional rule and on the EPA's draft connectivity report, and to respond to requests from the public for additional time to provide comments on the proposed rule, the agencies extended the public comment period on the proposed rule to November 14, 2014. The SAB completed its review of the scientific basis of the proposed rule on September 30, and the SAB completed its review of the EPA's draft connectivity report on October 17.

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT  
OF

THE HONORABLE JO-ELLEN DARCY  
ASSISTANT SECRETARY OF THE ARMY  
(CIVIL WORKS)

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

UNITED STATES HOUSE OF REPRESENTATIVES

ON

*Potential Impacts of Proposed Changes to the Clean Water Act  
Jurisdiction Rule*

June 11, 2014

Chairman Gibbs, Ranking Member Bishop, and Members of the Subcommittee, I am Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works). Thank you for the opportunity to discuss the Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency's (EPA) proposed rule defining "waters of the U.S." under the Clean Water Act (CWA). I would like to specifically discuss why our agencies are pursuing rulemaking on this subject and the policy objectives of this rulemaking effort. I will also discuss the key beneficial changes and clarifications of the proposed rule, and outline what we propose to change and what we are not changing through this rulemaking effort. This rulemaking effort will enable our agency to protect aquatic resources and provide clarity and predictability for the regulated public in a manner that is consistent with the statute and Supreme Court decisions. Finally, I will discuss the rulemaking process going forward and describe our efforts to obtain valuable public input to inform the final rule.

Under Section 404 of the CWA, the Corps regulates discharges of dredged or fill material into waters of the United States, including wetlands. The regulatory program is implemented day-by-day at the district level by staff that knows their regions and resources, and the public they serve. Nationwide, the Corps makes decisions on over 88,000 applications as well as approximately 58,000 jurisdictional determinations annually.

The jurisdictional scope of the CWA is "navigable waters," defined in the statute as "waters of the United States, including the territorial seas." The statutory text, legislative history and the case law confirm that "waters of the United States" in the CWA are not limited to the traditional navigable waters. It is this CWA definition that is the subject of this proposed rule. The CWA leaves it to EPA and the Corps to define the term "waters of the United States." Existing regulations define "waters of the United States" as 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.

Since the enactment of the CWA and publication of our 1986 regulations defining waters of the U.S. for purposes of CWA Section 404, there have been three significant Supreme Court decisions that have addressed the scope of waters that are regulated under Section 404 of the Act. I will briefly describe the outcome of these cases and my intent is to illustrate that there is a real need for the Corps, working closely with EPA, to clarify and update our regulations defining the geographic scope of CWA jurisdiction, which were last published in 1986.

In *United States v. Riverside Bayview Homes*, the U.S. Supreme Court deferred to the Corps' judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." The Court found that interpretation reasonable in light of Congress' broad objectives of protecting water quality and aquatic

ecosystems. In 2001, the Supreme Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, that the use of "isolated" non-navigable intrastate ponds as habitat by migratory birds was not, by itself, a sufficient basis for the exercise of Federal regulatory authority under the CWA and that the significant nexus between the adjacent wetlands and 'navigable waters' had informed the Court's reading of the CWA in *Riverside Bayview*. *Rapanos v. United States* involved two consolidated Supreme Court cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. All members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality interpreted the term "waters of the United States" as covering relatively permanent, standing or continuously flowing bodies of water that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies. Justice Kennedy concluded that the term "waters of the United States" encompasses wetlands that "possess a *significant nexus* to waters that are or were navigable in fact or that could reasonably be so made." Justice Kennedy stated that wetlands possess the requisite significant nexus if the wetlands, "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Kennedy's opinion notes that such a relationship with navigable waters must be more than "speculative or insubstantial." The four dissenting Justices concluded that waters that satisfy either the plurality's or Justice Kennedy's standard are "waters of the United States" within the meaning of the CWA. The United States' view is that CWA jurisdiction can be established under either standard. Because Justice Kennedy identified "significant nexus" as the touchstone for CWA jurisdiction, and the four dissenting Justices agreed that this was an appropriate basis for establishing jurisdiction, the Corps and EPA have determined that it is reasonable and appropriate to apply the "significant nexus" standard to both open waters and wetlands to determine whether they are subject to CWA jurisdiction.

#### **Why the agencies chose to do a rule, its policy objectives, and its benefits.**

As a result of these complex court decisions, there exists a need for a rule that provides clarity, efficiency, and certainty for the regulated public and agency staff regarding CWA jurisdiction. Following the *SWANCC* and *Rapanos* decisions, the agencies developed policy guidance that calls for case-specific significant nexus analysis for many categories of non-navigable streams, other water bodies, and wetlands. These jurisdictional determinations require extensive documentation, field work, and coordination between the Corps and EPA, all of which require significant resources and time. The confusion and lack of clarity contributes to uncertainty for the regulated public. In addition, when the agencies began developing draft guidance on this subject in 2011, we received many comments from various entities, including Congress, stakeholders, and the public, urging the agencies to pursue a notice and comment

rulemaking effort instead of non-binding less formal agency policy guidance. Furthermore, Chief Justice Roberts recommended in his concurring opinion in *Rapanos* that the agencies conduct a notice and comment rulemaking and promulgate a new final rule regarding CWA jurisdiction. We listened to these requests.

The agencies are proposing this rule to provide much-needed clarity regarding which waters are, and which waters are not, jurisdictional under all sections and programs of the CWA. Our proposal is consistent with the best available science and the agencies' interpretation of the Supreme Court decisions. The proposed rule will help improve efficiency in making jurisdictional determinations. The proposed rule will ensure protection of our Nation's aquatic resources and make the process of identifying "waters of the United States" less complicated and more efficient. The rule achieves these goals by increasing CWA program transparency, predictability, and consistency. This rule will result in more effective and efficient CWA jurisdictional determinations with increased certainty and less litigation.

The proposed rule will improve clarity for regulators, stakeholders, and the regulated public. The proposal accomplishes this by defining certain categories of waters that currently require case-specific analyses as jurisdictional by rule. By decreasing the number of jurisdictional determinations that require this case-specific significant nexus analysis evaluation, the proposed rule is expected to reduce documentation requirements and processing times for jurisdictional determinations.

#### **What has NOT changed, and what is NOT jurisdictional?**

The proposed rule retains much of the structure of the agencies' longstanding definition of "waters of the United States," including many of the existing provisions not directly impacted by the *SWANCC* and *Rapanos* Supreme Court decisions. The agencies propose to define "waters of the United States" in section (a) of the proposed rule for all sections of the CWA as follows:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;



- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

The agencies do not propose to substantively change the following provisions: traditional navigable waters interstate waters, the territorial seas.

For the first time, the agencies propose a regulatory definition for the term “tributary” and propose that only those waters that meet that definition and that flow directly or indirectly into a traditional navigable water, an interstate water, or the territorial seas are jurisdictional as tributaries.

The agencies propose to change the definition of “adjacent” to cover both adjacent wetlands and other adjacent water bodies. Furthermore, our proposed rule clarifies the meaning of the term “neighboring” as used in the definition of “adjacent” and defines the terms “riparian area” and “floodplain.” These new definitions afford greater clarity to the identification of waters that would be jurisdictional by rule under this category using well understood ecological concepts. In addition, the agencies propose that waters outside of the riparian and floodplain areas would be jurisdictional only if they have confined surface or shallow subsurface connection to a traditional navigable water, an interstate water, the territorial seas, or an impoundment or tributary of such waters. As a result, no additional site-specific analysis would be required for the adjacent waters category. Our decision to propose to regulate “by rule” all tributaries and adjacent waters and wetlands is based on our understanding that these waters, alone or in combination with similarly-situated waters in a watershed, have a significant nexus to a traditional navigable water, interstate water, or the territorial seas based on the best currently available science.

One of the most substantial changes in the proposed rule is to delete the existing regulatory provision that defines “waters of the United States” to include as jurisdictional all other waters the use, degradation or destruction of which could affect interstate or foreign commerce. These are generally referred to as “other waters.” Under the proposed rule, an “other water” could be determined to be jurisdictional only upon a case-specific determination that it has a significant nexus with traditional navigable waters, interstate waters, or the territorial seas. The rule offers a definition of “significant nexus” and explains how similarly situated “other waters” in the region could be identified. The proposed rule also presents several alternative options for determining the jurisdictional status of certain “other waters;” those other options would rely less, or not at all, on case-specific significant nexus evaluations. The agencies may adopt one or a combination of these options for the final rule after considering public comment and the evolving scientific literature on connectivity of waters.

The agencies propose for the first time to exclude by rule in section (b) certain waters and features over which the agencies have as a policy matter generally not asserted jurisdiction. The proposed section (b) would exclude specified waters and features from the definition of “waters of the United States.” Waters and features that are determined to be excluded under section (b) of the proposed rule will not be jurisdictional under any of the categories in the proposed rule under section (a), even if they would otherwise satisfy the regulatory definition of a jurisdictional water body. Those waters excluded under section (b) of the proposed rule that would not be “waters of the United States” are: ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water; artificial reflecting pools or swimming pools created by excavating and/or diking dry land; groundwater, including groundwater drained through subsurface drainage systems; and, gullies, rills, and non-wetland swales.

Finally, the agencies do not propose any changes to the existing regulatory exclusions, including those for waste treatment systems or prior converted cropland.

#### **What is the process going forward?**

The proposed rule was published in the Federal Register on April 21, 2014, for a 91-day public comment period. The FR notice solicits comment and public input on all aspects of the proposed rule and specifically requests comment on certain options and approaches; we look forward to robust public comment to inform the final rule. After the completion of the comment period, the agencies will fully evaluate and consider the comments received in the development of the final rule. In addition, the agencies have committed that the rule will not be finalized until the connectivity science synthesis report is finalized, which will reflect feedback provided by EPA’s Science Advisory Board and the public. The agencies will determine at that time whether the entire administrative record supports the conclusions of the proposed rule, and make any adjustments to the final rule deemed to be appropriate at that time.

#### **Outreach and public input.**

The agencies recognize the importance and value of receiving public input on this proposed rule. The public may submit comments within the 91-day public comment period. In addition, the agencies have developed a rigorous schedule of outreach and stakeholder calls to present the proposed rule to the public and interested parties and to solicit further comments. There are various joint stakeholder meetings held each week between the agencies and various groups, such as: state governments and agencies, businesses, the agricultural industry, the natural resources industry, and environmental

organizations. The agencies also plan to participate when invited to speak at various meetings and conferences, when within budget constraints. In addition, the agencies are hosting webinars and have developed informative websites to further disseminate information on the proposed rule. Also, the roll-out effort for the proposed rule included significant outreach and other media events. The agencies have tried to reach out to as many different interested parties as possible to ensure that the proposed rule receives valuable public input in order to best develop the final rule.

Mr. Chairman, this concludes my statement. Thank you again for the opportunity to be here today and I will be happy to answer any questions you may have.



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
108 ARMY PENTAGON  
WASHINGTON DC 20310-0108

AUG 20 2014

The Honorable Timothy Bishop  
Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment  
United States House of Representatives  
Washington, D.C. 20515

Dear Representative Bishop:

Thank you for your letter dated June 23, 2014, to the Department of the Army (Army) and the U.S. Environmental Protection Agency (EPA), regarding the agencies' joint rulemaking to clarify the jurisdiction of the Clean Water Act (CWA). Your letter transmits questions received from Members of Congress as a follow-up to the June 11, 2014, Water Resources and the Environment Subcommittee hearing on the proposed rule to clarify the definition of "waters of the United States" under the CWA. The agencies have coordinated and are providing you with separate responses, with each agency responding to the questions applicable to its respective authority. Please reference the attached enclosure which contains the Army's response to Question #1 from Representative Napolitano and Question #3 from Representative Titus. I apologize for the delay in responding.

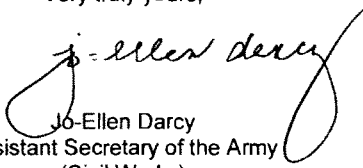
On April 21, 2014, the Army and EPA published a proposed rule in the Federal Register to clarify the definition of "waters of the United States" under the CWA. The proposed rule is currently open for public comment until October 20, 2014. After the close of the comment period, the Army and EPA will evaluate the comments received in developing the final rule. This process, codified in federal law and regulation, ensures that the fundamental principles of transparency, public participation, and collaboration will be followed throughout the rulemaking effort. The agencies initiated this effort to respond to requests from a broad range of interests, including members of Congress, industry, agriculture, states, environmental groups, and other stakeholders, that we clarify the geographic scope of CWA jurisdiction through formal notice and comment rulemaking.

The Army and EPA anticipate receiving a diverse array of comments from multiple interests and stakeholders. We will carefully review all comments received as we move forward in finalizing the rule. It is our strongest desire that once finalized, the new rule will add considerable clarity and significantly improve consistency and predictability for all CWA programs. We anticipate the proposed rule will improve efficiency and provide needed clarity regarding jurisdictional determinations, reducing uncertainties and delays.

Comments can be submitted through [www.regulations.gov](http://www.regulations.gov). Your continued interest in the proposed rule is valued and we appreciate your willingness to share any

additional thoughts and concerns that you might have during the rulemaking process and the subsequent initial implementation period. My point of contact for the proposed rule is Mr. Chip Smith, who can be reached at: [charles.r.smith567.civ@mail.mil](mailto:charles.r.smith567.civ@mail.mil) or (703) 693-3655.

Very truly yours,

  
Jo-Ellen Darcy  
Assistant Secretary of the Army  
(Civil Works)

Enclosure

**Question from the Honorable Representative Grace Napolitano, (D-CA):**

**Q #1:** How will the proposed rule apply to western streams which are ephemeral in nature and which may flow only one or two times a year? Will they have to go through the same permitting process?

**Question from the Honorable Representative Dina Titus, (D-NV):**

**Q #3:** The proposed rule includes for the first time a regulatory definition of "tributary." This language references "sedimentary tributaries" expanding coverage to systems that were not covered under the Clean Water Act before. Can you clarify the intent of this new definition and how systems, in particular ephemeral streams that are common in the desert Southwest, will be impacted?

**A (to both Q#1 and Q#3):** The Army believes that the proposed rule is consistent with the intent of the Clean Water Act (CWA) to protect the Nation's aquatic resources. Streams that meet the definition of "tributary" would be jurisdictional by rule under the proposed rule regardless of flow regime, including ephemeral, intermittent, and perennial streams that meet such definition. The term "tributary" under the proposed rule means, "a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3). A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4)."

Some features in the West and Southwest do not have adequate flow volume, frequency, or duration to develop such tributary characteristics and therefore would not be jurisdictional under the proposed rule. In addition, the proposed rule provides a list of water features that would be excluded from the definition of waters of the U.S., such as the erosional features "gullies and rills," which may also be found in the West and Southwest.

The proposed rule retains much of the structure of the longstanding definition of "waters of the U.S." and many of the existing provisions of that definition where revisions are not required in light of the Supreme Court's decisions or other basis for revision. It is the Army's view that the proposed rule does not cover any new types of waters that have not been historically regulated under the CWA. All tributaries are "waters of the U.S."

under the existing 1986 regulations (33 CFR §328.3), and ephemeral streams are also addressed in the 2008 Rapanos guidance for determining jurisdiction under the CWA drafted as a result of the Supreme Court decisions in the consolidated cases *Carabell v. U.S.* and *Rapanos v. U.S.* (2006). Under the 2008 guidance, the agencies determine jurisdiction over non-navigable tributaries that are not relatively permanent (e.g., ephemeral streams) based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water. A significant nexus analysis assesses the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters. A significant nexus analysis includes consideration of hydrologic and ecologic factors. Under the proposed rule, the agencies conclude, based on existing science and the law, that a significant nexus exists between all tributaries (as defined in the proposed rule) and the traditional navigable waters, interstate waters, and the territorial seas into which they flow. Therefore, all tributaries would be jurisdictional by rule.

Moreover, the proposed rule also specifically solicits comment on such terms as “tributary” and whether the rule should provide greater specificity with regard to the application of these terms in order to improve clarity and certainty. The final rule will be informed by the complete administrative record, including comments received, and science analyzed in order to provide more clarity and “bright lines” regarding the key terms.

The proposed rule only provides a definition for “waters of the U.S.” The rule will not affect the CWA statute in which authorization may be required for discharges of dredged and/or fill material into waters of the U.S. In addition, the proposed rule would not affect activities that are currently exempt from CWA regulation nor will it affect the tools such as the use of general permits that the U.S. Army Corps of Engineers implements for expeditious review and efficiency in processing permit applications for discharges of dredged and/or fill material into waters of the U.S.

**United States House of Representatives  
Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment**

**Hearing:  
“Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule”**

**Testimony of**

**J.D. Strong  
Western Governors’ Association  
Western States Water Council**

**June 11, 2014**

**I. Introduction**

Chairman Shuster, Ranking Member Rahall, and members of the Committee, my name is J.D. Strong, and I am the Executive Director of the Oklahoma Water Resources Board. I am testifying on behalf of the the Western Governors’ Association (WGA) and the Western States Water Council (WSWC) in my capacity as the Chairman of the WSWC’s Water Quality Committee. I appreciate the opportunity to testify regarding the WGA’s and WSWC’s perspectives on the Clean Water Act (CWA) rule the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) proposed on March 25, and published in the Federal Register on April 21. My testimony is based on a series of attached letters the WGA and WSWC have sent EPA and the Corps regarding the rulemaking. Separately, I am submitting testimony on behalf of the State of Oklahoma.

WGA is an independent, non-partisan organization comprised of the Governors of 19 western states and three U.S.-flag islands. The WSWC is a non-partisan government entity created by western Governors, which is affiliated with WGA and advises the Governors of eighteen western states on water policy matters. The WSWC’s members, including myself, are appointed by their respective Governors and include state natural resource directors, state engineers, water quality directors, assistant attorney generals, and others.

The WGA and the WSWC recognize that the EPA and the Corps are especially impactful to the West. These agencies have rich potential to either support state efforts or impinge on state authority under the CWA. They can exercise vital leadership or they can interfere with well-managed state activities. Accordingly, it is critical that state and federal agencies develop and maintain positive, cooperative working relationships. Our organizations believe that such cooperation is only possible when states are regarded as full and equal partners of the federal government in the development and execution of programs for which both have responsibility.

This is particularly true for the CWA because Congress intended for the states and EPA to implement the CWA in partnership, delegating authority to the states to administer the law as co-regulators with EPA. Such consultation will be critical in ensuring the effectiveness of this



particular rulemaking and in avoiding unintended consequences, especially in the West, which is defined by arid landscapes and unique hydrologic and geographic features not found in the East. As such, state water managers must have a robust and meaningful voice in the development of any rule regarding the jurisdiction of the CWA.

## **II. The Lack of Substantive State Consultation in the Development of the Rule**

WGA and the WSWC are concerned that states were insufficiently consulted in the development of the proposed CWA rule and had no involvement in its drafting.

As indicated by the attached letters, the WSWC first wrote EPA and the Corps in 2011 to urge them to pursue formal rulemaking instead of the now withdrawn guidance.<sup>1</sup> At that time, the western states believed rulemaking, unlike guidance, would afford greater opportunities for early and ongoing state consultation and would better ensure the treatment of states as co-regulators. In making this request, the WSWC urged EPA and the Corps to consult with the states in the early phases of the rule's development, a request it reiterated in three subsequent letters dated April 10, 2013, November 20, 2013, and March 10, 2014 (attached).

As the WSWC noted repeatedly in its letters, waiting until the public comment period to solicit state input does not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives. Unfortunately, these requests for substantive consultation have largely been ignored, and EPA and the Corps issued the proposed rule without conducting substantive consultation with the states.

In addition, the WSWC also urged the agencies to acknowledge the federalism implications of the rulemaking and to comply with the state consultation criteria set forth in Executive Order 13132. However, as noted in the preamble of the proposed rule, EPA and the Corps do not believe that Executive Order 13132 applies to this rulemaking and also believe that the rulemaking "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."<sup>2</sup> Contrary to this belief, any effort to redefine or clarify the term "waters of the U.S." has, on its face, numerous federalism implications that some western states believe will have very substantial and direct effects, thereby requiring robust state consultation and compliance with Executive Order 13132.

While EPA and the Corps conducted some outreach with the WGA, the WSWC, and other state organizations during their development of the rule, much of this consisted primarily of communicating the agencies' goals and time lines for the rulemaking. Moreover, prior to the issuance of the proposed rule, the agencies consistently stated that they could not discuss the "substance" of the rule they were developing, thereby limiting the ability of the states to meaningfully participate in its development.

<sup>1</sup> U.S. Environmental Protection Agency and U.S. Department of the Army, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (May 2, 2011), available at: [http://www.epa.gov/tribal/pdf/wous\\_guidance\\_4-2011.pdf](http://www.epa.gov/tribal/pdf/wous_guidance_4-2011.pdf).

<sup>2</sup> Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188, 22,220 – 22,221 (Apr. 21, 2014).

The federal government should engage in true consultation with states as co-regulators. EPA and Corps communications cannot take the place of substantive, collaborative engagement with the individual states and their respective water quality agencies. The substantial differences in hydrology, geography, and the legal frameworks in the West require significant consultation with each state to determine how the draft rule will effect them and be implemented, in order to avoid misrepresentations and unintended consequences.

Now that EPA and the Corps have issued the rule, the WGA and WSWC urge EPA and the Corps to fully avail themselves of the states' on-the-ground knowledge of their unique circumstances, as well as their primary role in protecting water quality, by giving as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs.

Our organizations also reiterate a request Governors John Hickenlooper of Colorado and Brian Sandoval of Nevada, the Chairman and Vice Chairman of the WGA, made in a March 25 letter to EPA and the Corps (attached). Namely, the Governors urged the agencies to consult with the states, individually and through the WGA, "in advance of any further action" on the rulemaking. Governors Hickenlooper and Sandoval also sent EPA and the Corps a subsequent letter on May 30 (attached), requesting a 180-day extension of the public comment period for the rule, stating:

"The published 91-day public comment period is insufficient for states to thoroughly review the content and analyze the implications of the proposed rule.... Before proceeding further with this proposal, your agencies should take the time to engage in true, substantive consultation with states."

Notably, the WGA and WSWC have had some initial contact with EPA, particularly Region 8, about this request, and the WSWC is coordinating conference calls with states, EPA and the Corps to facilitate a dialogue on particular issues of concern to the western states. While the WSWC and WGA appreciate the willingness of EPA and the Corps to participate in these calls, information sharing does not equate to meaningful consultation. Therefore, in this and future rulemaking processes, the WGA and WSWC urge EPA and the Corps to pursue an authentic partnership with the states.

### **III. EPA's Science Advisory Board**

The states' role would also be significantly enhanced by greater state representation on EPA's Science Advisory Board (SAB), on which the agency relies to provide the scientific underpinnings for this and other regulatory decisions.

The SAB was established by the Environmental Research, Development, and Demonstration Authorization Act of 1978 in accordance with the Federal Advisory Committee Act of 1972 (FACA). It has a broad mandate to advise EPA on scientific, technological, and social and economic issues and its Charter defines the SAB as a scientific and technical advisory committee. Sections 5(b)(2) and 5(c) of FACA further require the membership of an advisory

committee to be “fairly balanced in terms of points of view represented and the functions to be performed.”

Despite the foregoing mandates and the tremendous value that would be added to SAB processes by state participation, state agency scientists are woefully and demonstrably under-represented on the SAB, as well as on its standing and *ad hoc* committees. This is particularly true for the SAB panel that is reviewing the EPA connectivity report that will serve to inform the final CWA rule.<sup>3</sup> Of the 27 experts on the panel, not one is a state agency scientist or expert.<sup>4</sup>

In addition, EPA and the Corps released the proposed CWA rule before finalizing the connectivity report. Releasing the proposed rule before the report raises concerns that the final report will have little or no influence on the final rule. Many western states have submitted individual comments for the SAB to consider in its review of the draft report. Waiting until the report was finished to release the proposed rule would have given EPA more information to consider, and could have led to revisions that may have improved the proposed rule.

Notably, some press reports have indicated that the SAB is still developing its comments on the connectivity report and has identified some preliminary areas that may require further changes to both the report and the rule. Although these comments are still in draft form, the SAB’s deliberations underscore the premature nature of the rule’s publication. Among other things, press reports have indicated that the SAB’s draft comments state that the report could be more useful to decision-makers if it brought more clarity to the interpretation of connectivity, especially regarding the quantification of the magnitude, degree, or consequences of connectivity, and the aggregate effects of streams and wetlands on downstream waters. The SAB’s deliberations further note that the report often treats connectivity as a binary property, either present or absent, rather than recognizing varying degrees of connectivity.<sup>5</sup>

The SAB’s preliminary comments speak directly to one of the concerns that the WSWC has expressed about the rule – that the rule should quantify “significance” as used in Justice Kennedy’s concurring opinion in *Rapanos v. United States*<sup>6</sup> to ensure that the rule does not extend jurisdiction to waters that have a de minimis connection to jurisdictional waters.

For these reasons, the WSWC encouraged EPA and the Corps to complete the connectivity report before publishing the proposed rule.

<sup>3</sup> U.S. Environmental Protection Agency, *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/660/R-11/098B, (Sept. 2013), available at: [http://www.epa.gov/sab/sabproduct.nsf/fedrgstr\\_activites/7724357376745F48852579F60043E88C/\\$File/WOUS-ERD2\\_Sep2013.pdf](http://www.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579F60043E88C/$File/WOUS-ERD2_Sep2013.pdf).

<sup>4</sup> U.S. Environmental Protection Agency Science Advisory Board, *Members of the Panel for the Review of the EPA Water Body Connectivity Report, External Draft*, available at: <http://www.epa.gov/sab/sabpeople.nsf/WebExternalSubCommitteeRosters?OpenView&committee=BOARD&subcommittee=Panel%20for%20the%20Review%20of%20the%20EPA%20Water%20Body%20Connectivity%20Report>.

<sup>5</sup> Saiyid, Amina. “Science Panel Urges EPA to Address Cumulative Impacts of Isolated Waters.” *Bloomberg BNA* 7 Apr. 2014: n. pag. Web; Daily News, “EPA Plans Method for Determining Whether Waters’ Nexus is ‘Significant.’” *InsideEPA* (Apr. 8, 2014): n. pag. Web.

<sup>6</sup> 547 U.S. 715 (2006).

#### **IV. Additional Recommendations**

The lack of effective state consultation in the development of the proposed CWA rule is not unique to this particular rulemaking, and many other EPA and Corps rulemaking efforts have failed to include sufficient state consultation in their development and implementation. To address this broader concern, the WGA and the WSWC make the following recommendations.

First, the WGA and WSWC encourage congressional direction to EPA and the Corps to engage states early and often (separate and before public involvement) in the development of any CWA rulemaking, guidance, policies, or studies as such efforts cannot help but affect the roles and jurisdiction of the states.

Second, the WGA and WSWC encourage congressional direction to ensure that EPA achieves more balanced SAB representation, to include state participation that constitutes no less than 10% of the membership of SAB committees, subcommittees and subject matter panels.

We believe the above recommendations would significantly improve the EPA's and the Corps' consultation with the states, which will ultimately result in more effective CWA policies and regulations.

#### **V. Conclusion**

The foregoing comments and recommendations are offered in a spirit of cooperation and respect. As such, the WGA and WSWC are prepared to assist the Committee, the EPA, and the Corps in the discharge of their critical and challenging responsibilities.

Thank you for your leadership in addressing this important issue.



**WESTERN  
GOVERNORS'  
ASSOCIATION**

John Hickenlooper  
Governor of Colorado  
Chairman

Brian Sandoval  
Governor of Nevada  
Vice Chairman

James D. Ogsbury  
Executive Director

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May 30, 2014

Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (1101A)  
Washington, D.C. 20460

Honorable Jo-Ellen Darcy  
Assistant Secretary of the Army (Civil  
Works)  
108 Army Pentagon  
Washington, D.C. 20310

Dear Administrator McCarthy and Assistant Secretary Darcy,

The purpose of this letter is to request an extension of the period for comment on the proposed rule regarding the jurisdiction of the Clean Water Act. As stated in our letter dated March 25, 2014, we are concerned that this proposed rulemaking could impinge upon state authority in water management.


The published 91-day public comment period is insufficient for states to thoroughly review the content and analyze the implications of the proposed rule. We request that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers issue a 180-day extension of the public comment period to provide states with reasonable time for the submission of comments.

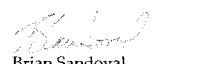
States are co-regulators of water quality and the primary managers of water resources within their borders. Before proceeding further with this proposal, your agencies should take the time to engage in true, substantive consultation with states. The Western States Water Council is coordinating conference calls with states and the EPA western Regional Offices to facilitate a dialogue on particular issues of concern to the western states. While we appreciate the willingness of the EPA regional offices to participate in these calls, we must stress that information-sharing does not equate to meaningful consultation; in this and future rulemaking processes, your agencies should pursue an authentic partnership with the states.

We are confident that such discussions could greatly enhance your efforts and ensure that the resulting rule is clear, scientifically sound and respectful of states' authority to manage water resources within their states.

Thank you for your consideration.

Sincerely,

  
John Hickenlooper  
Governor, State of Colorado  
WGA Chairman

  
Brian Sandoval  
Governor, State of Nevada  
WGA Vice Chairman

cc: House Transportation and Infrastructure Committee Leadership  
House Natural Resources Committee Leadership  
Senate Environment and Public Works Leadership  
Michael Boots, Acting Chairman, Council on Environmental Quality



**WESTERN  
GOVERNORS'  
ASSOCIATION**

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Governor of Colorado  
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March 25, 2014

Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (1101A)  
Washington, DC 20460

Honorable Jo-Ellen Darcy  
Assistant Secretary of the Army (Civil  
Works)  
108 Army Pentagon  
Washington, DC 20310

Dear Administrator McCarthy and Assistant Secretary Darcy:


We are writing with respect to the pending rulemaking regarding the jurisdiction of the Clean Water Act. As Governors of Western states, we are concerned that this rulemaking was developed without sufficient consultation with the states and that the rulemaking could impinge upon state authority in water management.


As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of their waters. While the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have provided briefings to inform states that rulemaking is underway, the conversations to date have not been sufficiently detailed to constitute substantive consultation. Western Governors strongly urge both EPA and the Corps to engage states as authentic partners in the management of Western waters.

States have federally-recognized authority to manage and allocate water within their boundaries. Section 101(g) of the Clean Water Act (CWA) expressly states 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." The Western States Water Council, in its March 10, 2014, correspondence to you both, delineates the areas of concern states have with this rulemaking process. Western Governors urge you to engage with us, individually and through the Western Governors' Association, to resolve these important concerns in advance of any further action on this issue.

We appreciate your consideration and hope to remain productive partners in the management of waters in West.

Sincerely,

  
John Hickenlooper  
Governor, State of Colorado  
Chairman, WGA

  
Brian Sandoval  
Governor, State of Nevada  
Vice Chairman, WGA

Attachment



**WESTERN STATES WATER COUNCIL**

5296 Commerce Drive, Suite 202 | Murray, Utah 84107 | (801) 685-2555 | FAX (801) 685-2559

Web Page: [www.westernstateswater.org](http://www.westernstateswater.org)

March 10, 2014

Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW (1101A)  
Washington, DC 20460

Jo Ellen Darcy  
Assistant Secretary of the Army (Civil Works)  
108 Army Pentagon  
Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Rulemaking

Dear Administrator McCarthy and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing eighteen western governors on water policy issues, I am writing to provide additional comments to inform your agencies' efforts to develop a rule on Clean Water Act (CWA) jurisdiction. These comments are intended to build upon our previous correspondence and meetings with representatives from your agencies on this issue.

We have also received a letter dated February 10 from EPA Acting Assistant Administrator for Water Nancy Stoner, which responds to our November 2013 letters. As discussed in our comments below, the western states continue to have concerns about EPA's and the U.S. Army Corps of Engineers' coordination efforts, and request extensive interaction with the individual states and the state agencies that deliver and implement the CWA.

**A. Connectivity Report**

EPA has indicated that its draft connectivity report will serve to inform the final rule on CWA jurisdiction. However, the draft rule's submission to the Office of Management and Budget (OMB) before the finalization of the connectivity report raises concerns that the final report will have little or no influence on the final rule. Therefore, the connectivity report should be finalized before EPA and the Corps publish the draft jurisdictional rule in the Federal Register for public comment.

Additionally, many western states have submitted individual comments for the Environmental Protection Agency's (EPA) Science Advisory Board (SAB) to consider in its review of the draft connectivity report. EPA should carefully evaluate the SAB's consideration of these comments and any subsequent recommendations from the final report. Waiting until the report is finalized will give EPA more information to consider, and may possibly lead to revisions that improve the rule before its publication for public comment.

**B. Deference to State Water Law**

The text of the rule itself should give full force and effect to, and should not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality.

### C. Groundwater

The Council understands that the draft rule would establish jurisdiction for waters that have a “shallow subsurface hydrologic connection” with jurisdictional waters. Congress did not intend for the regulatory reach of the CWA to apply to the management and protection of groundwater.

The Council understands that the preamble for the draft rule may include disclaimers that the rule is not intended to cause the shallow subsurface connections themselves to become jurisdictional, and that such connections would not be considered Waters of the United States (WOUS) in and of themselves. The Council supports the intent of such language. However, to fully clarify that groundwater is not subject to CWA jurisdiction, the text of the rule itself should expressly exclude groundwater and any subsurface flows used to establish shallow subsurface hydrologic connections between surface waters.

### D. Exclusions

The Council understands that the draft rule may specifically exclude certain waters from its definition of WOUS. The Council supports the intent of such a provision and requests that your agencies also include other waters and features that are generally considered to be outside the scope of the CWA. In addition to groundwater, the following should also be excluded:

1. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA’s agricultural exemption;
2. Man-made dugouts and ponds used for stock watering or irrigation in upland areas that are not connected to surface waters;
3. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement;
4. Man-made pits and quarries that have been excavated in uplands and that fill with groundwater but are not connected to surface waters; and
5. Prairie potholes and playa lakes.

The preamble for the rule should also recognize that the states have authority pursuant to their “waters of the state” jurisdiction to protect excluded waters, and that excluding such waters from federal CWA jurisdiction does not mean that they will be exempt from regulation. The preamble should further recognize that the states are best suited to understand the unique aspects of their geography, hydrology, and legal frameworks, and are therefore in the best position to provide the most feasible and effective protections for excluded waters.

### E. Significant Nexus

The Council understands that the draft rule may recognize that Justice Kennedy’s significant nexus test requires a connection between waters that is “more than speculative or insubstantial” to establish jurisdiction. The Council supports the intent of such recognition. However, the rule should also quantify “significance” to ensure that it does not extend jurisdiction to waters that have a de minimis connection to jurisdictional waters.

### F. State Consultation

As noted in the Council’s prior correspondence and meetings with your agencies, the western states remain concerned about the process EPA and the Corps are using to develop this rule.



In 2011, the Council asked EPA and the Corps to pursue formal rulemaking instead of finalizing the now withdrawn guidance. At that time, the Council believed rulemaking, unlike guidance, would afford greater opportunities for early and ongoing consultation with the states. The Council also believed rulemaking would better ensure the treatment of states as co-regulators in the development of a draft rule.

However, the submission of a draft rule on CWA jurisdiction to OMB for interagency review without any substantive state consultation in the development of the rule raises significant concerns that your agencies will use a process that is no better than the one they used to develop the draft guidance. In particular, we remain concerned that individual states will not have the opportunity to provide substantive feedback until after EPA and the Corps have developed a draft rule and published it for public comment in the Federal Register.

While we recognize that EPA and the Corps have participated in various meetings and calls with the Council and other state organizations to discuss their goals and time lines for the rulemaking, such communication cannot take the place of substantive, collaborative engagement with the states and their respective water quality agencies on an individual basis. In particular, the substantial differences in hydrology, geography, and legal frameworks in the West will require significant consultation with each state to determine how the draft rule will be implemented in order to avoid misinterpretations and unintended consequences. The potential for unintended consequences further underscores the need for EPA and the Corps to avail themselves of the states' on-the-ground knowledge of their unique circumstances by giving as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs.

In sum, EPA and the Corps should not wait until the public comment period to involve the states on a collective and individual basis in the development of the draft rule. States are co-regulators and are therefore separate and apart from the public. As such, waiting until the public comment period to consult with the states, both individually and collectively, in the development of the draft rule ignores their role as co-regulators and will not allow for meaningful state input or consideration of state concerns.

G. Conclusion

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip C. Ward", written over a horizontal line.

Phillip C. Ward  
Chairman, Western States Water Council



**WESTERN STATES WATER COUNCIL**

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Web Page: [www.westgov.org/hswc](http://www.westgov.org/hswc)

December 23, 2013

Sent Via Fax: (202) 395-3888

The Honorable Sylvia Mathews Burwell, Director  
Office of Management and Budget  
725 17<sup>th</sup> Street N.W.  
Washington, D.C. 20503

RE: Draft Clean Water Act Rule

Dear Director Burwell:

On behalf of the Western States Water Council, representing 18 western states on water policy issues, I am writing to ask that the Office of Management and Budget (OMB) ensure that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) comply with the state consultation criteria set forth in Executive Order (E.O.) 13132 as they formulate and implement their Clean Water Act (CWA) jurisdiction rule. These comments are based on our enclosed position dated July 29, 2011, as well as our letters to EPA and the Corps dated April 10, 2013, November 5, 2013, and November 20, 2013.

**A. State Consultation and E.O. 13132**

The submission of a draft rule on CWA jurisdiction to OMB without any state consultation raises significant concerns about how and when EPA and the Corps will consult with the states regarding the formulation of this rule. Congress intended that the states and EPA would implement the CWA as a federal-state partnership, delegating authority to the states to administer the law as co-regulators with EPA.

While EPA has conducted some outreach with the Council and other organizations, these efforts have consisted primarily of communicating EPA's and the Corps' goals and time lines for the rulemaking. There is a difference between communication and consultation, and EPA and the Corps have yet to engage the states regarding state needs, perspectives, or expertise in developing the draft rule. Ideally, EPA and the Corps would have conducted this type of consultation with the states prior to beginning the rulemaking process and before submitting a draft rule to OMB.

We are also concerned that EPA and the Corps apparently do not consider the rulemaking to have federalism implications requiring compliance with E.O. 13132, which sets forth specific state consultation criteria for federal agencies to follow when formulating and implementing policies that have federalism implications. According to Section 1(a) of the order, a policy will have federalism implications if it has "substantial direct effects on the States." Efforts to redefine or clarify the term "waters of the U.S." have, on their face, numerous federalism implications that many states believe will have very substantial and direct effects, thereby requiring compliance with E.O. 13132.

### B. E.O. 13132's State Consultation Criteria

There is a considerable amount of uncertainty and significant differences of opinion regarding the extent of the CWA's authority and the impacts of any new rule. Such uncertainty underscores the need for EPA and the Corps to consult with the states as co-regulators regarding the formulation and implementation of this rule. Such consultation should be separate and apart from the general public comment period, and should give as much weight and deference as possible to state needs, priorities, and concerns. Indeed, numerous provisions of E.O. 13132 call for substantive state consultation, including among others:

- Section 2(i): "The national government should be *deferential to the States* when taking action that affects the policymaking discretion of the States and should act only with the *greatest caution* where State or local governments have identified *uncertainties regarding the constitutional or statutory authority* of the national government." (emphasis added)
- Section 3(b): "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether *Federal objectives can be attained by other means.*" (emphasis added)
- Section 3(c): "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States *the maximum administrative discretion possible*. Intrusive Federal oversight of State administration is *neither necessary nor desirable.*" (emphasis added)
- Section 6(b): Requiring federal agencies to consult with state and local officials "*early in the process* of developing the proposed regulation" where the regulation will impose "substantial direct compliance costs on State and local governments and that is not required by statute." (emphasis added)

### C. Conclusion

As the Council has stated in its prior correspondence and interactions with EPA and the Corps, waiting until the publication of a proposed rule for public comment to solicit state input will not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives.

Quite simply, it will be very difficult to develop a workable rule that resolves the considerable uncertainty regarding CWA jurisdiction and that leads to actual water quality improvements without meaningful, substantive consultation with the states. Changing the current trajectory of this rulemaking to include the states' views and concerns before seeking public comment is a needed first step. Promulgating this rule without complying with E.O. 13132's consultation criteria would be counterproductive and detrimental to building a positive and productive relationship with the states in implementing the CWA.

We respectfully request that OMB ensure that EPA and the Corps comply with E.O. 13132's state consultation criteria as they formulate and implement their CWA jurisdiction rule.

Thank you for considering the Council's views on this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Phillip C. Ward". The signature is fluid and cursive, with the first name "Phillip" being more prominent.

Phillip C. Ward  
Chair, Western States Water Council

Enclosures

cc: Howard Shelanski, Administrator, Office of Information and Regulatory Affairs  
Nancy Sutley, Chair, White House Council on Environmental Quality  
Gina McCarthy, Administrator, Environmental Protection Agency  
Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works)



**WESTERN STATES WATER COUNCIL**

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November 20, 2013

Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW (1101A)  
Washington, DC 20460

Ms. Jo Ellen Darcy  
Assistant Secretary of the Army (Civil Works)  
108 Army Pentagon  
Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Rulemaking

Dear Administrator McCarthy and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing 18 western states on water policy issues, I am writing to strongly urge your agencies to consult with the states as soon as possible in the development of their Clean Water Act (CWA) jurisdiction rule. These comments are based on our enclosed position and our letters dated April 10, 2013, and November 5, 2013.

**A. State Consultation and Executive Order 13132**

The submission of a draft rule on CWA jurisdiction to the Office of Management and Budget (OMB) without any state consultation raises significant concerns about how and when the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers will consult with the states regarding this rule. Congress intended the states and EPA to implement the CWA as a federal-state partnership, delegating authority to the states to administer the CWA as co-regulators with EPA. As such, your agencies must treat the states as co-regulators in the development of any proposed rule regarding CWA jurisdiction. Ideally, EPA and the Corps would have consulted with the states prior to beginning the rulemaking process and certainly prior to submitting a draft rule to OMB.

We are especially concerned that your agencies may not consider the rulemaking to have federalism implications requiring compliance with Executive Order (E.O.) 13132's state consultation criteria. Such a perspective is in direct opposition to the principles of cooperative federalism embedded within the CWA. Any efforts to redefine or clarify the term "waters of the U.S." have, on their face, numerous federalism implications that necessitate compliance with E.O. 13132. In particular, such efforts qualify as "policies that have federalism implications" under the order because they have "substantial direct effects" on the states and on the "distribution of power and responsibilities among the various levels of government."

For example, aside from four states, including Idaho and New Mexico in the West, every state is primarily responsible for regulating discharges of pollutants to jurisdictional waters because they have delegated responsibility from EPA to operate approved National Pollutant Discharge Elimination System permitting programs under Section 402 of the CWA. Any

changes to the regulations and policies that govern which waters are jurisdictional will have a direct substantial impact to these programs. Specifically, changes limiting CWA jurisdiction could affect the states' ability to regulate waters previously considered to be jurisdictional, while changes that expand authority could require states to expend additional resources to permit discharges to previously unregulated waters.

Moreover, regardless of whether they have delegated authority under Sections 402 or 404, the requirements and limitations associated with jurisdictional waters will directly impact the ability of every state to enact policies regarding waters within their borders, as well as the allocation of their already limited resources. This is particularly true if the rule compels states to extend their Section 303(d) responsibilities to waters that are functionally marginal.

The considerable uncertainty and differences of opinion that exist regarding the extent of the CWA's authority demand that states receive a unique audience with your agencies as co-regulators that is separate and apart from the general public, and gives as much weight and deference as possible to state needs, priorities, and concerns. Indeed, numerous provisions of E.O. 13132 call for exactly this type of consultation, including among others:

- Section 2(i): "The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government." (emphasis added)
- Section 3(b): "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means." (emphasis added)
- Section 3(c): "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable." (emphasis added)
- Section 6(b): Requiring federal agencies to consult with state and local officials "early in the process of developing the proposed regulation" where the regulation will impose "substantial direct compliance costs on State and local governments and that is not required by statute." (emphasis added)

As we have stated repeatedly in our prior correspondence and interactions with officials from your agencies, waiting until the publication of a rule for public comment to solicit state input will not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives. Quite simply, it will be very difficult to develop a workable rule that resolves the considerable uncertainty regarding CWA jurisdiction and that leads to actual water quality improvements without changing the current trajectory of this rulemaking to include the states' views and concerns before seeking public comment. Further, promulgating this rule without complying with E.O. 13132's consultation criteria could threaten the historically positive and productive relationship that states have enjoyed with EPA and the Corps in implementing the CWA.

**B. Concerns to Address Through Consultation**

As stated in our prior correspondence, there are a number of issues that require state consultation to address, including but not limited to:

- State Deference: How the rule will ensure deference to the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality as required under Sections 101(b) and 101(g).
- Groundwater: How to ensure that the rule will not be misinterpreted as extending CWA jurisdiction to groundwater, including state concerns regarding the use of "shallow subsurface hydrologic connections" to establish jurisdiction.
- Extent of CWA Jurisdiction: How the rule will comply with the limits Congress and the U.S. Supreme Court have established regarding the extent of CWA jurisdiction, including how the rule will provide clear and recognizable limits to such jurisdiction, especially pertaining to isolated wetlands.

**C. Conclusion**

In light of the above, we urge EPA and the Corps to recognize the significant federalism implications of this rulemaking and to comply with E.O. 13132's state consultation criteria. We also respectfully request additional information on how and when your agencies will consult with the states regarding the development of this rule, including how they will ensure the treatment of states as co-regulators.

We look forward to your response to these concerns.

Sincerely,



Phillip C. Ward  
Chair, Western States Water Council

Enclosure

cc: Robert Perciasepe, Deputy Administrator, Environmental Protection Agency  
Let Mon Lee, Deputy Assistant Secretary for Policy and Legislation, U.S. Army Corps of Engineers



## WESTERN STATES WATER COUNCIL

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Web Page: [www.westernstateswater.org](http://www.westernstateswater.org)

November 5, 2013

Gina McCarthy  
 Administrator  
 U.S. Environmental Protection Agency  
 1200 Pennsylvania Avenue, NW  
 Washington, DC 20460

RE: Docket ID No. EPA-HQ-OA-2013-0582

Dear Administrator McCarthy:

On behalf of the Western States Water Council, and its members, representing the governors of 18 western states, I am writing to comment on your agency's draft science report titled *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (September 2013 External Review Draft, EPA/600/R-11/098B). Our understanding is that the final version of this report will serve as the scientific basis for rulemaking that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers are jointly developing to clarify the extent of Clean Water Act (CWA) jurisdiction in light of the U.S. Supreme Court's *SWANCC* and *Rapanos* decisions. Our comments are based on our attached position and related letter dated April 10, 2013, which we sent to your agency and the Corps regarding the now withdrawn CWA guidance.

We are concerned that the report may be misinterpreted inappropriately to suggest that a scientific connection between waters alone is sufficient to establish CWA jurisdiction. The report only discusses well-known scientific principles of hydrology and geohydrology regarding the interconnections between waters, but does not and cannot describe how these principles apply to the legal and institutional boundaries that Congress and the Supreme Court have placed on CWA jurisdiction.

The overriding question in the rulemaking is not one of science, but of legal authority, namely the extent of federal authority over water resources under Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion in *Rapanos*. For example, under Justice Kennedy's test, a mere scientific connection or "nexus" between waters is not sufficient to determine CWA jurisdiction. Instead, Justice Kennedy's test requires a fact-intensive, case-by-case physical and legal inquiry to determine whether that nexus is "significant" enough to establish CWA jurisdiction. Since the report does not describe how its scientific findings apply to this test or Justice Scalia's plurality decision, it is insufficient alone to establish or support CWA jurisdiction.



The report should not be used to support a rule that improperly asserts that the scope of the CWA is essentially unlimited. We recognize that there are differing interpretations of *Rapanos*, but it is undisputed that the Court rejected the EPA's and the Corps' pre-*Rapanos* interpretation of CWA authority. A rule that attempts to return CWA jurisdiction to the pre-*Rapanos* "status quo," using the report's findings of global hydrologic connectivity would be contrary to the limits that Congress and the Court have established, and would be an improper use of the report and federal rulemaking authority. Moreover, the CWA does not apply to ground waters, which are protected and allocated by western states, which recognize the hydrogeologic connections. Any reference to ground waters, including "shallow subsurface flows," is inappropriate in any related rulemaking.

As stated in our position regarding the draft CWA guidance, efforts to expand CWA authority beyond the limitations the Court established in *SWANCC* and *Rapanos* "would likely lead to further litigation" and would do little to resolve the current uncertainty regarding the extent of CWA jurisdiction.

We are also concerned about the lack of state expertise and state representation on the Science Advisory Board. Not a single member of the board is a state agency expert or administrator. As stated in our April letter, the states have on-the-ground expertise and knowledge of water quality conditions and challenges within their borders.

In light of the above, we urge you to recognize the limitations of the report as it does not address the legal limits of CWA jurisdiction and authority, and how those limits apply to the scientific principles discussed in the report.

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,



Phillip C. Ward  
Chair, Western States Water Council

Enclosures

cc: Office of Environmental Information (OEI), Docket (Mail Code: 28221T),  
Docket ID No. EPA-HQ-OA-2013-0582, U.S. Environmental Protection Agency,  
1200 Pennsylvania Ave. NW, Washington, DC 20460



WESTERN STATES WATER COUNCIL

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April 10, 2013

Sent via email: [Perciasepe.bob@epa.gov](mailto:Perciasepe.bob@epa.gov)  
[ASACWPOC@conus.army.mil](mailto:ASACWPOC@conus.army.mil)

Mr. Robert Perciasepe  
 Acting Administrator  
 U.S. Environmental Protection Agency  
 Ariel Rios Building  
 1200 Pennsylvania Avenue, NW (1101A)  
 Washington, DC 20460

Ms. Jo Ellen Darcy  
 Assistant Secretary of the Army (Civil Works)  
 108 Army Pentagon  
 Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Guidance and Rulemaking

Dear Acting Administrator Perciasepe and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing the governors of 18 western states, I am writing to reiterate concerns regarding the *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, which the Council set forth in the enclosed comment letter dated July 29, 2011.

It is our understanding that your agencies are developing a proposed rule to clarify Clean Water Act (CWA) jurisdiction, as indicated in the Uniform Regulatory Agenda and Regulatory Plan published on December 21, 2012. As explained in our comment letter, the Council prefers rulemaking to clarify CWA jurisdiction instead of legally unenforceable guidance. Therefore, we urge you not to issue or apply the guidance to determine CWA jurisdiction while your agencies develop a new rule.

The vast majority of states have long worked as co-regulators with your agencies to protect water quality pursuant to the framework of cooperative federalism embodied in the CWA. Although states are responsible for implementing and administering most CWA programs, EPA and the Corps did not consult with the states in developing the draft guidance, nor did they share the document with the states prior to releasing it for public comment in April 2011. We understand your agencies have since revised the guidance after the public comment period and submitted it to the Office of Management and Budget for final review. Nevertheless, the revised guidance has not been made public nor has it been provided to the states for review.

We remain concerned about the lack of state consultation in developing the guidance and the potential that the final document may not adequately account for state needs and perspectives. The complexities of CWA jurisdiction and the broad ramifications for state and federal water quality programs warrant a formal and transparent rulemaking process. Unlike guidance, the notice and comment provisions of formal rulemaking facilitate early and ongoing engagement with states and other stakeholders. Formal rulemaking also triggers Executive Order 13132, which provides states with further opportunity to review a proposed regulation and offer perspectives prior to the publication of a rule.

Mr. Perciasepe and Ms. Darcy  
April 10, 2013  
Page 2

States bear the primary responsibility for preventing, reducing, and eliminating water pollution. By providing greater consultation with states, formal rulemaking is more likely than guidance to produce actual water quality improvements because it would better take into account state needs and perspectives, as well as the states' on-the-ground expertise and knowledge of water quality conditions and challenges within their borders. Issuing the guidance in the interim while EPA and the Corps pursue rulemaking would be a distraction that would create unnecessary conflict and uncertainty that would hinder the development of an effective rule.

Lastly, we urge you to continue to view the states as co-regulators and to ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip C. Ward". The signature is stylized with a large, looped initial "P" and a distinct "W" at the end.

Phillip C. Ward  
Chair, Western States Water Council

Enclosure (WSWC Position #330.5)


**WESTERN STATES WATER COUNCIL**

5296 Commerce Drive, Suite 202 | Murray, Utah 84107 | (801) 685-2555 | FAX (801) 685-2559

 Web Page: [www.westernstateswater.org](http://www.westernstateswater.org)

Position #330.5

July 29, 2011

Water Docket  
 Environmental Protection Agency  
 Mail Code 2822T  
 1200 Pennsylvania Avenue, NW  
 Washington, DC 20460

RE: EPA-HQ-OW-2011-0409

To Whom It May Concern:

On behalf of the Western States Water Council, representing the governors of 18 western states, we are writing to provide our comments on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' *Draft Guidance on Identifying Waters Protected by the Clean Water Act*. Before commenting on the guidance, we wish to express our preference for EPA and the Corps promulgating a clarifying rule, as opposed to legally unenforceable guidance.

We understand that the intent of the draft guidance is to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court's *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC)<sup>1</sup> and *Rapanos v. United States* (Rapanos)<sup>2</sup> decisions. It is also our understanding that EPA and the Corps intend to undertake rulemaking after the guidance is final to provide further clarification regarding the extent of CWA jurisdiction. Indeed, Justice Kennedy's opinion in the *Rapanos* decision would appear to invite promulgation of a rule.

The guidance provides no clear and concise limits to federal jurisdiction. Further, it could actually lead to an expansion of claims of jurisdiction beyond the limitations delineated in *SWANCC* and *Rapanos*, and if promulgated as regulations, once applied, would likely lead to further litigation.

**A. State Water Resources Allocation and Water Rights Administration**

Section 101(g) of the CWA expressly 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. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

Section 101(b) of the CWA further states: "It is the policy of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . ."

<sup>1</sup> 531 U.S. 159 (2001).

<sup>2</sup> 547 U.S. 715 (2006).

The guidance and any subsequent regulations regarding the extent of CWA jurisdiction should reference Sections 101(b) and 101(g), and should not infringe upon the states' primary authority to allocate water and administer water rights within their borders and protect water quality.

## **B. The Watershed Approach to Jurisdiction**

The draft guidance sets forth a "watershed" approach for satisfying Justice Kennedy's "significant nexus" test in which CWA jurisdiction is determined by reference to the nexus between the watershed and the closest traditional navigable water, not the nexus between the particular wetland or tributary in question and the navigable waters. Under this approach, virtually any tributary or wetland, or "other waters," no matter how far removed, no matter how small or insignificant, could become jurisdictional if aggregated with all other tributaries and wetlands or other waters within a watershed. Such an outcome raises questions as to whether a watershed approach is consistent with *SWANCC* and *Rapanos*, which hold that the CWA's jurisdiction is not without limits.<sup>3</sup>

Questions also remain as to whether the EPA and the Corps can use guidance to promulgate a "watershed" approach instead of a "case-by-case" determination. In particular, Justice Kennedy stated in his concurring opinion in *Rapanos* that "absent more specific regulations," a "case-by-case" analysis is needed to determine jurisdiction for wetlands based upon adjacency to navigable tributaries.<sup>4</sup> Kennedy further stated that such a showing is necessary to avoid "unnecessary application" of the CWA given the "potential overbreadth" of the federal regulations at issue in *Rapanos*.<sup>5</sup> The draft guidance, while not a regulation, needs further clarification to ensure that it complies with this requirement.

With respect to CWA jurisdictional determinations for tributaries, the draft guidance states that a significant nexus is presumed to be established if it can be shown that the tributary: (1) contains a bed, bank, and ordinary high water mark; and (2) drains, or is part of a network of tributaries that drain, into a downstream navigable water or interstate water. However, the draft guidance does not address how much water a tributary is required to drain in order to meet this test, leaving open the possibility that an ephemeral or other stream with a *de minimis* volume of flowing water is enough to constitute a jurisdictional tributary. This could create uncertainty and lead to further confusion about the types of waters subject to CWA jurisdiction, particularly in the arid West where there are a variety of waters with minimal flows.

In light of the above, the Council urges EPA and the Corps to ensure that the guidance and any related regulations comply with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on CWA jurisdiction. In carrying out these tasks, EPA and the Corps should also ensure that the guidance does not displace nor circumvent the regulatory and legislative processes.

## **C. Groundwater**

Page 16 of the draft guidance states that a wetland can be deemed to be "adjacent," and therefore jurisdictional, if there is an unbroken "surface or shallow sub-surface hydrologic connection between the wetland and the jurisdictional waters." Although the draft guidance does not use the term "groundwater," nor define the term "shallow sub-surface hydrologic connection," it could be interpreted as referring to

<sup>3</sup> See *Rapanos*, 547 U.S. at 739 (stating, "The Corps' expansive interpretation of the 'waters of the United States' is thus not 'based on a permissible construction of the statute.'"); *Id.* at 778 – 79 (J. Kennedy concurring) (stating that the deference owed to regulations at issue in *Rapanos* does not extend so far as to apply CWA jurisdiction "...whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."). *Id.* at 778-79 (Kennedy concurring)

<sup>4</sup> *Id.* at 782.

<sup>5</sup> *Id.*

groundwater, tributary or alluvial groundwater, water stored in the bed and banks of streams, or even soil moisture, again expanding the jurisdictional reach without legal basis or limit, resulting in greater uncertainty and likely litigation.

Groundwater is not subject to the CWA and states are solely responsible for protecting, allocating and administering water rights pertaining to this resource. Accordingly, administrative and judicial interpretations of the CWA have consistently treated groundwater separately from “waters of the United States.” The guidance and any related regulations regarding the extent of CWA jurisdiction should make clear that such jurisdiction does not extend to groundwater, and that groundwater allocation and water rights administration fall under the exclusive purview of the states.

#### **D. States as Co-Regulators**

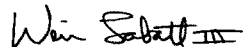
The states, EPA, and the Corps have made progress in working together to carry out the CWA’s goal of controlling water pollution. The EPA and Corps should continue to view states as co-regulators and should ensure that state water managers have a robust and meaningful voice in the development of any guidance and/or regulations regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

#### **E. Conclusion**

In sum, the guidance and/or regulations that EPA and the Corps may promulgate regarding CWA jurisdiction should: (1) provide clear and concise limits to federal jurisdiction; (2) not infringe upon the states’ primary authority to allocate water and administer water rights within their borders; (3) be consistent with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on the extent of CWA jurisdiction; (4) make clear that CWA jurisdiction does not extend to groundwater and that groundwater allocation and water rights administration fall under the exclusive purview of the states; and (5) be developed with robust and meaningful state participation.

We very much appreciate the opportunity to comment on the draft guidance, and look forward to continuing our work with EPA and the Corps to address water quality in the West. Thank you again for considering the Council’s views on this matter.

Sincerely,



Weir Labatt, III  
Chair, Western States Water Council

**United States House of Representatives  
Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment**

**Public Hearing  
“Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule”**

**Testimony of**

**J.D. Strong  
Oklahoma Water Resources Board**

**June 11, 2014**

**I. Introduction**

In addition to my testimony on behalf of the Western Governors’ Association (WGA) and Western States Water Council (WSWC), which I wholeheartedly support and hereby incorporate by reference, I would also like to address the Committee in my capacity as the Executive Director of the Oklahoma Water Resources Board (OWRB). The OWRB’s mission is to enhance the quality of life for Oklahomans by managing, protecting, and improving the state’s water resources to ensure clean, safe, and reliable water supplies, a strong economy, and a healthy environment. Our primary duties and responsibilities include Oklahoma’s water use appropriation and permitting, water quality monitoring and standards, financial assistance for water/wastewater systems, dam safety, floodplain management, water supply planning, technical studies and research, and water resource mapping.

The OWRB plays a crucial role in Oklahoma’s co-regulatory partnership with the federal government under the Clean Water Act (CWA), along with the Oklahoma Department of Environmental Quality (ODEQ); Oklahoma Department of Agriculture, Food and Forestry (ODAFF); Oklahoma Conservation Commission (OCC); Oklahoma Corporation Commission (OCC); and many other public and private stakeholders.

Before providing Oklahoma’s perspective on the proposed rule, please note that these comments will only describe the views of my particular state and not the views of the WGA, the WSWC, and their member states. The rule will affect every state differently given the considerable differences in the states’ hydrology, geography, and legal frameworks. In turn, each state has its own, unique perspective about the substance of the proposed rule, and the degree to which each state may support or oppose the rule and its specific provisions will vary. These differences further underscore the need for the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) (collectively, the agencies) to conduct substantive consultation with each of the individual states in the development and implementation of this or any other proposed rule regarding CWA jurisdiction.

## II. Oklahoma concerns with rulemaking process

### a. Co-regulators are not just stakeholders

The State of Oklahoma plays a significant role in ensuring effective implementation of the CWA. Our co-regulator status elevates the State of Oklahoma, and every other state, above the multitude of other stakeholders now engaged in the public review process. It is imperative that with a rulemaking process of this magnitude, which directly impacts states' implementation of CWA programs, that significant input and review be provided to co-regulator entities on the substance of the proposed rule. With regard to the proposed rule regarding CWA jurisdiction, the WOTUS rulemaking process undeniably excluded Oklahoma's CWA co-regulating agencies.

As stated in my testimony on behalf of WGA and WSWC, EPA and the Corps failed to follow Federalism consultation requirements under Executive Order 13132. Oklahoma believes this failure is a direct violation not only of a Presidential directive designed to maintain the proper balance between federal and state regulation of our citizens, but also of a specific Congressional mandate that shared Federalism guide the ultimate implementation of the CWA. In the proposed rule's preamble, EPA and the Corps downplay the rule's substantial effects on the relationship between the national government and states. On the contrary, the very architecture of the CWA relies upon a strong, cooperative relationship between the federal and state agencies charged with its implementation. Thus, it stands to reason that any rule designed to implement this law must also be based upon substantial cooperation between the federal and state governments.

From a more practical standpoint, there was no reason for EPA and the Corps to avoid formal and meaningful consultation with the states over the many years that have transpired since the agencies embarked upon this process. Erring on the side of caution and demonstrating a genuine desire to cooperate with the very state agencies that have labored to make CWA implementation a success over the past forty-plus-years, EPA and the Corps just as easily could have engaged in the more formal consultation process outlined by Executive Order 13132. Oklahoma recognizes that this rule is one that EPA and the Corps must address at a national level; however, Section 3(b) of Executive Order 13132 *requires* federal agencies to "consult with State and local officials to determine whether Federal objectives can be attained by other means." This is critical in the current situation given the significant effect this rule could have on the ability of Oklahoma and many other drought-stricken states to manage and allocate scarce water resources, not to mention the absolute necessity to do so at the State, regional and local levels. By skipping this critical step in the process, Oklahoma and many other states are left confused, disenfranchised, and scrambling within a 90-day period allotted for public comment to figure out how we will carry out our respective responsibilities on a mostly final rule.

### b. Cart before the horse

Further, it defies logic and scientific reason that EPA and the Corps would expedite submittal of the draft Connectivity Report<sup>1</sup> to the EPA Science Advisory Board (SAB) at the same time they

<sup>1</sup> U.S. Environmental Protection Agency, *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/660R-11/098B (Sept. 2013), available at:



submitted the proposed rule to OMB. As a scientist, I am concerned by what can only be described as an effort to effectively cut off the ongoing scientific deliberation vital to the fundamental questions underlying this proposed rule. Such a rushed, uncollaborative process is foreign to state regulatory agencies like the OWRB that are often engaged in developing highly technical rules over extended periods of time with multiple opportunities for input, first by the scientist that help better inform the decision-making process, then by those burdened with implementing or complying with such rules.

**c. Comparison to Oklahoma's rulemaking process**

For example, as the state agency charged with developing Oklahoma's Water Quality Standards (WQS), the OWRB follows a comprehensive process for rulemaking that fosters regulatory collaboration and creates effective policy. Due to the fact that Oklahoma's WQS have a significant impact on several state agency partners and a vast network of agricultural, industrial, and municipal stakeholders, collaboration is critical to establishing standards that are clear and effective.

The first step in the OWRB's WQS rulemaking process is to bring all agency co-regulators and scientists to the table for discussion and input regarding what rules are needed and the scientific basis for such rules. In fact, we often ask that our agency co-regulators provide draft language for provisions they deem to be important to include in the rulemaking process. This is what genuine consultation between co-regulators looks like. Further stakeholder discussion is accomplished through at least two informal open meetings, all before embarking on an extended series of formal notices, reviews, and hearings. Essentially, the goal of this process is for stakeholders to have reached a solid understanding, if not consensus, on the general terms and language of the proposed rule prior to launching into the formal rulemaking process provided under Oklahoma's Administrative Procedures Act. Time and again, we have witnessed the success of this process in fostering clear and effective water quality policy for the citizens of Oklahoma.

If the OWRB had followed the process used by EPA and the Corps to develop its proposed WOTUS rule, I have no doubt that the Oklahomans to which we are accountable would have secured legislative and/or gubernatorial sanctions preventing any further action to finalize such rules. Recognizing the State of Oklahoma as a co-regulator, and thus affording us the opportunity for comprehensive input similar to the rulemaking process used in Oklahoma, could have avoided altogether many of the concerns I will now outline regarding the proposed WOTUS rule.

**III. Oklahoma concerns with the draft rule**

EPA and the Corps have arduously emphasized that the goal for this proposed rulemaking is to provide a measure of definition, clarity and objectivity to the determination of WOTUS jurisdiction. I wholeheartedly agree that clarity and less subjectivity in making CWA

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[http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr\\_activites/7724357376745F48852579E60043E88C/\\$File/WOTUS\\_ERD2\\_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOTUS_ERD2_Sep2013.pdf).

jurisdictional determinations are the key reason for pursuing this rulemaking in the first place. Falling short of this goal would render the rulemaking process futile for all involved.

Unfortunately from Oklahoma's perspective, the proposed rule does not make it any more clear or precise which waters fall under CWA jurisdiction unless we are to assume that nearly all waters fall under such jurisdiction. Having not been involved in the deliberations prior to drafting the rule, and given the expedited review timeline that we now face, we are concerned that EPA and the Corps have made a policy decision that all connections between waters are "significant" regardless of how much or how often they actually contain water or influence truly navigable waters. *Essentially, EPA and the Corps have taken an already fuzzy line and moved it from one place to another without making the line any less fuzzy.*

Critical portions of the proposed rule include key concepts that are newly created, yet are left unclear, undefined or subject to agency discretion. In other words, the rule fosters continued and additional subjectivity – a result diametrically opposed to the authoring agencies' intent. While the proposed rule does not change the primary categories of water that historically have been regulated as "navigable waters" (e.g. tidal water bodies, interstate waters, territorial seas, and impoundments of these waters), the proposal seemingly expands the CWA's regulatory coverage of tributaries and includes broad new categories of waters, such as ditches, adjacent waters, riparian areas and floodplains.

Because I and other Oklahoma co-regulators were not invited to participate in the decision-making process, we are left wondering whether our myriad ditches, dry ephemeral streams, playa lakes and other features that sometimes carry water will fall under federal jurisdiction. Current regulations do not even refer to ditches as jurisdictional waters, so why have they been added? The mere mention of ditches evokes an entirely new dispute for most arid western states like Oklahoma, as entire communities and economies have been built upon vast networks of ditches. Under the proposed rule, it seems at least possible that EPA and the Corps want to regulate our ditches, except for a few rare cases in which some farm ditches may fall into either of the two exempt categories narrowly crafted by the agencies.

Equally confusing in the proposed rule are its somewhat incoherent list of exemptions, including the aforementioned narrow ditch exemption. These exemptions apply to a limited set of features excavated wholly on uplands, which is yet another critical term left undefined in the proposed rule. It is also noteworthy that in the rule's preamble, EPA and the Corps acknowledge the difficulty of distinguishing excluded "gullies and rills" from potentially regulated "ephemeral streams."

Essentially, the proposed rule can be interpreted to open the door for most water features, and even dry land, to become WOTUS—a broad expansion of the areas across the landscape where no "dredge or fill" material or other "pollutant" can be "discharged" without a federal permit. It begs the question whether anything within a watershed will ever be deemed so insignificant that the federal government leaves regulatory discretion to Oklahoma and the other states.

#### IV. Oklahoma concerns with jurisdictional expansion

By establishing broader definitions of existing regulatory categories, such as “tributaries,” and regulating new areas that are not jurisdictional under current regulations, the proposed rule basically provides no clear limit to federal jurisdiction. Location of a water in a riparian area or a floodplain, a connection through shallow subsurface water or directly or indirectly through other waters, and aggregation of similarly situated waters, are some of the ways that the proposed rule could capture waters that historically would be non-jurisdictional.

##### a. Jurisdiction over subsurface flows, a.k.a. “groundwater”

Of great significance to Oklahoma, the proposed rule does not go far enough to ensure that Oklahoma’s groundwater is off limits. While I appreciate that EPA and the Corps have added a specific statement in the proposed rule that excludes groundwater, they continue to say that shallow subsurface flows could be used to establish jurisdictional nexus. In Oklahoma, any subsurface water, no matter how shallow, is considered groundwater and thus belongs to private property owners subject only to reasonable regulation by the state. As a practical matter, it’s hard to fathom how CWA regulations can be effectively applied to distinct surface waters connected only through subsurface waters without ultimately expanding jurisdiction over the property owner’s groundwater resource. Any regulation of subsurface flows, or other water under the surface, would be a severe encroachment on the private property rights of Oklahoma landowners.

##### b. Local and state management is key to success

While not stated explicitly in the proposed rule, expansion of EPA and Corps jurisdiction over any waters not previously considered WOTUS must be predicated on a belief that states are incapable of protecting and managing such waters – an assertion that simply is not supported by science or facts. The OWRB and other state agencies in Oklahoma have been responsible and effective stewards of water quality and quantity management both before and since enactment of the CWA. In fact, many of Oklahoma’s success stories are highlighted in EPA’s own publications and webpages and are due to state and local voluntary conservation programs, effective water management strategies, and superior water quality monitoring networks.

##### c. Inadequate economic impact analysis

EPA and the Corps also claim that the rule would have minimal economic impact and would not affect many acres—only about 1,300 acres nationwide—which seems grossly inaccurate given that the proposed rule could be read to affect this number of acres within one Oklahoma county alone. Furthermore, in order for EPA and the Corps to substantiate such claims that the rule will only impact a defined number of acres or defined percentage of waters requires that they delineate the newly impacted areas. *So show us the map!* Such a map would go a long way to helping states and the regulated community understand exactly where each jurisdictional water is located. Unfortunately, up to this point there has been no map delineating the proposed scope of CWA jurisdiction, even in the abstract, which seems like a very reasonable and helpful visual aid to accompany a geographically-based rule. When we contacted our Corps District Office to help

identify which waters would be covered by the new rule, we were told that case-by-case determinations would continue to be made, which begs the question whether anything has been clarified by the proposed rule.

Largely avoiding the true costs, EPA and the Corps have instead emphasized that the proposed rule will *benefit* businesses by making it easier to determine if a body of water is covered by the CWA. Based upon our aforementioned confusion regarding definitions and new undefined terms, this is only true if we assume that nearly *everything* is covered. This, of course, does not save anyone from the cost and burdens of increased regulation. As highlighted in a recent report prepared for The Waters Advocacy Coalition, “The inclusion of these (expanded categories of) 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.”<sup>2</sup> Thus, the proposed rule creates a situation where continued litigation will likely cause a greater expenditure of time and resources to subjectively apply the definitions contained within the proposed rule. This impact will be felt by the entire regulated community and all Oklahomans, including small landowners and businesses least able to absorb such costs. Of grave concern to the OWRB and our sister agencies, the analysis also does not address the burden on state resources for required for permitting, oversight and enforcement.

## V. Recommendations

The issues outlined above are of great concern to the State of Oklahoma for a number of reasons, not least of which is that a significant amount of time and resources have been expended on a proposed rule that is confounding. Instead, this proposed rule breeds the continued broad interpretations that have lead to repeated subjectivity and uncertainty in years past. While it is my sincere hope that my comments today will be accepted as constructive criticism, I recognize that they would not be fully constructive without identifying some recommendations for a path forward.

### a. Time-out

First and foremost, I encourage EPA and the Corps to recognize that this flawed process cannot continue without genuine consultation with state co-regulators like Oklahoma, as doing so would continue to violate Executive and Congressional mandates, not to mention the very trust and cooperation upon which we co-regulators depend. Stepping back and following a collaborative rulemaking process similar to Oklahoma’s or any number of other states, or the process outlined in Executive Order 13132 in the alternative, would resolve difficult and protracted complications that undoubtedly will flow from continuing down the current path. My agency and our CWA co-regulatory partners in Oklahoma stand ready to assist both EPA and the Corps with initiating this process in our own state.

<sup>2</sup> David Sunding, Ph.D., *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States*, The Brattle Group (May 2014), available at: <http://news.agc.org/wp-content/uploads/2014/05/WOTUS-Economic-Report-FINAL.pdf>

As noted previously, Section 3(b) of Executive Order 13132 requires consideration of whether federal objectives can be met through other means. It also provides the following additional remedies to state co-regulators that have so far been excluded from this rulemaking process:

Section 2(i): “The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.” (emphasis added)

Section 3(c): “With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable.” (emphasis added)

Section 6(b): Requiring federal agencies to consult with state and local officials “early in the process of developing the proposed regulation” where the regulation will impose “substantial direct compliance costs on State and local governments and that is not required by statute.” (emphasis added)

Pausing the WOTUS rulemaking process at this stage would allow EPA and the Corps to step back and engage states in this meaningful, if not mandatory, process. In addition to clarifying for states what is meant by the new definitions and undefined terms found in the draft rule, an extended pause would allow federal and state partners to consider more effective alternatives that have not been fully vetted and likely will not be fully vetted within the 90-day timeframe to which we are currently confined.

For example, states like Oklahoma are considering highly conceptual solutions such as a ***rebuttable presumption approach***, which essentially shifts the burden off of landowners and others in the regulated community and instead requires EPA and the Corps to prove that certain marginal waters are in fact jurisdictional under the rule. Furthermore, waiting for the Connectivity Report to be fully vetted and finalized could result in a more solid scientific basis to establish a ***gradient approach*** in which more clear delineations of jurisdictional versus non-jurisdictional waters could be derived. Ongoing deliberations between the members of the SAB suggest that such gradients could be more clearly defined in the Connectivity Report. Such scientific advancements could go a long way to illuminating a more clear path forward for jurisdictional decision-making.

#### **b. Statutory amendments**

While amending the CWA is a difficult prospect that has alluded many a Congress, a narrow amendment designed to articulate a more collaborative and mandatory rulemaking process seems reasonable given the unsatisfactory experience that most states have had with this and numerous other CWA rulemakings of late. Avoiding an intractable debate on wholesale amendments or reauthorization of the CWA, Congress could craft an amendment designed for the singular purpose of prohibiting promulgation of any rule that fails to include meaningful, robust consultation with the states, tribes, and others charged with implementation.

**VI. Conclusion**

The foregoing comments and recommendations are offered in a spirit of cooperation and utmost respect for the daunting task faced by Congress and the many agencies charged with implementing its significant laws. I know that I and my sister Oklahoma agencies stand ready to assist the Committee, the EPA, and the Corps in this process.

Thank you for the opportunity to share Oklahoma's views with you today, and thank you for your leadership in addressing this important issue.

Before the U.S. House of Representatives  
Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment

Hearing on “Potential Impacts of Proposed Changes to the Clean Water Act  
Jurisdiction Rule”

Testimony of  
Mark T. Pifher  
Manager, Southern Delivery System  
Colorado Springs Utilities

Submitted on behalf of the  
National Water Resources Association

June 11, 2014

Mr. Chairman and members of the Subcommittee, my name is Mark Pifher and I am here today to provide you with the perspective of Western water users. Municipal water and wastewater utilities, as well as irrigated agriculture, share concerns over the recently released rulemaking proposal concerning the definition of "waters of the U.S." under the federal Clean Water Act. In particular, I would like to share the views of the members of the National Water Resources Association (NWRA) and the Western Urban Water Coalition (WUWC). The NWRA is a nonprofit federation made up of municipal and agricultural water providers, state associations, and individuals dedicated to the conservation, enhancement and efficient management of our nation's most important natural resource, water. Its members provide clean water to millions of individuals, as well as families, agricultural producers and other businesses throughout the Western United States. WUWC consists of the largest urban water utilities in the western United States, serving over 35 million customers in 15 metropolitan areas across five states, some of also operate wastewater and electric facilities. The membership of WUWC includes: Arizona-Central Arizona Project and City of Phoenix; California- East Bay Municipal Utility District, Eastern Municipal Water District, Los Angeles Department of Water and Power, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission and Santa Clara Valley Water District; Colorado- Aurora Water, Colorado Springs Utilities, and Denver Water; Nevada- Las Vegas Valley Water District, Southern Nevada Water Authority and Truckee Meadows Water Authority; and Washington- Seattle Public Utilities. WUWC is committed to providing a progressive perspective on the management of water resources in the West.

I have been actively involved with both of the above organizations for many years, serving as the chair of their Water Quality or Clean Water Act Committees. I have also been associated with the Western Coalition of Arid States (WESTCAS). WESTCAS endorses these comments. In addition, I have worked for state government in the water quality arena, have served as the Director of Utilities for the third largest municipality in Colorado, where I oversaw the completion of a



\$600M reuse project, and am currently assisting with regulatory compliance on the Colorado Springs Utilities' Southern Delivery System (SDS), a \$900M municipal water delivery system that, not unlike the Aurora project, depends on the use of re-useable return flows.

#### I. Introduction

Western municipal utilities and irrigation districts provide essential water, wastewater and, at times, stormwater control services to their customers. They have historically been, and will continue to be, ardent supporters of the goals of the federal Clean Water Act (CWA). Achievement of the Acts' goals will assist in the protection and enhancement of the "source water" upon which such utilities depend in ensuring that a reliable, safe supply of water can be delivered to meet residential, commercial, agricultural, recreational and aesthetic demands. It is these municipal utilities who are the on-the-ground partners with EPA and the states in the implementation of both the CWA and the Safe Drinking Water Act (SDWA). They are the entities who design, construct, and operate the water and wastewater treatment and conveyance systems, and the stormwater control structures, that are essential to maintaining their citizens' quality of life, and it is their ratepayers who shoulder the majority of the financial burden associated with doing so.

With specific reference to the proposed "waters of the U.S." rule, it represents a significant expansion of the historical scope of federal jurisdiction. Under the proposal, all tributary and adjacent waters would now be "jurisdictional by rule," the definition of "tributary" and the scope of what is "adjacent" would both expand, a new concept of "neighboring waters" would be incorporated, and the significant nexus test would allow for a watershed scale determination of jurisdiction. Many of the dry arroyos, washes, ditches and ephemeral or intermittent water bodies so common in the arid West could become the subject of federal oversight. As EPA Administrator McCarthy stated shortly after the release of the proposal, "[i]f we need to make any adjustments in this, we will certainly do that." Western water providers, and NWRA members in particular, welcome the opportunity to work cooperatively with EPA in the identification of

such adjustments, while continuing to meet our environmental and water supply obligations.

The importance of this change to municipal utilities lies primarily in its relationship to sections 404 and 402 of the CWA. If a water feature is determined, either per se or on a case-by-case basis, to be a “water of the U.S.,” the dredge and fill permit provisions of section 404 and the point source permit provisions of section 402 are potentially triggered by a variety of municipal undertakings. Invoking these provisions can, in turn, implicate the need for a section 401 water quality certification from the state and, more importantly, may necessitate a costly and time consuming review of the local initiative under the National Environmental Policy Act (NEPA). Finally, the need for the issuance of federal approvals may, in turn, also trigger consultation requirements under the federal Endangered Species Act (ESA).

## II. Placing the Proposal in Context

It is important that the implications of this proposed agency interpretation of Congressional language be considered in the context of the full panoply of environmental and water supply challenges being faced by local communities in the West. This would include those challenges associated with climate change, most notably drought, forest fires, post fire floods, and the overall health of forested watersheds.

The arid West is, in fact, the region which will be the most directly and significantly affected by the outcome of this rulemaking process. It is within this geographic region that one frequently finds dry arroyos and washes that flow only in response to infrequent storm events, isolated ponds, intermittent and ephemeral streams with a tenuous connection to downstream navigable waters, and effluent dominated and dependent water bodies.

In order to meet water supply and wastewater treatment needs, as well as stormwater control requirements, Western municipal utilities and irrigation districts must make substantial infrastructure investments, often requiring creative and innovative approaches. These investments will include new or

expanded storage reservoirs; reuse facilities; desalinization plants; water collection, delivery and distribution pipelines; pump-back projects; groundwater recharge facilities; and reverse osmosis water treatment plants. Many of these facilities will, of necessity, be in somewhat close proximity to the types of “waters” discussed in the current rule proposal. It is essential that these critical activities, many of which may be undertaken in direct response to emergency conditions related to drought, fire, or post-fire damage, do not unnecessarily trigger a federal nexus and its concomitant lengthy and costly permitting procedures.

By way of example of the impact of the existence or non-existence of a federal nexus, in 2010, Aurora Water, in Aurora, Colorado, completed, with the support of the environmental community and other stakeholders, its award winning Prairie Waters Project (PWP). The PWP is an approximately \$638M pump-back reuse project pursuant to which the City recaptures its treated re-useable return flows downstream of the City and, utilizing a thirty-four mile pipeline, three pump stations and a state-of-the-art water treatment plant, delivers potable water back to its customer base. The City, working cooperatively with the Army Corps of Engineers, was able to go from alternatives analysis, to final design, to construction, to grand opening in approximately five years, with less than \$2M in total permitting and mitigation costs. The individual permit provisions of section 404 were never triggered, a situation that it is doubtful could be repeated if the current proposal becomes the law. Though the City employed some re-design efforts and micro-tunneling to avoid traditional navigable waters, it never-the-less did cross a number of what were, at the time, “non-jurisdictional” dry arroyos, washes, swales and ditches, or waters which then qualified for “nationwide” status.

The City of Colorado Springs, on the other hand, is currently constructing its \$900M Southern Delivery System (SDS). It also entails three pumping stations, a new treatment plant, and a pipeline to bring water from an existing reservoir located approximately fifty miles downstream. SDS did need to obtain a section 404 permit, and hence did go through the Environmental Impact Statement (EIS) process under NEPA. The planning and permitting for the project took over a

decade, with NEPA and related environmental studies costing approximately \$30M (\$12M for NEPA alone), and project mitigation costs, many local in nature, exceeding \$150M. Hence, the importance, from both a time and cost perspective, of avoiding unnecessary reviews is apparent. Unfortunately, it would appear that the “Economic Analysis” submitted by the agencies with this proposal significantly underestimates the true costs associated with its implementation.

In addition to constructing new infrastructure projects, many Western municipal water providers are seeking additional “firming” water supplies through the establishment of leasing/fallowing or other interruptible supply arrangements with the agricultural community. The delivery of water under such water sharing contracts often times entails the use of agricultural ditches and diversion structures, many of which may be in need of repair or replacement. To the extent the proposed rule addresses water found in ditches, canals, and even pipes, a finding of a federal nexus, and the regulatory consequences thereof, may very well lead to time delays and cost increases that would preclude such mutually beneficial cooperative transactions.

Further, many smaller Western municipalities are not located in close proximity to perennial rivers or streams and use lagoon or “package plant” technology to treat their wastewater effluent. Though the proposed rule retains the exclusion for CWA wastewater treatment facilities, to the extent the lagoons may discharge to washes or dry arroyos that may now become “waters of the U.S.”, additional costly treatment requirements may be imposed in order to ostensibly protect uses that may have once existed in these dry environments or, in theory, could exist in the future. Added to this is the risk of crossing such common arid area “water” features in the extension of wastewater collection lines or the construction of lift stations. Further, to the extent total maximum daily loads (TMDLs) may be needed to alleviate existing water quality impairments, more small facilities may be caught in the TMDL web as the jurisdictional reach moves even further upstream. Should such requirements be imposed as a consequence of the new federal nexus, this would be potentially cost prohibitive for these communities, yet most likely not result in any significant environmental gains.

Finally, Western municipal utilities and agricultural water providers are also interested in assisting EPA in pursuing “green infrastructure” options for stormwater control. Indeed, stormwater flows remain one of the largest impediments to meeting water quality standards. However, the installation of such infrastructure, including artificially constructed wetlands, natural detention basins, and pervious drainage ways or channels could prove problematic if such infrastructure was found to then be located within, or if itself became, “waters of the U.S.”.

### III. Impacts on Western Water Operations

Western water users have acquired most, if not all, of their water portfolio under the prior appropriation system as administered by their respective states. However, as alluded to above, in order to place those waters to beneficial use, they must divert and/or store that water and subsequently deliver it through a complex set of collection and distribution infrastructure. Congress, through sections 101(g) and 510(2) of the CWA, has afforded an appropriate measure of deference to state water allocation decisions. That said, given the expansive reach of the proposed rule, including its determination as to what constitutes waters that are “jurisdictional by rule,” it would appear that at least some of the infrastructure related activities of the municipal water providers might be subject to federal oversight, even in the absence of any commerce clause connection. The proposal, in effect, removes the concept of “navigable” from the Act contrary to the Supreme Court’s admonition in *SWANCC* that this term must be accorded some effect. Certainly in an area of traditional state primacy, such as the allocation and distribution of essential water supplies, the federal agencies should take all steps necessary to prevent the expansion of federal jurisdiction in the absence of a clear Congressional directive to do so. No such directive exists here.

### IV. The Need for Further Clarification

As this Committee is aware, the proposed rule and accompanying supporting documentation is extremely lengthy and, in places, quite technically complex. In addition, the proposal places reliance not only on numerous published scientific articles, But also EPA’s own draft study, “Connectivity of Streams and Wetlands to

Downstream Waters,” which has not been finalized and published yet. Hence, it is difficult at this early stage in the process to identify, in detail, all potential concerns. That said, upon initial review the proposal raises a number of questions. In particular, it remains unclear as to whether, and if so, “why” all of the following waters fall within the definition of “waters of the U.S.”. To the extent such waters are considered jurisdictional, many would raise the specter of potential future legal and/or technical challenges, and would certainly complicate the ability of Western municipal utilities and irrigated agricultural water providers to fulfill their core service missions.

- Isolated waters without any direct surface or shallow subsurface connection to (1)–(3) waters, i.e., TNWs, interstate waters and the territorial seas, but which periodically capture sheet flows containing pollutants.
- Normally dry arroyos that flow only in response to infrequent, e.g., one in five year or greater, rainfall events.
- Water treatment, storage, and/or conveyance systems that do not discharge to a TNW and are not otherwise designed to meet CWA requirements, including certain recharge, recycling and reuse projects.
- Artificial lakes or ponds that are not used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, including stormwater detention ponds.
- Water-filled depressions that are incidental to other than construction activity.
- Man-made swales used to capture stormwater.
- Ditches that are excavated in uplands, drain only uplands or non-jurisdictional waters, but have standing water after rainfall events or due to other natural conditions occurring at such times as irrigation water is not being introduced.
- Construction detention ponds that ultimately drain to navigable waters
- Isolated waters where the only connection to (1)-(3) waters is the migration of amphibians, waterfowl or other wildlife.

- Waters that are not (1)-(3) waters, tributaries thereof or adjacent thereto, and for which no site specific study has been performed, but which lie within a watershed in which a general scientific study has been conducted and a conclusion reached that the waters, in combination with other similarly situated waters in the region, affect the chemical, physical or biological integrity of downstream (1)-(3) waters.
- Ditches that may meet the definition of a wetland or tributary or adjacent water, but which also meet the terms of the exclusions under (b)(3) or (b)(4) of the proposal.
- All ephemeral and intermittent headwater streams.
- Waters that are “adjacent” to tributaries, including non-navigable tributaries, regardless of how remote or insubstantial the connection thereto.

The agencies must be called upon to clarify their position on such waters, explaining in detail “why” it is necessary to include such waters under the regulatory definition if that is the conclusion the agencies have reached.

As I have touched on throughout my testimony there is concern about the “waters of the U.S.” rule in both the municipal and agricultural water delivery communities. I would like to take a moment to expand on some of the concerns noted by irrigation water suppliers. Historically, under Section 404 of the CWA, the discharges of dredged or fill material associated with the construction or maintenance of irrigation ditches, or the maintenance of drainage ditches, are not subject to regulation under Section 404. In addition, discharges of dredged or fill material associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures and other facilities functionally related to irrigation ditches have been included in this exemption.

Irrigation districts, canal companies and other water providers perform routine maintenance work in their conveyance facilities every year. In addition, they are required to make more extensive improvements in the form of rehabilitation or replacement of some of the works from time to time. As demand for water in the West grows, water conservation activities such as lining or piping canals and drains are also commonplace activities, along with relocating portions of these water conveyance facilities for improved efficiencies. Without the ability to

conduct these necessary activities free of time consuming and costly federal processes, agricultural water delivery, and many of the efforts aimed at improving efficiencies and conserving water, would be severely challenged. Additionally, many of these facilities provide a flood control function. In such cases, regular maintenance activities to maintain channel capacity are necessary to protect life and property and prevent serious flood damages. Though EPA has published its “Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)”, and the NRCS has posted its Conservation Practice Standards Exemption List, additional clarity on the nature and scope of the exemptions may be necessary.

To put the challenges that expanded jurisdiction would create in perspective, I will note the Nampa and Meridian Irrigation District (District) in Idaho. The District, which was formed in 1904 and has been delivering water ever since, operates hundreds of miles of canals, laterals, ditches and drains to provide water to their hundred square mile service area. The District’s effective operation depends on numerous factors, including the safe and efficient use of approximately eighty drains. The District performs regular maintenance on these drains to ensure effective system use. If the District were required to obtain a CWA permit for each such activity, these routine activities would become exponentially more expensive, time consuming and difficult. This would not only adversely affect system operations, but would likely cause increased water costs, unintentionally creating an incentive to increase groundwater pumping. This one example could be extrapolated to almost any other irrigation district in the West.

Expanded CWA jurisdiction would not only trigger Section 404 permitting requirements but would also precipitate Section 401 and 402 permitting as well as potential Section 303 requirements. Each of these would create additional burdens for irrigation districts. The proposed rule needs greater clarity, ensuring that the historic exemptions for irrigation ditches and associated infrastructure are retained.

#### V. Conclusion

Western water suppliers, both municipal utilities and agriculture water providers, will encounter daunting challenges in the years ahead as they strive to meet both water supply and wastewater/stormwater treatment obligations in the face of challenges associated with growing demand, drought, fires, extreme storm events



and unhealthy watersheds. Nevertheless, they remain dedicated to full compliance with CWA and SDWA mandates, and the protection of our most valuable resource—water.

Unfortunately, the “waters of the U.S.” rule, as currently proposed, could serve to impose additional regulatory burdens on local communities and economies without any concomitant environmental benefits. The rule could “federalize” many of the local geologic and man-made water related features common to the arid West, including dry arroyos, washes, conveyance ditches and ephemeral streams that flow only in response to infrequent storm events. This would further complicate the permitting and approval process, negatively impacting the ability of utilities to timely and cost effectively respond to the significant challenges noted above.

That said, Western municipalities and irrigated agriculture are prepared to work with the federal agencies and Congress in the crafting of a rule that adds clarity and certainty to the CWA and its implementing regulations, yet respects local needs, acknowledges the efficacy of local solutions, and achieves an appropriate cost/benefit balance.



**WRITTEN STATEMENT FOR THE RECORD**

**WARREN "DUSTY" WILLIAMS  
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**ON BEHALF OF  
THE NATIONAL ASSOCIATION OF COUNTIES  
&  
THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES**

**POTENTIAL IMPACTS OF THE PROPOSED CHANGES TO THE CLEAN WATER ACT JURISDICTIONAL RULE**

**BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE'S  
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT**

**JUNE 11, 2014**

**WASHINGTON, DC**

Thank you Chairman Gibbs, Ranking Member Bishop and Members of the Subcommittee for the opportunity to testify on the April 21 proposed rule—*Definition of the Waters of the United States Under the Clean Water Act*—as proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps).

My name is Dusty Williams and today I represent both the National Association of Counties (NACo), and the National Association of Flood and Stormwater Management Agencies (NAFSMA), where I currently serve as President. I am also an active member of the California State Association of Counties (CSAC).

Both NACo and NAFSMA members play an important role in the management of water resources while ensuring public safety. While we share members, our groups offer unique perspectives, which is ideal for today's hearing. Both organizations actively partner with federal and state governments and understand the challenge of drafting regulations, since in our communities we are both the regulators and the regulated.

We are very concerned with the scope of the "waters of the U.S." definition proposal. While the proposed rule is intended to clarify issues raised in recent Supreme Court decisions on the Clean Water Act's (CWA) Section 404 permit program, its potential impact is significantly broader in scope. It extends federal jurisdiction well beyond the Section 404 permit program and could have far reaching impacts on many other CWA's programs.

#### **About NACo**

Founded in 1935, NACo is the only national organization that represents county governments in the United States. NACo assists America's 3,069 counties in pursuing excellence in public service to produce healthy, vibrant, safe and resilient counties. NACo promotes sound public policies, fosters county solutions and innovation, promotes intergovernmental and public-private collaboration and provides value added services to save counties and taxpayers money.

The proposed rule is of particular interest to counties because they are responsible for building and maintaining 45 percent of public roads in 43 states, with Delaware, North Carolina, New Hampshire, Vermont and West Virginia not providing authority over roads to any counties. 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, 50 percent (1,542) serve counties with populations below 25,000 residents. So 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 resources available to local governments poses significant implementation challenges.

Since many counties are tasked with dealing with a number of Clean Water Act (CWA) programs that impact roads and roadside ditches, flood control channels, stormwater culverts and pipes, water and water transfer rights, implementation of water quality and land use plans, green infrastructure, floodplain management, onsite water treatment and management systems, NACo has particular interest in this proposal. Changes in the

definition of “waters of the U.S.” will not only impact county operations, but will also increase costs and permitting time.

#### **About NAFSMA**

NAFSMA is a local and regional public agency driven organization based in the nation’s capital, with a focus on effective flood and stormwater management in urban areas. Our mission for more than 35 years has been to advocate public policy and encourage technologies in watershed management that focus on flood protection, stormwater and floodplain management. Many of NAFSMA’s members are partners on flood damage reduction and environmental restoration projects with the Corps and we recently signed a memorandum of agreement on green infrastructure with the U.S. Environmental Protection Agency (EPA).

NAFSMA members are on the front line, protecting their communities and regions from flood hazards that can result in loss of life and property. They are responsible for flood mitigation, stormwater and emergency management activities, as well as water quality protection.

#### **Overarching Concerns with the Proposed “Waters of the U.S.” Rule**

On behalf of both NACo and NAFSMA, I am here to express strong concerns with the proposed rule and the process used for the rule’s development.

While the proposed rule aims to clarify confusion over the CWA’s Section 404 jurisdiction in the field stemming from several Supreme Court decisions, we believe that the proposed rule brings about more questions than answers. The proposed definition will significantly increase the number of public infrastructure ditches that fall under federal jurisdiction.

Additionally, the proposed definition also applies to all CWA programs, not just to the Section 404 permit program, and impacts nine different regulatory programs, including Section 402, which establishes the nation’s stormwater management program, and Section 401, which governs water quality certifications.

Key terms used by the “waters of the U.S.” definition—tributary, adjacent waters, riparian areas, flood plains, and the exemptions listed—also raise important questions. It is uncertain how they will be used to effectively implement the Section 404 permit program.

#### **Agency Consultation with State and Local Partners Was Flawed**

We appreciate that EPA and the Corps are moving forward with a proposed rule, rather than a guidance document, as originally proposed. However, our organizations are concerned by the process used to create this

proposal, and specifically whether impacted state and local groups were adequately consulted throughout the process.

Under “Executive Order 13132—Federalism,” federal agencies are required to work with state and local governments on proposed regulations that have substantial direct compliance costs. Since the agencies have determined that the definition of “waters of the U.S.” imposes only “indirect” costs, the agencies state in the proposed rule that the new definition does not trigger Federalism considerations.

However, the agencies’ cost-benefits analysis—*Economic Analysis of Proposed Revised Definition of Waters of the U.S.* (March 2013)—tells a different story. The economic analysis acknowledges that there may be additional implementation costs for a number of CWA programs and cautions that the data used and the assumptions made to craft the analysis may be flawed. Since states, local governments and their agencies implement and enforce CWA programs, the “waters of the U.S.” definitional change has a “substantial direct effect” on these entities. The economic analysis agrees, stating that CWA programs “may subsequently impose direct or indirect costs as a result of implementation.” We regret that local and regional governments were not actively engaged in substantial policy discussions on options prior to the rule’s publication; such discussions could have lessened the confusion surrounding the proposed rule.

In addition to the aforementioned issues, we are also concerned 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 scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized seems premature, and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would inform development of the proposed rule.

Because of the complexity of the proposed rule, we are further concerned that it only allows 90 days for review and comment. In order to fully understand what the rule does (and does not do), we recommend that the agencies adopt a multi-step consideration process. The Administration should, at the very least, reopen the comment period for 90 days after EPA’s Connectivity report is released and updates are made to the proposed rule based on the final report.

The agencies should also consider extending the current comment period by an additional 90 days in order to give all stakeholders adequate time to assess unintended consequences, since counties and public agencies will need ample time to study the proposal and assess its impacts within their own jurisdictions. As partners in implementing and enforcing the Clean Water Act, we should be given the opportunity to fully consider and comment on rules that will have a significant impact on capital costs, operations and mandates on the people we serve.

As previously mentioned, while the agencies have performed cost-benefit analysis of the definitional changes on CWA programs, they have acknowledged that the data used and the assumptions made to craft the analysis may

be flawed. On page two, the report states, "The economic analysis is necessarily based on readily available information and 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."

Additionally, the methodologies used to determine economic costs and benefits to the proposed rule are misleading. In its economic cost analysis for the proposed rule, the agencies indicated that an additional 2.7 percent water features will be considered jurisdictional under the Section 404 program. However, the data used to compute costs for Section 404 comes from submitted Section 404 permit applications for FY2009-2010. The economic analysis dismisses the fact that, under the proposal, additional waters, currently not jurisdictional (and thus, with no permit submissions), will become jurisdictional. This reasoning is flawed and does not give a true accounting of potential costs or benefits.

We are also particularly concerned that the impacts of intermittent streams, biological connectivity and adjacency requirements have not been correctly assessed with regard to how significantly they impact the jurisdictional reach of the CWA, nor the impact of the rule on other CWA programs such as 402(p). Further, while we are asked to provide alternatives, we are only given an inadequate 90 days to develop such alternative methodologies.

The agencies should consider suspending the current public comment period and re-releasing the proposal, with the updated economic analysis (based on the comments received), after the science-based connectivity report is issued. This approach would be welcomed by local governments and their flood and stormwater management agencies.

#### **Impacts on Section 404 Program**

Both NACo and NAFSMA believe that the proposed rule will increase the number of publicly maintained stormwater management facilities and roadside ditches that would require CWA Section 404 permits, even for routine maintenance. This is critical because the federal jurisdictional process is not well understood. Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely complex, time-consuming and expensive, leaving local governments and public agencies charged with public safety vulnerable to citizen suits.

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.

Determining whether a project is jurisdictional can be very difficult, and if a project is deemed jurisdictional, it is then subjected to a multitude of regulatory requirements under CWA. Other federal laws are triggered, such as environmental impact statements, National Environmental Policy Act (NEPA) and impacts on the Endangered Species Act (ESA). These 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, which can take years.

These delays are extremely significant to local agencies responsible for maintaining public infrastructure, such as roadside ditches, flood control channels and stormwater systems designed to protect public safety by funneling water away from low-lying roads, properties and businesses to prevent accidents and flooding. Expanding the number of ditches that are regulated will increase necessary public infrastructure projects' budgets and timelines. The cost of operations and maintenance for public infrastructure, such as existing flood damage reduction systems, will also be increased and will take more time to accomplish than it should for an existing facility—potentially putting public safety at risk and increasing flood damage. We continue to recommend strongly that maintenance activities of existing storm water management facilities and roadside ditches, such as channels and detention basins, be exempt from repetitive Section 404 permitting.

Additionally, the Corps, which oversees the 404 permit program, is already severely backlogged in evaluating and processing permits. Delays in the permitting process have resulted in flooding of constituent and business properties. This puts our nation's counties and flood and stormwater management agencies in a precarious position—especially those who are balancing small budgets against public health and environmental protection

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 and given adequate time for review.

#### **Impact on Public Infrastructure Ditches**

The EPA and the Corps state that the purpose of the rule is to provide clarity in the jurisdictional process. However, our members indicate that the definitional language is far from clear.

The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a "water of the U.S.," regardless of perennial, intermittent or ephemeral flow. The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S."

That said, key terms like “uplands” and “contribute flow” are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a “water of the U.S.” A public infrastructure ditch system—roadside, flood or stormwater—is interconnected and can run for hundreds, if not thousands of miles. Our ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to “waters of the U.S.”

To assist in visualizing some of these concerns, I would like to focus on the Romoland area of Riverside County. The District recently had a jurisdictional determination completed for a large flood hazard mitigation project that would address this approximately 17 square mile watershed that ultimately serves as a tributary to the 500 plus square mile San Jacinto River watershed.

Today, the project area is deemed non-jurisdictional by the Corps because the ephemeral drainage features that exist within the watershed are isolated from the San Jacinto River (Exhibit A). However, based on the definitions in the proposed rule, coupled with the exception hidden in the ditch exclusion of the proposed rule, upland ditches and other ephemeral, isolated drainage features could be deemed jurisdictional waters of the U.S. (Exhibit B). This analysis also does not consider the impacts of the significant nexus test for “other waters” that would effectively require the entire project area to be evaluated for potential physical, chemical or biological connections to the San Jacinto River. This is just one of many examples of the potential cumulative jurisdictional expansions of the definitional changes that are being raised by our members. We have countless examples like this from across the country.

#### **Stormwater and Green Infrastructure Impacts**

Since stormwater management activities are not explicitly exempt under the proposed rule, concerns have been raised that man-made conveyances and facilities for stormwater management could now be classified as a “water of the U.S.” Some counties and cities own municipal separate storm sewer systems (MS4) infrastructure, which is defined under (40 CFR 122.26(b)(8)) 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.” While MS4s are currently regulated under the CWA’s Section 402(p), there is concern that stormwater conveyances or systems of conveyances could be deemed a “water of the U.S.” under the proposed regulation. This would potentially change the locations of outfalls for MS4s, and therefore the point of regulation, as defined in the CWA’s Section 402. This could mean that MS4 Section 402 permit holders would have to regulate, not only at the point of discharge into a “water of the U.S.,” but also when a pollutant initially enters the stormwater conveyance system.

This is a significant potential impact for states, counties and other MS4 permittees that own MS4 infrastructure, because these newly jurisdictional facilities would trigger requirements for the state to expend resources to designate beneficial uses pursuant to CWA Section 131.10 requirements. Further, 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.

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, etc. Our 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.

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. In stakeholder meetings, EPA has suggested that local governments need to include in their comments whether an exemption is needed, and if so, under what circumstances, along with the reasoning behind the request. We are working to develop those recommendations. However, an exemption is clearly needed.

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. It is also unclear how the proposed definitional changes may impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts and drinking and other water delivery systems.

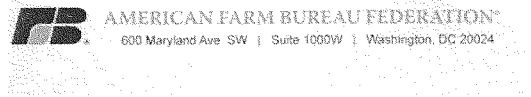
### **Conclusion**

Mr. Chairman and Members of the Committee, the bottom line is that the proposed rule contains many terms that are not adequately defined. Our associations 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 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. Many of these waters are presently under current practices; however, the degree and cost of regulation will increase dramatically if these features are redefined as "waters of the U.S."

Because we want to work with you to ensure that we have a clean, safe supply of water for generations to come and that we can keep our public as safe as possible from flooding, we are proud to partner with the federal and state governments, as the founding fathers intended, to protect our nation's water resources. We look forward to working with the federal government to clearly define goals and to work together to accomplish these shared goals.

For additional information on this testimony, please contact Julie Ufner at NACo (202-942-4269) or [JUfner@naco.org](mailto:JUfner@naco.org) or Susan Gilson at NAFSMA (202-289-8625) or [sgilson@nafsma.org](mailto:sgilson@nafsma.org).



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**TESTIMONY**

## **Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule**

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**Before the House Transportation and Infrastructure Committee  
Subcommittee on Water Resources and Environment**

**By Bob Stallman  
President  
American Farm Bureau Federation**

**June 11, 2014**

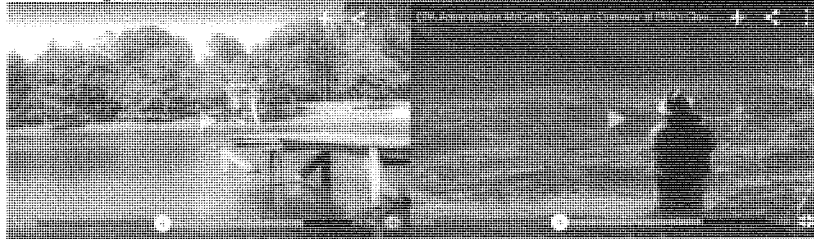
## I. Introduction

The American Farm Bureau Federation thanks the Committee for holding this hearing and welcomes the opportunity to offer its perspective about the impacts of the Environmental Protection Agency's and Army Corps of Engineers' "Waters of the U.S." proposed rule. AFBF has carefully analyzed the proposed rule and has concluded that it poses a serious threat to farmers, ranchers and any other individual or business whose livelihood depends on the ability to use the land.

The proposal published April 21, 2014, in the Federal Register would categorically regulate as "navigable waters" countless ephemeral drains, ditches and other features across the countryside that are wet only when it rains and may be miles from the nearest truly "navigable" water. It would also regulate small, remote "wetlands"—which may be nothing more than low spots on a farm field—just because those areas happen to be adjacent to a ditch or located in a floodplain. EPA says its new rule will reduce uncertainty, and I suppose that much is true. There will not be much uncertainty if the federal government could regulate every place where water flows or stands when it rains.

A picture is worth a thousand words, so I would ask that members of the committee look at some of the images EPA has used to publicize the proposed rule. Compare those images with the types of features commonly found on agricultural land, which we believe would be swept inappropriately into federal jurisdiction.

EPA's images:



Images from Farm Bureau members:



We believe that the proposed categorical regulation of these land features amounts to an attempted end-run around Congress and two Supreme Court rulings. The Supreme Court, in separate decisions in 2001 and 2006, ruled that Congress meant what it said in the Clean Water Act: “navigable waters” does not mean all waters. Yet the proposal will significantly expand the scope of “navigable waters” subject to Clean Water Act jurisdiction by regulating innumerable small and remote “waters”—many of which are not even “waters” under any common understanding of that word. To farmers, ranchers and other landowners, these features look like land, and this proposed rule looks like a land grab.

Contrary to EPA’s assurances to farmers and ranchers, this expansion of federal regulatory reach would essentially negate several longstanding statutory exemptions for agriculture. Congress established these exemptions to prevent federal permit requirements—and potential permitting roadblocks—for working the land and growing our nation’s food, fiber, and fuel. Under this rule, farmers and ranchers will have to get federal permits for ordinary and essential agricultural activities, just because those activities may cause dirt, fertilizer or crop protection products to fall into a dry ditch or a low spot on the field.

In addition to our concerns about the rule itself, we are concerned that EPA and the Corps have established a 90-day comment period that directly coincides with the planting and growing season, when farmers and ranchers have limited time to learn about the rule and comment on it. We ask the Committee to support an extension of the comment period. We also urge committee members to vigorously oppose the rule as it is currently proposed.

## II. The Proposed Rule Significantly Expands the Definition of “Navigable Waters”

The proposed rule adopts three primary definitional changes that result in a significant expansion of federal control over land and water resources across the nation.

- First, the proposed rule regulates **“ephemeral streams” as tributaries**. “Ephemeral streams” are just dry land most of the time. To a farmer, an “ephemeral stream” is often simply a low area across the farm field.
- Second, the proposed rule categorically regulates as “tributaries” ***all* ditches** that *ever* carry *any* amount of water that eventually flows (over any distance and through any number of other ditches) to a navigable water. Ditches are commonplace features prevalent across farmland (and the rest of the nation’s landscape).
- Third, the proposed rule would regulate all waters deemed **“adjacent” to other jurisdictional waters (including dry ditches and ephemerals) plus any “other waters” that have a “significant nexus.”** These categories have the potential to sweep into federal jurisdiction vast numbers of small, isolated wetlands, ponds and similar features on farmlands nationwide.

These changes, described in more detail below, will trigger substantial new roadblocks and costs for farming, ranching, the construction of homes, businesses and infrastructure, and innumerable other activities across the countryside. EPA’s public relations campaign notwithstanding, the

proposed rule expands Clean Water Act jurisdiction beyond its current scope (as properly limited by the Supreme Court) and far beyond the scope intended by Congress in 1972.

**A. Ephemeral Drainages Are “Tributaries” Under the Proposed Rule.**

The American Heritage Dictionary (1982) defines “tributary” as “a stream or river flowing into a larger stream or river.” This common understanding of “tributary” simply does not include so-called “ephemerals”—low areas or ditches that carry water only when it rains.

The proposed rule, however, would define “tributary” to include all areas of dry land where rainwater sometimes flows through an identifiable path or channel, so long as that path or channel ultimately leads (directly or through any number of other paths or channels) to a creek or stream that in turn ultimately flows to navigable waters. **The agencies propose to identify a “tributary” based on the presence of a bed, bank, ordinary high water mark (OHWM) and any minimal amount of flow** that eventually reaches navigable waters.

- The terms “bed” and “bank” simply mean land with lower elevation in between lands of higher elevation. All but the flattest terrain will have natural paths of lower elevations that water—obeying the laws of gravity—will follow.
- “Ordinary high water mark” is an equally broad term that encompasses any physical sign of water flow, such as changes in the soil, vegetation or debris. When rainwater flows through any path on the land, it tends to leave a mark. The agencies themselves recognize that the definition of OHWM is vague, ambiguous and inconsistently applied.<sup>1</sup> In fact, an official from the Corps’ Philadelphia District has observed that, due to inconsistent interpretations of the OHWM concept, as well as inconsistent field indicators and delineation practices, identifying precisely where the OHWM ends is nothing more than a judgment call.<sup>2</sup>
- The agencies make no bones about their view that the **frequency, duration and volume of flow will no longer have any relevance** to determining whether a feature, like the low spot on a farmer’s field, is jurisdictional. Low areas where rainwater channels will be “navigable waters” if they carry any rainwater that eventually reaches an actual navigable water.

We all know that water flows downhill, and, at some point, much of that water eventually finds its way into a creek, stream or river. Yet based on nothing more than the flow of rainwater along a natural pathway across the land, the agencies propose to categorize vast areas of otherwise dry land as “tributaries” and therefore “navigable waters.” These are areas that the average person would not recognize as a stream, let alone “navigable waters” appropriate for regulation by two federal agencies. It would be funny if it were not so frightening.

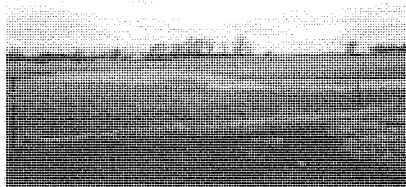
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<sup>1</sup> GAO Report “Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, Feb. 2004.

<sup>2</sup> Presentation by Matthew K. Mersel, USACE, “Development of National OHWM Delineation Technical Guidance,” March 4, 2014.

The following photos show a farm field in central Michigan over the course of two weeks. The path where rainwater flowed on April 14, 2014, was almost completely dry by April 25. However, demarcations in the vegetation show that water flowed there. If the water that flowed through this field eventually found its way to a creek, stream or ditch that in turn eventually flowed to navigable waters, then this farmer's field could be "navigable water" under the proposed rule.

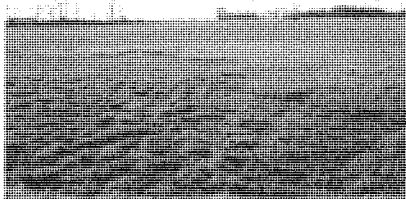
April 14, 2014



April 18, 2014



April 25, 2014



A bed, bank and OHWM are common features on lands that are perfectly dry, except when it rains. Indeed, in *Rapanos*, Justice Kennedy expressed deep concern that the physical indicators of a bed, bank and OHWM are so broad that they could be used to assert jurisdiction over waters that have *no* significant nexus to traditionally navigable waters. (547 U.S. at 781-82.) That is precisely what the agencies have done. Rather than asserting jurisdiction only where specific

features are found to have a significant effect on navigable waters (accounting for the volume of flow, proximity, etc.), the agencies classify ***all ephemeral features as jurisdictional waters if any flow can reach a traditional navigable water***. Such a broad assertion of federal jurisdiction takes “waters of the U.S.” far beyond what Congress intended in 1972—and far beyond what this body and the American public should tolerate.

**B. Nearly Every Ditch Across the Country Could Be Regulated as a Tributary Under the Proposed Rule.**

In its public outreach on the proposal, EPA repeatedly insists the rule “does not expand jurisdiction over ditches.” This is simply false.

The proposed rule would **categorically regulate as “tributaries” virtually all ditches that ever carry any amount of water that eventually flows (over any distance and through any number of other ditches) to a navigable water.**

The only excluded ditches would be a narrowly defined (one might say mythical) category of ditches “excavated wholly in uplands,” draining only uplands, and with less than perennial flow.<sup>3</sup> The preamble explains that this exclusion applies only to those ditches that are excavated in uplands (the term uplands is not defined in the proposed rule, but presumably means not waters or wetlands) at *all* points “along their entire length.” 79 Fed. Reg. at 22,203.

The exception is essentially meaningless. **One would be hard pressed to find a ditch that at no point along its entire length includes waters or wetlands.**

- First, over the last several decades, the agencies have expanded their regulatory footprint by broadening the criteria for classifying land as “wetland” (e.g. expanding the list of wetland vegetation). In many cases, low spots on the landscape that were not considered wetlands in the ‘70s and ‘80s would certainly be considered wetlands today. Since the purpose of ditches is to carry water, many ditches will tend to develop “wetland” characteristics and therefore not be “wholly in uplands.”
- Second, because the purpose of a ditch is to carry water, few ditches are excavated along the tops of ridges. The most logical places to dig stormwater ditches are at natural low points on the landscape. Clearly, most ditches will have some section that was excavated in a natural ephemeral drain or a low area with wetland characteristics. Such ditches will not qualify for the proposed exclusion for “wholly upland” ditches.
- Third, the “less than perennial flow” requirement will likely disqualify many irrigation ditches from the exclusion. Irrigation ditches do not just carry stormwater; they carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow the water to reach particular fields. These irrigation ditches

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<sup>3</sup> The rule would articulate an additional “exclusion” for ditches that “do not contribute flow” of any amount to actual navigable waters. However, such ditches would not meet the expansive “tributary” definition anyway. Further, such ditches are presumably quite rare, as the primary purpose of most (if not all) ditches is to carry water.



are typically close to larger sources of water, irrigation canals or actual navigable waters that are the source of irrigation water—and they channel return flows to those source waters. In arid sections of the nation, these irrigation ditches, and the valuable surface water that flows through them, are highly regulated by state authorities that appropriate water based on vested water rights and permit systems. Under the proposed rule, such irrigation ditches will also be federally regulated as “tributaries.”

Given the expansive definition of “tributary” and the extremely limited exclusion, the vast majority of ditches in the U.S. will be categorically regulated as “navigable waters” under the proposed rule. The results could be startling. For example, the typical suburban homeowner would likely be surprised to find that EPA and the Corps view the roadside ditch at the edge of her lawn as “navigable water” worthy of the full weight of Clean Water Act protections. She would also likely be surprised to find that landscaping, insect control or even mowing the grass in that ditch are violations of the Clean Water Act. Yet that will be the result of the proposed rule.

Will EPA seek enforcement against a homeowner mowing the lawn? Probably not. But the fact that it *could* illustrates the ridiculous implications of the proposed rule. In addition, if the agencies will have to pick and choose which discharges they *actually* regulate, then the rule hardly provides the certainty that the agencies claim.

**C. Virtually Every Other Water Feature Can Be Regulated Under the Proposed Rule as Either an “Adjacent Water” or “Other Waters.”**

The proposed rule would regulate all waters deemed “adjacent” to other “waters of the U.S.”—including “tributaries” (ditches and ephemerals). The agencies broadly define “adjacent” as “neighboring,” which includes features located in the “riparian area”<sup>4</sup> or floodplain of any other jurisdictional water, or features with a “shallow subsurface ... or confined surface hydrologic connection.”<sup>5</sup> Whether any of these characteristics exist will be determined in the agency’s “best professional judgment.” 79 Fed. Reg. at 22,208. Thus, the exact scope of “adjacent” waters is left to the vagaries of inconsistent regulators.

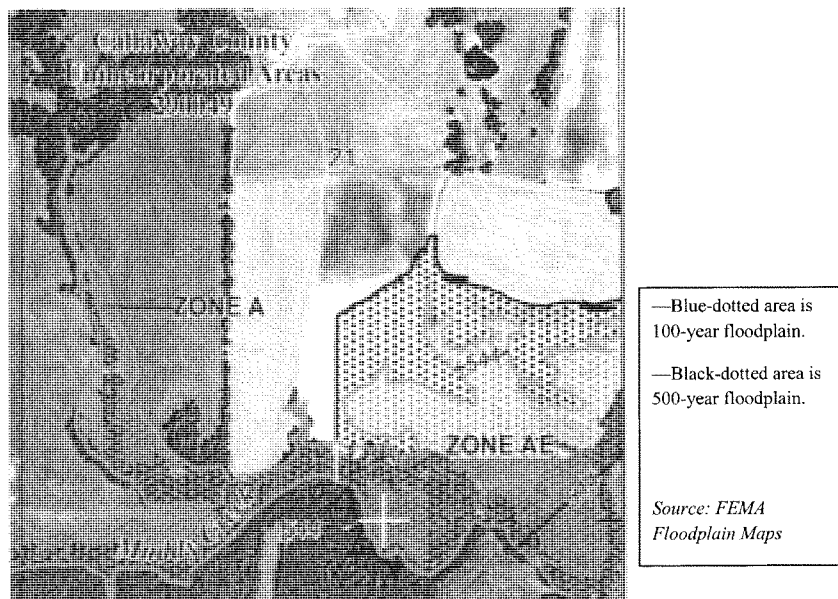
Long, linear features, such as ditches, will have floodplain and riparian areas around them—and will often have “hydrologic connections” to nearby wetlands or ponds. For this reason, the inclusion of small, isolated wetlands, ponds and similar features that are “adjacent” to ditches would sweep into federal jurisdiction countless small and otherwise remote wetlands and ponds that dot the nation’s farmlands.

The following image shows the 100-year and 500-year floodplain of Muddy Creek (a true navigable water) superimposed on a farmer’s property in Missouri. Under the proposed rule,

<sup>4</sup> “Riparian areas” are defined in terms useful only to a hydrologist: “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.”

<sup>5</sup> The preamble explains that wetlands or ponds that “fill and spill” to ditches or other ephemeral features during intense rainfall would be viewed as having a confined surface hydrologic connection to those features. 79 Fed. Reg. at 22,208. Such wetlands or ponds would therefore be “navigable waters,” no matter how small or remote they are from true navigable waters.

EPA and the Corps could determine any “water” within the shaded areas to be “adjacent” to Muddy Creek. Of course, more “waters” still could be swept in as “adjacent” to the ditches and ephemerals that flow toward Muddy Creek.



For those “other waters” that do not fall within the broad categories of “tributary” or “adjacent” waters (e.g., even more isolated wetlands, ponds and the like), the proposed rule establishes jurisdiction where those waters have a “significant nexus” to another “water of the U.S.” “Significant nexus” means “more than speculative or insubstantial effect” that a water, alone or in combination with other similarly situated waters in the region, has on the “chemical, physical or biological integrity” of a navigable water. The same “region” would be interpreted as the “watershed that drains to the nearest traditional navigable water, interstate water or the territorial seas...” 79 Fed. Reg. at 22,212. The preamble provides page after page of potential scientific indicators of physical, biological and chemical connections. *See* 79 Fed. Reg. at 22,213-14. The possibilities are so numerous and broad that regulators will have no difficulty finding a significant nexus for even the most minor features when combined with all similar features in the watershed.<sup>6</sup>

<sup>6</sup> For example, “[f]unctions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, export of organic matter, export of food resources, and provision of aquatic habitat.” 79 Fed. Reg. at 22,213.

#### D. EPA's Public Statements Regarding the Proposed Rule are Misleading.

The proposed rule and EPA's public statements in support of it are misleading to the public and regulated communities. The proposal is cloaked in scientific-sounding jargon and words that evoke images of rivers, streams and swamps—images that bear no resemblance to the land features the rule would regulate. For example:

- “Waters” (as used in the rule) can be ditches or low spots on a field that are dry except when it rains.
- “Bed, bank and ordinary high water mark” includes land with only subtle changes in elevation—any land where rainwater naturally channels as it flows downhill.
- “Wetland” has come to mean areas where water-tolerant vegetation can be found, even if the land isn't particularly “wet” most of the time.

To the general public, such terms may conjure images of flowing waters or swamps appropriate for Clean Water Act protection and regulation. In reality, they are being used to regulate *land* as if it were *water*—and “navigable water” at that.

EPA has claimed repeatedly that the proposed rule would not assert jurisdiction over “new types of waters” or beyond waters that were “historically covered” and would “not expand jurisdiction over ditches.” These statements are misleading, at best—and the last one is simply false.

First, the text and preamble of the current regulations (promulgated in 1986 by the Corps and in 1988 by EPA) contain *no reference* to “ephemeral” streams or drains. Likewise, the regulations say nothing to suggest that ditches can be “tributaries.” EPA and the Corps have asserted in *guidance* and in *enforcement actions* that certain ditches and “ephemeral streams” are subject to CWA jurisdiction as “tributaries,” but that is ad hoc “regulatory creep,” not proper notice-and-comment rulemaking. In other words, the fact that EPA and the Corps have at times asserted jurisdiction over these “types” of features does not make it right—and does not make it lawful to categorically regulate virtually all ditches and ephemerals.

Second, “historically”—i.e. before the Supreme Court's ruling in *SWANCC*—there was no real limit to the scope of CWA jurisdiction as interpreted by EPA and the Corps. The agencies unlawfully asserted jurisdiction over any waters to the full reach of the interstate commerce clause. That interpretation was resoundingly rejected by the Supreme Court in *SWANCC*. Since 2007, however, agency guidance has asserted jurisdiction over “non-navigable tributaries” only after a case-by-case analysis of whether a particular feature has a “significant nexus” to true navigable waters. Key to that analysis is the volume, duration and frequency of flow, as well as proximity to downstream navigable waters. Under the proposed rule, the volume, duration and frequency of flow—as well as distance to navigable waters—are deemed *irrelevant*. See 79 Fed. Reg. at 22,206 (“tributaries that are small, flow infrequently, or are a substantial distance from the nearest [navigable water] are essential components of the tributary network...”). All such ditches and ephemeral drains will be *categorically* deemed to be “navigable waters” if they carry *any* flow that *ever* reaches navigable waters. That—whether EPA says so or not—is a substantial expansion of federal jurisdiction.

EPA makes much of the fact that the proposed rule “preserves” existing Clean Water Act exemptions and exclusions for agricultural activities. But under the proposed rule, ordinary farming and ranching activities will require a Clean Water Act permit despite Congress’ clear intent to exempt those activities.

According to Administrator McCarthy’s March 25 op-ed aimed specifically at the agricultural community:

The rule keeps intact existing Clean Water Act exemptions for agricultural activities that farmers count on. But it doesn’t stop there—it does more for farmers by actually expanding those exemptions. We worked with USDA’s Natural Resources Conservation Service and USACE to exempt [56] additional conservation practices.

As explained below, these assurances also are misleading—another attempt to cloak the true impact of this rule.

### **III. Statutory Exemptions Intended to Prevent Federal Permit Requirements for Common Farming and Ranching Activities Will Be Rendered Almost Meaningless Under the Proposed Rule.**

When it adopted the Clean Water Act, Congress specifically included several critical statutory exemptions for agriculture, each of which is severely undermined by the proposed rule.

- Section 404 exemption for “normal” farming and ranching activities
- Section 404 exemption for construction of farm or stock ponds
- Agricultural stormwater discharges

These exemptions demonstrate a clear and consistent determination by Congress NOT to impose Clean Water Act permit requirements on ordinary farming and ranching activities— weather-dependent and time-sensitive activities that are necessary for the production of our nation’s food, fiber and fuel. However, the proposed rule’s assertion of jurisdiction over ditches and low spots on farm fields will render those exemptions almost meaningless.

#### **A. Section 404(f) Exemption for “Normal” Farming and Ranching Activities**

In the mid-1970s, when the Corps began to define “navigable waters” to include certain wetlands—so as to make farming, ranching and forestry practices within those wetlands potentially subject to Clean Water Act regulation—Congress amended the Act to specifically exempt “normal” farming, ranching and forestry from section 404 “dredge and fill” permit requirements. 33 U.S.C. § 1344(f)(1). Thus, “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” are generally exempt from section 404 permitting requirements. 33 U.S.C. § 1344(f)(1)(A). Only if the activity’s purpose is to convert an area of navigable water into a use to which it was not

previously subject, or where the reach of navigable waters may be reduced, (e.g., to convert wetland to non-wetland) will the activity require a 404 permit. 33 U.S.C. § 1344(f)(2) (the so-called “recapture” provision).

On March 25, 2014, the agencies issued an immediately effective “interpretive rule” concerning the application of “normal” farming exemptions to 56 listed conservation practices. Although EPA claims to have “expanded” agriculture’s Clean Water Act exemptions through this interpretive rule, that is not true. Rather, as described below, the interpretive rule provides no meaningful protection from the harmful implications of the expansion of “navigable waters” and, in fact, further narrows the already limited “normal” farming exemption.

**1. The normal farming exemption only applies to section 404 “dredge and fill” permitting, not NPDES permitting or other Clean Water Act requirements.**

The normal farming exemption only applies to the section 404 “dredge and fill” permit program. It provides no protection from potential liability and requirements of any other part of the Clean Water Act, including section 402 National Pollutant Discharge Elimination System (NPDES) permit requirements for discharges of other “pollutants.” The agencies’ proposed expansion of jurisdiction means that everyday weed control, fertilizer applications and any number of other commonplace and essential farming activities may trigger Clean Water Act liability and section 402 permit requirements if even small amounts of dust, nutrients or chemicals fall into dry ditches, ephemerals or low spots (small “wetlands”) located beside, between or within farm fields.

The normal farming exemption also will not protect farmers from new restrictions (or prohibitions) on farming practices that arise from the establishment of water quality standards and “total maximum daily loads” under Clean Water Act section 303 for the ditches, ephemerals and other features EPA now plans to sweep into federal jurisdiction. These requirements apply to all “navigable waters” under the Act, and thus they will apply to dry ditches, ephemerals and low spots on fields, too, if those features are defined as jurisdictional waters.

**2. The normal farming exemption only applies to farming or ranching ongoing since the 1970s.**

Since 1977, the agencies have narrowly interpreted the “normal” farming, ranching and silviculture exemption to apply only to “established” operations “ongoing” since 1977 (when the exemption was enacted and the Corps’ implementing regulations were adopted). *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). Newer farms, or farms where farming ceased since 1977 and later resumed, or sometimes even farms that have switched from one crop to another since 1977, will all fall outside of the exemption. *See, e.g., Borden Ranch P’ship v. U.S. Army Corps of Eng’rs*, 261 F.3d 810, 815 (9th Cir. 2001), *aff’d* 537 U.S. 99 (2002) (finding that conversion of ranch lands to orchards and vineyards falls outside normal farming exemption). Therefore, if the new interpretive rule provides any benefit for any farmers and ranchers, it will only be for those who have been farming or ranching continuously at the same location since 1977. *See* Interpretive Rule at 2.

Reading the preamble to the proposed rule closely, one can see how regulating ephemeral drains as “waters of the U.S.” would render the normal farming exemption meaningless. The reason lies in the so-called “recapture” provision of section 404(f)(2). This provision negates the exemption where farming impairs the flow or reduces the reach of navigable waters. In the context of discussing ephemeral “tributaries” in the proposed rule, the agencies reveal that if plowing or discing the soil on farmland eliminates what would otherwise be an identifiable bed, bank and OHWM, that farming requires a section 404 permit because it has reduced the reach of jurisdictional waters. *See* 79 Fed. Reg. at 22,204, fn.8, and accompanying text. Of course, this means that any plowing that has already eliminated a bed, bank or OHWM of an ephemeral drain in a farm field without a 404 permit was (in the view of the agencies) a violation of the Act.

**3. The agencies have further narrowed the normal farming exemption by making it contingent on compliance with NRCS standards.**

To the extent a farmer or rancher has a long-standing operation that would qualify as “normal” farming and ranching, the new interpretive rule further narrows the existing exemption by requiring compliance with NRCS technical standards for the 56 listed conservation practices. Many of the listed “conservation practices” are extremely common farming and ranching practices—such as fencing, brush management and pruning shrubs and trees—which we believe are already exempt.

The agencies claim to be “clarifying” the exemption for 56 listed activities, but, at the same time, the interpretive rule *requires* compliance with specific NRCS standards—something that was never required before to qualify for the “normal” farming and ranching exemption. Therefore, the practical effect of the interpretive rule is to narrow the existing exemptions, rather than broaden them as EPA claims. The rule explicitly states that farmers who deviate from NRCS standards will not benefit from the exemption.<sup>7</sup> Farmers who could previously undertake these activities (which, again, include things as commonplace as fencing) as part of their “normal” farming or ranching now *must* comply with NRCS standards or risk Clean Water Act enforcement.

The interpretive rule does not clarify which regulatory agency has final authority on compliance with NRCS standards—but the answer appears to be EPA. The rule states that a farmer not enrolled in a USDA cost share program is responsible for ensuring the practice meets all NRCS criteria, and NRCS is responsible for ensuring the practice meets the criteria where there is a USDA contract. Ultimately, however, EPA has reserved its Clean Water Act authority to make all final determinations. Even if a farmer and NRCS believe that the practice meets the appropriate standards, EPA presumably could veto that determination.

The new rule also raises questions about the status of other practices for which NRCS has developed standards, but that are not included in the list of 56 conservation practices. Examples include “Residue and Tillage Management, Reduced Tillage” (practice #345), pond (practice #378), and cover crop (practice #340).” The implication of *not* listing these practices is that they

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<sup>7</sup> *See* Interpretive Rule at page 2 (“To qualify for this exemption, the activities must be part of an ‘established (i.e. ongoing) farming, silviculture, or ranching operation,’ consistent with the statute and regulations. The activities must also be implemented in conformance with NRCS technical standards.”).

will require a section 404 permit if any incidental discharge of “dredged or fill” material occurs. This could have a chilling effect on the implementation of conservation practices on farms and ranches.

Further, EPA and the Corps could alter or retract the interpretive rule at any time. Even for those farmers who may perceive value in the “assurances” offered by this new guidance, the fact that it could be changed or eliminated at any time, without advance public notice, robs them of that so-called assurance. For that matter, the standards to which the exemption is now tied can be unilaterally changed by NRCS at any time without rulemaking. We see little value or certainty for farmers under these circumstances.

#### **B. Section 404 exemption for construction or maintenance of farm ponds**

Another agriculture-related exemption in section 404 of the Act is the exemption for “construction or maintenance of farm or stock ponds or irrigation ditches.” 33 U.S.C. § 1344(f)(1)(C). This provision exempts from 404 “dredge and fill” permit requirements any discharge of dredge or fill materials into waters of the U.S. for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches.

Through guidance and enforcement actions, the Corps has interpreted the farm pond exemption narrowly and applied the so-called “recapture” provision broadly. If construction or maintenance of the pond results in earth-moving activities that reduce the reach or change the hydrology of a water of the U.S., the Corps takes the position that the “recapture” provision applies and the discharge is unlawful without a permit. In the Corps’ view, impounding a jurisdictional feature is an unlawful “dredge and fill” discharge, and the resulting impoundment is itself “waters of the U.S.” 77 Fed. Reg. 22,188, 22,201 (Apr. 21, 2014). In the experience of many farmers, where wetlands or non-navigable “tributaries” are involved in farm or stock pond construction, the recapture provision essentially swallows the exemption. Farmers have been ensnared in litigation and enforcement due to the creation of ponds that impound small ephemeral streams. See, e.g., <http://agfax.com/2014/03/21/epa-vs-rancher-clean-water-act-battle-dtn/> (EPA asserting jurisdiction over rancher’s stock pond used to support ongoing farming activities).

The proposed rule will further limit farmers’ and ranchers’ ability to build and maintain farm ponds. As explained above, the proposed rule will establish jurisdiction over virtually every ephemeral drain as a “tributary.” Thus, any impoundment of those drainage features will be an unlawful discharge absent a section 404 permit, and the resulting farm pond itself will become “waters of the U.S.” In addition, any construction of a farm pond in a small low spot (“wetland”) swept into Clean Water Act jurisdiction under the “adjacent” or “other waters” provisions of the proposed rule (discussed above) will also require a section 404 permit and will result in a pond that is itself waters of the U.S.

This aspect of the rule will affect countless (maybe most) farm and stock ponds. By expanding jurisdiction to include common ephemeral drains and isolated wetlands, the rule will prohibit the impoundment of these natural drainage or depressional areas that are often the *only* rational way to construct a farm or stock pond. Farm or stock ponds are typically constructed at natural low spots on the farm or ranch property, to capture stormwater that enters the pond through sheet

flow and ephemeral drains. Depending on the topography, pond construction may be infeasible without diking a natural drainage path on a hillside.

The proposal includes an exclusion from the definition of waters of the U.S. for “artificial lakes or ponds created by excavating and/or diking *dry land* and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.” This exclusion is almost meaningless because, as discussed above, “dry land” is interpreted to exclude anything that qualifies as a wetland or any ephemeral feature where stormwater naturally channels. This leaves little “dry” land available for the construction of farm ponds. Put simply, farm and stock ponds are not excavated on hill tops and ridges, they are excavated at low spots where water naturally flows and collects. Thus, the proposed farm pond exclusion will be meaningless for most farmers and ranchers.

### C. Exemption for Agricultural Stormwater and Irrigation Return Flows

Another key agricultural exemption in the Clean Water Act applies to “agricultural stormwater discharges” and “irrigation return flows.” Under this exemption, precipitation runoff and irrigation water from farms and ranches is specifically excluded from regulation as a “point source” discharge. The exemption applies even if the stormwater or irrigation water contains “pollutants” and is channeled through a ditch or other conveyance that might otherwise qualify as a “point source” subject to Clean Water Act section 402 NPDES permit requirements. The exemption shows Congress’ clear intent to exclude farmers and ranchers from Clean Water Act liability and permitting for activities on farm and ranch lands that may result in “pollutants” being carried by precipitation or irrigation flows into navigable waters.

The proposed rule would severely undermine this exemption by regulating as “waters of the U.S.” the very ditches and drains that carry stormwater and irrigation water from farms. As drafted, the statutory exemption applies to pollutants discharged to navigable waters *carried by* stormwater or irrigation water, which would typically flow through ditches or ephemeral drains. However, the exemption arguably does not cover the direct addition of pollutants into “navigable waters” by other means (such as materials that fall into or are sprayed into navigable waters).

Because stormwater and irrigation ditches and ephemeral drains are ubiquitous on farm and ranch lands—running alongside and even within farm fields and pastures—the proposed rule will make it impossible for many farmers to apply fertilizer or crop protection products to those fields without triggering potential Clean Water Act liability and permit requirements. A Clean Water Act pollutant discharge to navigable waters arguably will be deemed to occur each time even a *molecule* of fertilizer, pesticide or dust falls into the jurisdictional ditch, ephemeral or low spot—even if the feature is dry at the time of the purported “discharge.”<sup>8</sup> Thus, farmers will have no choice but to “farm around” these features—allowing wide buffers to avoid activities that might result in a discharge—or else obtain an NPDES permit for farming. Technically, cattle or horses would need to be fenced out of ephemerals and low spots to avoid a direct “discharge” of manure. This is contrary to congressional intent and would present a substantial additional hurdle for farmers to conduct essential practices to grow and protect their crops and livestock.

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<sup>8</sup> Courts have long held that there is no *de minimis* defense to Clean Water Act discharge liability.



#### IV. Practical Implications for Farmers and Ranchers

Farming is a water-dependent enterprise. Whether they are growing plants or animals, farmers and ranchers need water. For this reason, farming and ranching tend to occur where there is either plentiful rainfall or adequate water available for irrigation (via ditches). Not surprisingly, America's farm and ranch lands are an intricate maze of ditches and ephemeral drains. As explained above, under the proposed rule, virtually all of these features would be categorically regulated as "navigable waters."

If the drains and ditches that cross between, among and within farm fields and pastures are regulated as "navigable waters," the implications for farmers and ranchers will be disastrous. Except for the very narrow section 404 exemptions discussed above, regulating these features as jurisdictional "waters" would mean that *any* discharge of a pollutant (e.g., soil, dust, "biological material") into those ditches and drains is unlawful, absent a Clean Water Act permit. Typical farming activities, such as plowing, planting, discing, insect and disease control, and fence building in or near ephemeral drains, ditches or low spots could be a violation of the Clean Water Act, subject to civil penalties of up to \$37,500 per violation per day—or even higher criminal penalties—unless a permit is obtained.

#### V. The Proposed Rule Suffers from Several Procedural Flaws

The agencies' economic, technical and small business analyses are severely flawed. First, according to an expert review by Dr. David Sunding, the agencies' economic analysis contains numerous glaring and problematic errors that "are so severe as to render [the economic analysis] virtually meaningless."<sup>9</sup> Second, the proposed rule relies on the draft Connectivity Synthesis Report that is still undergoing vetting and peer review by the Science Advisory Board (SAB). Rather than wait for the final SAB report before drafting a proposed rule that purports to rely on the science contained in that report, the agencies plowed forward with a proposed rule that relies on a draft. It is clear that the agencies are not properly taking the science into account and that the outcomes have been pre-determined. Finally, the agencies have refused to meaningfully comply with the Regulatory Flexibility Act (RFA). The agencies erroneously certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. This certification flies in the face of the undeniably "significant" impacts the proposed rule will have on small businesses.

##### A. The Economic Analysis Significantly Underestimates the Increase in Jurisdiction.

The Sunding Report concludes that "the EPA analysis relies on a flawed methodology for estimating the extent of newly-jurisdictional waters that systematically underestimates the impact of the definition change."

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<sup>9</sup> Report by Dr. David Sunding, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States", May 15, 2014. Prof. Sunding holds the Thomas J. Graff Chair of Natural Resource Economics at the University of California, Berkeley. He is the founding director of the Berkeley Water Center and currently serves as the chair of his department. He has won numerous awards for his research, including grants from the National Science Foundation, the U.S. Environmental Protection Agency and private foundations.

A threshold problem with EPA's economic analysis is that it analyzes the implications of only one category of Clean Water Act jurisdiction under the new proposed rule, "other waters." As discussed above, the proposed rule includes broad new definitions (e.g. "tributary" and "neighboring") that will categorically sweep into Clean Water Act jurisdiction countless features currently subject to only case-by-case regulation based on a significant nexus analysis. However, the economic analysis focuses solely on how jurisdiction might change for "isolated waters" that are not jurisdictional under the current Clean Water Act framework, but that are likely to become jurisdictional under an expanded definition of "other waters."

As Dr. Sunding found, the database EPA used to estimate economic implications for incremental expansion of jurisdiction does not track information on these new terms and categories of jurisdiction. For example, EPA's economic analysis recognizes that the "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 system to "reflect needed data elements" as a result of the rule's new jurisdictional categories. EPA does not alter its analysis to account for this major deficiency. As a result, numbers extrapolated from the records, which do not marry up with the draft rule's categories of jurisdiction, are not useful for approximating the economic implications of the percentage of increase in jurisdiction or the increase in jurisdictional acreage.

Second, the analysis relies on FY 2009/2010 as the baseline year for estimating impacts. FY 2009/2010 was a period of significant contraction in the nation's economy, and the housing market specifically, due to the financial crisis. As a result of this contraction, there were fewer construction projects and significantly smaller projects than in periods of normal economic activity. 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. Because the report bases its findings on this period of extremely low construction activity, the result is artificially low numbers of applications and affected acres. By using the number of permits issued in 2010 as a baseline, EPA significantly underestimates the affected acreage.

Third, EPA's economic analysis only considers permitting data from section 404 to estimate the potential additional percentage of acres that would come under jurisdiction. EPA then assumes that every other section of the Clean Water Act would be affected the exact same way as section 404, applying the estimated increase in percentage of acres impacted to all other relevant sections of the Clean Water Act. There is no reason to believe that this is a valid approach given significant differences in location and in permitting requirements for different economic activities. EPA recognizes this limitation,<sup>10</sup> but does nothing to address it.

#### **B. The Economic Analysis Significantly Underestimates the Cost of the Proposed Rule.**

EPA's economic analysis is further flawed because it underestimates the cost of the proposed rule by relying on section 404 permitting cost data that are nearly 20 years old. To make matters worse, these costs are not adjusted for inflation or any other changes in the permit system.

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<sup>10</sup> EPA 2011. *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, p. 3.

Moreover, EPA's analysis omits the costs of avoidance and delay, which are likely the largest out-of-pocket expenses for anyone seeking a Corps permit. While estimations of these costs are included in the report cited by EPA, they are inexplicably absent from EPA's "review and synthesis." According to the report EPA cites, individual section 404 permit application costs were measured as \$43,687 plus \$11,797 per acre of impacts to "waters of the U.S." For nationwide permits, costs were measured as \$16,869 plus \$9,285 per acre of "waters of the U.S." impacted.<sup>11</sup> If those figures were updated to 2014 dollars in order to account for inflation the application costs are even more astounding. In 2014 dollars, individual section 404 permit application costs would be \$62,166 plus \$16,787 per acre of impacts to "waters of the U.S." For nationwide permits, costs would be \$24,004 plus \$13,212 per acre of "waters of the U.S." impacted. (See Sunding Report at 17.)

EPA's analysis further underestimates costs for some programs, like section 303 (state water quality standards, "total maximum daily loads" and implementation plans) and section 402, by assuming them to be "cost-neutral or minimal" without providing any analysis to support this assumption. The effects of expanded jurisdiction are likely to vary significantly from program to program; however, careful assessment of program-specific effects is omitted in lieu of simplistic, generalized estimations.

EPA acknowledges that additional permit applications may require increased consultation with other agencies, which would drive up the price tag of a definitional change. EPA, however, omits these costs from its analysis.

### **C. The Economic Analysis Significantly Overestimates Benefits of the Proposed Rule.**

EPA's analysis is also flawed for reasons of overestimation. Relying on third-party, outdated studies, EPA overestimates an average willingness to pay for wetland mitigation. These studies are highly problematic because they are old—nine of the 10 studies EPA used are more than a decade old (the oldest is nearly 30 years old)—and do not provide accurate estimates of benefits. Many were not published in peer-reviewed journals.

EPA calculates benefits based on an unstated and improbable assumption that all of the incremental wetlands affected by the definitional change would be completely destroyed if federal jurisdiction were not expanded. EPA then (1) presumes that benefits calculated for a specific geography and time can be readily applied elsewhere, forcing a comparison between different types of wetlands being considered, and (2) makes the assumption that the public would be willing to pay the same amount to protect an isolated low spot or pond as they would a high-value wetland. This significantly biases EPA's analysis. Even the studies cited by EPA show highly localized impacts that are not broadly applicable beyond the study site.

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<sup>11</sup> Sunding and Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, Natural Resources Journal, Vol. 42, p. 74.

EPA makes little effort to account for changes in economic trends, recreational patterns and state preferences over time. Finally, EPA suggests there may be “across the board” savings in program enforcement related to increased clarity in the Clean Water Act program.

Taking these underestimates and overestimates into account, Dr. Sunding concludes that EPA’s analysis suffers from a lack of transparency and that the methodology, errors and omissions render it virtually meaningless.

**D. The Agencies’ Rulemaking Does Not Take Into Account Scientific and Technical Underpinnings.**

The agencies’ proposed rule relies on a draft review of the scientific literature on “connectivity” currently under review by an SAB. The agencies have drafted the proposed rule in reliance on the draft Connectivity Synthesis Report, without waiting for the SAB’s final report. Sending a proposed rule to OMB for interagency review before the SAB completes its peer review demonstrates that the agencies are not properly taking the science into account and that the outcomes have been pre-determined. Any proper rulemaking should begin with an agency collecting, developing and then appropriately evaluating all of the relevant science. The agency should seek to validate or correct its understanding of the science through conducting independent scientific peer review. Finally, the agency should use what is learned through a vetting process to inform any policy or regulatory decisions.

Instead, EPA has asked the SAB to engage in a post-hoc review of a severely limited portion of the science that will be used to justify a rule that has already been written. EPA’s decision to develop a rule based on a scientific report that has not undergone external scientific peer review calls into question the legitimacy of the rulemaking process. EPA should allow the SAB to complete its review. The agencies should extend the comment period on the proposed rule until after this process is complete and the report is thoroughly vetted to ensure that any final rule is based on the final, peer-reviewed connectivity report.

**E. The Impacts to Small Business Are Staggering.**

On April 23, the House Small Business Committee added the proposed rule to its website alerting small businesses to burdensome federal regulations. According to Committee Chairman Sam Graves (R-Mo.), the “EPA and Corps are proposing to expand the jurisdiction of the Clean Water Act to include nearly every damp patch of land in the United States.” Graves termed the proposed rule a “regulatory overreach,” saying:

[This] means small businesses and landowners may need costly permits and face lengthy delays for ordinary activities on private property. Projects may need to be redesigned or relocated to satisfy federal regulators. Worse, permit applications may be denied. This extraordinary intrusion into the lives of many farmers, ranchers and small business owners has the likely potential to be economically devastating and must be stopped.

The agencies have not properly complied with the procedural requirements of RFA. The agencies try to dodge the RFA by claiming that the “scope of regulatory jurisdiction in this

proposed rule is narrower than that under the existing regulations.” 79 Fed. Reg. at 22,220. Therefore, “because fewer waters will be subject to the Clean Water Act under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations ... [and] will not have a significant adverse impact on a substantial number of small entities.” *Id.* The agencies thus erroneously conclude that no RFA analysis is required.

But there can be no question that the proposed rule has direct effects not only on regulated entities, but also on the entire nation. The scope of Clean Water Act jurisdiction has implications that permeate all sections and programs under the Act, such as section 303 water quality standards and total maximum daily loads, section 311 oil spill prevention control and countermeasures, section 401 water quality certifications, the section 402 NPDES program and the section 404 dredge and fill permit program. These programs regulate countless diverse small business activities across the nation, from farming and roadside produce stands, to home building, to manufacturing and energy development. The agencies’ proposal expands these Clean Water Act programs geographically to cover more areas across the landscape including ditches, dry washes and desert drainages. When public or private property is deemed “waters of the United States” by the agencies, there are numerous impacts that flow from that determination, including the reduced value of land, the need to hire consultants to prepare permits, delays, restrictions on land use and the cost of complying with permitting requirements, including mitigation—not to mention the potential for permit denial or the cost of forgoing a project entirely rather than take on the bureaucracy. These widespread impacts are felt acutely by small businesses.

In Florida, for example, it is estimated that 40 percent of the value of farmland is directly attributable to its future development potential.<sup>12</sup> Thus, when Clean Water Act regulatory jurisdiction or permitting requirements are expanded over farmland, the value of that land decreases significantly because of the associated regulatory burdens. For farmers and ranchers, their land is typically their principal asset and frequently provides collateral for loans and other capital purchases needed to operate their farm or ranch. The agencies’ determination that Clean Water Act jurisdiction exists over ditches and other features on farmland may affect small farmers’ ability to obtain loans.

As another example, agricultural insect, weed and disease control will increasingly be subject to NPDES requirements under EPA’s new permit program for pesticides.<sup>13</sup> Some small business owners have estimated that it will cost an additional \$50,000 per year to comply with the new paperwork burden imposed by the pesticide permit program alone.<sup>14</sup> These burdensome NPDES

<sup>12</sup> Plaintiff, A.J., Lubowski, R.N., and R.N., Stavins, *The Effects of Potential Land Development on Agricultural Land Prices*, 52 J. of Urban Economics 561, 581 (2002).

<sup>13</sup> It is estimated that under the new NPDES permit program for pesticides, 365,000 new sources will be required to obtain NPDES permits, but this estimate was made prior to, and does not account for, the expansion of jurisdiction proposed in the Draft Guidance. See EPA, “Background information on EPA’s Pesticide General Permit,” <http://cfpub.epa.gov/npdes/pesticides/aquaticpesticides.cfm> (viewed Jun. 26, 2011).

<sup>14</sup> See Responsible Industry for a Sound Environment, “Comments in Response to Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharge from the Application of Pesticides,” Docket No. EPA-HQ-OW-2010-0257, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2010-0257-0490> (Jul. 19, 2010).

requirements place severe limitations on the location and operation of many activities undertaken by small entities. Expanding the scope of waters that are regulated as “waters of the United States” to ditches and other ephemeral features only adds to the “waters” at issue in the pesticide general permit and thus exacerbates the complexities and costs of implementing this program.

The bottom line is that the expansion of the waters regulated under the Clean Water Act has enormous implications for small business entities that the agencies have not considered, much less explained.

#### **VI. Conclusion**

Farmers, ranchers and other landowners will face a tremendous new roadblock to ordinary land use because of this proposed rule. The rule will make it more difficult to farm and ranch, build homes, develop energy resources and otherwise use the land. Farm Bureau believes the proposed rule will have a detrimental effect on existing farmers, on encouraging new and beginning farmers to enter the profession and potentially on landowners’ willingness to undertake conservation practices.

The agencies have obscured rather than explained the rule’s impacts on farmers, ranchers and others.

We need Congress’ help to fight this rule.

Thank you for the opportunity to explain our opposition to the waters of the U.S. proposed rule. We would be glad to provide any further information the Committee may need.

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**Testimony of Kevin Kelly**  
**Chairman of the Board**  
**National Association of Home Builders**  
**Before the Subcommittee on Water Resources and Environment**  
**Hearing on “Potential Impacts of Proposed Changes to the**  
**Clean Water Act Jurisdiction Rule”**

**June 11, 2014**

Chairman Gibbs, Ranking Member Bishop, members of the subcommittee, on behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today. My name is Kevin Kelly and I am the president of Leon Weiner and Associates, a building company based in Wilmington, Delaware, and NAHB’s 2014 Chairman of the Board.

NAHB members are involved in the home building, remodeling, multifamily construction, land development, property management, subcontracting and light commercial construction industries. Our industry is largely dominated by small businesses, with our average builder member employing 11 employees. Since the Association’s inception in 1942, NAHB’s primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they choose to buy or rent a home.

Recognizing the need for a clean environment and the benefits that it brings to communities, residents, and potential home buyers, NAHB members have a vested interest in preserving and protecting our nation’s land and water resources. Since its inception in 1972, the Clean Water Act (CWA) has helped to make significant strides in improving the quality of our water resources and improving the quality of our lives. As environmental stewards, the nation’s home builders build neighborhoods and help create thriving communities while maintaining, protecting, and enhancing our natural resources, including our lakes, rivers, ponds, and streams. Under the CWA, home builders must often obtain and comply with section 402 storm water and 404 wetlands permits to complete their projects. What is most important to these compliance efforts is a regulatory scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. Unfortunately, such a permitting program is becoming more and more elusive.

My business is dedicated to the development, preservation, and management of affordable housing for all citizens. I have a unique understanding of how the federal government's regulatory process impacts businesses in the real-world. Additional regulations make it more difficult for me to provide homes or apartments at a price point that is affordable to working families.

Housing serves as a great example of an industry that would benefit from smarter and more sensible regulation. According to a study completed by the NAHB, government regulations can account for up to 25% of the price of a single-family home. Nearly two-thirds of this impact is due to regulations that affect the developer of the lot, with the rest due to regulations that are imposed on the builder during construction.<sup>1</sup> The regulatory requirements we face as builders do not just come from the federal government. A key component of effective regulation is ensuring that local, state and federal agencies are cooperating, where possible, to streamline permitting requirements and respect the appropriate responsibilities of each level of government. Importantly, more sensible regulation will translate into job growth in the construction industry.

The growth potential in the home building industry is particularly important because few industries have struggled more during the Great Recession than home building. The decline in home construction was historic and unprecedented. Single-family housing production peaked in early 2006 at an annual rate of 1.8 million homes, but construction fell to 353,000 homes per year in early 2009, an 80% decline in activity. In contrast, a normal year driven by underlying demographics should see 1.4 million single-family homes produced. Clearly, if home building were operating at a normal level, there would be millions of more jobs in home building and related trades. Smart regulation can help unleash that growth.

Our impact on the economy is more than just jobs. Buyers of new homes and investors in rental properties add to the local tax base through business, income and real estate taxes, and new residents buy goods and services in the community. NAHB estimates the first-year economic impacts of building 100 typical single family homes to include \$28 million in wage and business profits, \$11.1 million in federal, state and local taxes, and 297 jobs. In the multifamily sector, the impacts of building 100 typical rental apartments include \$10.8 million in wages and business profits, \$4.2 million in federal, state and local taxes and 113 jobs.

As an industry, we have finally turned the corner and are contributing to, rather than subtracting from, Gross Domestic Product growth and an improving labor market. Thus, any effort to advance our nation's housing recovery is smart economic policy. To reach these goals, however, we need policies that streamline and enhance existing efforts and remove regulatory hurdles, not ones that add layers of regulatory red tape and provide minimal benefits.

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<sup>1</sup> Survey conducted by Paul Emrath, National Association of Home Builders, "How Government Regulation Affects the Price of a New Home," 2011.



**“Waters of the United States” Proposed Rule:**

On April 21, 2014, the Environmental Protection Agency and U.S. Army Corps of Engineers (“the agencies”) proposed a rule redefining the scope of waters protected under the CWA. For years, landowners and regulators alike have been frustrated with the continued uncertainty over the scope of federal jurisdiction over “Waters of the United States.” By improving the CWA’s implementation, removing redundancy, and further clarifying jurisdictional authority, the agencies are hoping they can do an even better job at facilitating compliance while protecting and improving the aquatic environment.

Unfortunately, the proposed rule falls well short of providing the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. Equally important, these changes will not significantly improve water quality because much of the rule improperly encompasses water features that are already regulated at the state level.

**The Proposed Rule Unnecessarily and Inappropriately Expands Federal Jurisdiction**

The agencies assert that the scope of CWA jurisdiction is narrower under the proposed rule than under current practices and that it does not assert jurisdiction over any new types of waters. This claim is simply not accurate. In reality, the proposed rule establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands and water features that are located in riparian areas or floodplains.

The agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit in the field, including stepping in where they may think a state has not gone far enough. For example, the proposal suggests that “neighboring” could include any wet feature within a “floodplain.” As I am sure you are aware, floodplains can extend for miles from traditional navigable waters, yet the agencies can now claim that those features, miles away, can be considered neighboring. This is a far cry from what Congress intended to be covered by the CWA. For any small business trying to comply with the law, the last thing it needs is a set of new, vague and convoluted definitions that only provide another layer of uncertainty. Let me discuss some of the problematic features in detail:

***New Definition of Tributary:***

The agencies have sought to expand their reach by adding, for the first time, a broad definition of “tributary.” They define a tributary as a “[w]ater body physically characterized by a bed and bank and ordinary high water mark which contributes flow directly or through other water bodies

to Traditional Navigable Waters (TNW).” They also state that a water body does not lose its tributary status if there are man-made breaks, as long as a bed and bank can be identified up or down stream. This new definition will include substantial additions, such as a first time inclusion of ditches, conveyances and other water features that may flow, if at all, only after a heavy rainfall. Unless proper mapping is provided by the agencies it may be impossible for a home builder to independently identify a tributary.

***New Definition of Adjacent:***

The concept of regulating “adjacent waters” is completely new. In the past, the notion of “adjacent” only applied to wetlands, yet through this rule, “adjacency” will now extend to water bodies. While widening this concept to include waters, the agencies also try to clarify what is “adjacency” by redefining essential terms. The current definition of “adjacency” is “bordering, contiguous, or neighboring.” However, much of the confusion rests within the meaning of “neighboring.” The rule vaguely defines “neighboring” as “waters located within the riparian area or floodplain or waters with a surface or shallow subsurface connection.”

The rule leaves the door completely open on the meaning of riparian and floodplain. It gives no indication as to what type of floodplain a water must be located in to be deemed jurisdictional and places no parameters on flood frequency. Intentionally leaving these terms loosely defined gives the agencies relatively unbounded jurisdiction and leaves land owners perplexed as to whether their land may be regulated.

***“Other Waters:”***

The rule also provides a catchall “other waters” category for areas that may not fit neatly into a specific water category but for which the agencies have retained complete discretion to find a significant nexus on a case-by-case basis. Significantly, this also includes the ability to make blanket jurisdictional determinations by considering all similarly situated waters located within the same region or watershed to determine if they, taken together, have a significant nexus to a TNW. The ability to aggregate waters further illustrates the notion that there is no limit to federal jurisdiction under this rule.

These definitions will leave home builders in a constant state of confusion. This unpredictability will make it difficult for my business to comply and grow. The agencies suggest that the rule provides clarity however; all it does is produce more questions. Unfortunately, we have to rely on the agencies for answers.

**The Proposed Rule is Inconsistent with Supreme Court Precedent:**

The CWA was designed to strike a careful balance between federal and state authority. This has proven to be a difficult task, and to some extent, the efforts of the courts to provide clarity have

only added to the uncertainty. The courts have been clear on one issue, which is that there is a limit to federal jurisdiction of waters. In fact, the Supreme Court has twice affirmed that both the U.S. Constitution and CWA place limits on federal authority over intrastate waters. While many were optimistic that this rule would finally translate the Court's directives to a workable framework, the proposed rule instead is a marked departure from past Supreme Court decisions and raises significant constitutional questions. In order to view the rule through this legal framework, it is necessary to look at the key cases:

***Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*:** In 2001, for the first time, the Supreme Court limited the federal government's jurisdictional authority under the CWA through the *SWANCC* decision. The case questioned whether the CWA conferred the Corps of Engineers with authority over isolated, seasonal ponds at an abandoned sand and gravel pit in suburban Chicago because they were susceptible to be used by migratory birds. The Court rejected the Corps's assertion of jurisdiction because the agency's interpretation gave no effect to the word navigable in the term "navigable waters." In other words, the Corps could not assert jurisdiction over the area in question simply because a migratory bird might land there.

***Rapanos v. United States and Carabell v. U.S. Army Corps of Engineering*:** Both *Rapanos*<sup>2</sup> and *Carabell*<sup>3</sup> cases followed the same fact-pattern: wetlands miles away from TNWs that drained through multiple ditches, culverts, and creeks, that eventually drain into a TNW. The question of this court case was over the jurisdictional theory that waters are jurisdictional as long as they have a "hydrological connection" to a TNW. *Rapanos* provided a significant clarification that CWA jurisdiction does not reach non-navigable features merely because they may be hydrologically connected to downstream navigable waters. In short, the "any hydrologic connection" theory was rejected—just as the migratory bird rule was disapproved in *SWANCC*.

However, two theories emerged from the majority's opinion in *Rapanos*. The first, written by Justice Scalia, claimed that CWA coverage extended to "...only those relatively **permanent, standing, or continuously flowing** [emphasis added] bodies of water 'forming geographic features' that are described in ordinary parlance as 'stream[s.] ... oceans, rivers, [and] lakes.'"<sup>4</sup> The plurality also developed a jurisdictional rule for wetlands in particular: "[O]nly those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' are 'adjacent to' such waters and covered by the Act."<sup>5</sup>

The second test was authored by Justice Kennedy, who concurred in the judgment, but wrote separately for himself. He elevated the concept of "significant nexus," first used by the Court in

<sup>2</sup> *Rapanos v. United States*, 126 S.Ct. 2208 (2006)

<sup>3</sup> *Carabell v. United States*, 126 S.Ct. 1295 (2006)

<sup>4</sup> *Rapanos* 126 S.Ct. at 2225

<sup>5</sup> *Id.* at 2226

*SWANCC*, to be the appropriate test for jurisdiction: “[W]etlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”<sup>6</sup> “Consistent with *SWANCC* and with the need to give the term ‘navigable’ some meaning, the Corps’ jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense.”<sup>7</sup>

The most significant clarification that *Rapanos* provided was that the five Justices agreed CWA jurisdiction does *not* reach non-navigable features merely because they are hydrologically connected to downstream navigable water. However, many have maligned *Rapanos* because the Justices failed to reach a majority opinion that announced the “correct” test for CWA jurisdiction. In many cases, the existence of two tests only adds more confusion and disagreement regarding the scope of the CWA.

While the agencies face a difficult task in resolving this conflict, the proposed rule is obviously inconsistent with these Supreme Court decisions and will expand the scope of waters that can be regulated by the agencies. The rule would extend coverage to many features that are remote and/or carry only minor volumes of water, and contrary to the Supreme Court’s findings, its provisions provide no meaningful limit to federal jurisdiction. The rule ignores the tests that were developed in *Rapanos* and reverts back to regulating any hydrologic connection. More specifically, the rule disregards Justice Kennedy’s “Significant Nexus” test by making all connections regulable. Such a broad overreach is unacceptable.

#### **The Proposed Rule Ignores Federal/State Balance**

While many aspects of the CWA are vague, it is clear that Congress intended to create a partnership between the federal agencies and state governments to protect our nation’s water resources. Congress states in section 101 of the CWA that “[f]ederal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resource.” Under this notion, there is a point where federal authority ends and state authority begins.

The rule proposed by the agencies, however, blatantly ignores this history of partnership and fails to recognize that there are limits to federal authority. If this rule is finalized as proposed, the federal government will severely cripple the state’s role in protecting our nation’s water resources, which would be a huge mistake as well as unconstitutional. Litigation is a likely

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<sup>6</sup> *Id.* at 2248

<sup>7</sup> *Id.* at 2249

result, and while it makes its way through the court system, regulators and businesses will be left in a lurch.

In addition, because the proposed change in jurisdictional authority does not only apply to section 404 of the CWA, but to all of its programs, the states will be required to conduct more monitoring and develop water quality standards for these newly-jurisdictional waters in addition to those that are already covered. States will also be required to develop total maximum daily loads if these waters do not meet their water quality goals. Because many of these newly-designated waters are on the drier side of the spectrum and/or will be conveyances designed to move water from one place to another, I am particularly concerned with the impacts this rule will have on section 402 storm water permitting requirements and how the states and localities may pass on the myriad of new, onerous and costly requirements to landowners.

States have adequately regulated their own waters and wetlands for years. States takes their responsibilities to protect their natural resources seriously and do not need the federal government to meddle in their affairs and unnecessarily assert jurisdiction. In fact, every state has the authority to exceed federal law so long as there is a compelling reason. If you looked around the country, you would find that many states are protecting their natural resources more aggressively than when the CWA was enacted – a testament to their desire and willingness to do so.

In these times of austere budgets and competing priorities, the agencies should heed the CWA's directive and allow the states to maintain their prerogatives to regulate the lands and waters within their boundaries as they see fit.

#### **Potential Impacts on Construction:**

Home building is a complex and highly regulated industry. As costs, regulatory burdens, and delays increase, the small businesses that make up a majority of the industry must adapt. This can include paying higher prices for land or purchasing smaller parcels, redrawing development or house plans, and/or completing mitigation or resource enhancement projects. All of these adaptations must be financed by the builder and ultimately arrive in the market as a combination of higher prices for the consumers and lower output for the industry. As output declines and jobs are lost, other sectors that buy from or sell to the construction industry also contract and lose jobs. Builders and developers, already crippled by the economic downturn, cannot depend upon the future home-buying public to absorb the multitude of costs associated with overregulation.

Because compliance costs for regulations are often incurred prior to home sales, builders and developers have to essentially finance these additional carrying costs until the property is sold. Because of the increased price, it may take longer for the home to be sold. Carrying these additional costs only adds more risk to an already risky business, yet is one of the difficult

realities that home builders face every day. This proposed rule only adds to the headwinds that our industry faces.

Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate income home buyers. Such buyers are more susceptible to being priced out of the market. As the price of the home increases, those who are on the verge of qualifying for a new home will no longer be able to afford this purchase. An analysis done by NAHB illustrates the number of households priced out of the market for a median priced new home due to a \$1,000 price increase. Nationally, this price difference means that when a median new home price increases from \$225,000 to \$226,000, 232,447 households can no longer afford that home.

The picture becomes more stark when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and \$271,596 to obtain an individual permit and 313 days and \$28,915 for a “streamlined” nationwide permit. Over \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.<sup>8</sup> Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant. When considering these excesses, it becomes clear that we need to find a necessary balance between protecting our nation’s water resources and allowing citizens to build and develop their land.

***Increased Number of Federal Permits:***

Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under CWA programs. Builders and developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approval. This takes time and money. Delays often lead to higher costs, which lead to greater risks. Onerous permitting liabilities could delay or eventually kill a real estate deal. If the rule is finalized in its current form, the ability to sell, build, expand, or retrofit structures or properties will suffer notable setbacks, including added cost and delays for development and investment.

Specifically for the “other waters” category, builders will be at the mercy of the agencies. Builders will have to request a jurisdictional determination from the agencies to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdictional determinations requests, across all industries, will result in greater permitting delays as the agencies are flooded with paperwork.

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<sup>8</sup> David Sunding and David Zilberman, “The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,” 2002

***Increased Federal Consultations:***

Many federal statutes tie their approval/consultation requirements to those of the CWA – meaning that if one has to obtain a CWA permit, he/she must also obtain others (examples include the Endangered Species Act, National Historic Preservation Act, and National Environmental Policy Act). If more areas are considered jurisdictional, more CWA permits will be required, triggering these additional statutory reviews. Because project proponents do not have a seat at the table during these additional reviews and the consulting agencies are not bound by a specific time limit, builders and developers are immediately placed at a disadvantage. Lengthened permitting times will include an increased number of meetings, formal and informal hearings, and appeals. These federal consultations are just another layer of red tape that the federal government has placed on small businesses and it is doubtful the agencies will be equipped to handle this inflow.

**Unintended Consequences:*****Discourages use of Low Impact Development:***

Oftentimes, localities will require or encourage builders and developers to use Low Impact Development (LID) or green infrastructure when managing stormwater runoff on their properties. These relatively new practices use or mimic natural processes to infiltrate or reuse stormwater runoff on the building site where it is generated. This is a highly encouraged practice that keeps rainwater out of the sewer system and reduces the amount of untreated runoff discharged into surface waters.

While the use of LID methods can be beneficial to communities throughout the country, there is no single source of federal funding dedicated to the design and implementation of LID solutions. Many builders voluntarily install LID Best Management Practices (BMPs) for the general benefit of their communities. Examples include bioretention areas such as raingardens, swales, retention ponds and infiltration basins. Over time, these areas could begin to function similarly to wetlands and under the proposed rule, be deemed jurisdictional. If so, builders and developers will be less inclined to install these highly-efficient and effective systems. Further, such an end result is in direct conflict with the current efforts by EPA to promote the use of green infrastructure.

***Impacts on Municipal Separate Storm Sewer Systems:***

Municipal Separate Storm Sewer Systems (MS4s) systems are owned and operated by state and local governments and vary in size; however, their function is universal—to transport or convey a cities' stormwater through pipes, drains, gutters and open ditches. Many MS4 systems are regulated as point sources and therefore are required to obtain 402 National Pollutant Discharge

Elimination System permits and develop stormwater management programs. Because exposed ditches and intermittent streams are often part of MS4 systems, I am concerned that the proposed may regulate MS4s (or their components) as “Waters of United States.” This would be problematic because these features are already regulated as a point source. Further, there are miles of roadside ditches that are simply there to carry storm water from the roadways for public safety and for which it makes little sense to consider as a federally regulable water.

#### **Scientific Study and Economic Analysis:**

EPA Administrator, Gina McCarthy, recently defended the importance of science in guiding the agency’s decision making. NAHB strongly agrees that sound science must underpin any regulatory action, which is why it so surprising that the agencies have yet to complete the report that was intended to serve as the scientific basis for the rulemaking. The agencies have submitted a draft scientific study, “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (“draft connectivity study”) to the EPA Science Advisory Board (SAB) for peer review. Final recommendations from the SAB panel are expected in the coming weeks, yet the agencies moved forward with the proposed rule before the review was completed. It remains unclear why the agencies are urgently moving this rulemaking forward prior to the release of the SAB’s findings – particularly when there is no statutory (or other) deadline compelling them to do so.

Likewise, NAHB remains concerned that the draft Economic Analysis for the rule was hastily completed, as it fails to fully consider the costs and impacts the proposed rule will have on the full suite of CWA programs and underestimates the extent and impact of those waters that will now be deemed jurisdictional.

In sum, we take issue with the agencies’ reckless disregard for the science and poorly considered economic analysis. The agencies violated the spirit of the Administrative Procedure Act and have made a mockery of the SAB process by proposing a rule without the foundational science firmly in place or a comprehensive analysis of the likely costs and benefits.

#### **Conclusion:**

The proposed rule does not add new protections for our nation’s water resources but rather, inappropriately shifts the jurisdictional authority of many drier-end waters to the federal agencies. As a builder serving the affordable housing market, I am concerned about additional government regulations and the continued uncertainty this rule ensures. I cannot continue to provide affordable housing to those in need while weighed down by additional regulatory burdens and requirements like these that provide little benefit.



In addition, the rule allows the agencies to illegally “take the easy way out” by sweeping everything under federal authority. If the agencies are interested in developing a meaningful and balanced rule, they must take a more methodical and sensible approach. I have significant concerns with the proposed rule and I would encourage the agencies to rethink it.

I appreciate the opportunity to discuss these important issues.



June 11, 2014

Mr. Chairman, thank you for your time.

My name is Eric Henry. I'm from Burlington, North Carolina, where I have lived for over 50 years and had a business for over 30 years. The t-shirt and jeans I am wearing today were made completely in North Carolina using North Carolina cotton and our Cotton of the Carolinas supply chain. I understand and value the importance of clean water to both my business and community, and I hope you will recognize that protecting this resource is invaluable to businesses like mine.

Burlington used to be a very large textile town - home to companies like Burlington Industries, which was founded in 1923 and was once one of the largest textile companies in the country.

I remember growing up seeing the multi color soap suds on Willowbrook Creek right across the street from my house. I also remember the much larger Haw River which powered a lot of the original textile mills in our community - that got polluted to the point where the river was like a toilet bowl where communities could dump their commercial and residential waste.

Today the Haw River is part of the rebuilding of Alamance County. Old mill communities like Saxapahaw and Glencoe, communities that had been dying out, are now becoming the most sought out places to live, work and play. Much of this is due to EPA's Clean Water regulations.

As a small business owner who started a t-shirt business over thirty years ago while attending North Carolina State University, I have witnessed firsthand the positive changes that come from bringing clean water back to our community.

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My t-shirt reflects our triple bottom line values of a successful business based on People, Planet, and Profit. This particular shirt is Cotton of the Carolinas - we go "dirt to shirt," covering every step of the production process from farm to factory, supporting 500 American jobs in a completely transparent supply chain spanning 600 miles. One other advantage of being part of a t-shirt business - you get to wear your product to hearings like this instead of high priced suits.

As a business owner, with a daily focus on meeting payroll and growing sales, I appreciate the value that my government partner brings to the table - the long-term view of clean water and clean air.

I believe we have an obligation not just to protect the water for the communities we live in today, but to ensure that future generations will have access to clean water. If protecting future generations truly matters to you, this is one way you can show it.

This is not a unique view among business owners. In independent polling commissioned by the American Sustainable Business Council (<http://asbcouncil.org/toxic-chemicals-poll>), 92 percent of small business owners supported the idea that there should be regulation to protect air and water from pollution by toxic chemicals. And 47 percent of that sample was self-identified *Republicans*.

Clear national water protections are critical to making waterways safe for families to swim in, fish from, and depend upon for a drinking water supply. They'll ensure that the playing field stays level, and that a business like mine will be playing by the same rules as everyone else's. That's fairer, and it's simpler.

Some people only see the higher cost of cleaner water and the impact to their bottom line. They miss the longer term view. What happens when water is polluted? You only need look at the impact of spills in the Elk River in West

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Virginia, and concerns that that spill could have spread downriver into Kentucky. You only need look at the recent spill in the Dan River in North Carolina, where tens of thousands of tons of coal ash were discharged into the river.

The companies responsible for those spills don't benefit from them - the Dan River spill is costing Duke Energy millions of dollars, and the company responsible for the Elk River spill, Freedom Industries, filed for bankruptcy. Companies like mine, which rely on a consistent source of clean water, certainly don't benefit. The people in these communities, the ones who can't shower or bathe or wash their clothes for days, they don't benefit.

And our economy doesn't benefit. The Elk River spill cost West Virginia's economy \$19 million a day, according to researchers at Marshall University. By contrast, the clean water rule you are discussing at today's hearing would have between \$388 million to \$514 million in annual benefits, compared with only \$162 million to \$278 million in costs. There's a strong economic case for these regulations, not against them.

We need to be the world leader in setting the bar for a better world, not just one with a cheaper, more polluted future. That is why I am asking you to support the EPA's move to protect our waterways. The people you represent - and the companies they rely on for jobs and economic growth - will thank you.

Sincerely

Eric M. Henry  
President

June 16, 2014

Mr. Eric Henry  
President, tsdesigns  
2053 Willow Spring Lane  
Burlington, N.C. 27215

Thank you for your testimony and observations related to the administration's proposed rule defining the term "waters of the United States" under the Clean Water Act. Your testimony was helpful in providing the Subcommittee with a "big picture" view on issues related to establishing minimum guidelines for protecting our nation's waters.

As a follow-up to your testimony, I would appreciate your response to the following questions for the hearing record:

1. As your written testimony notes, your "Cotton of the Carolina" t-shirts cover every step of the production process from farm to factory, so you have a unique perspective in being involved in many different business sectors, including agricultural and manufacturing. Another member of your panel suggested in their testimony that the proposed "waters of the United States" rule "poses a serious threat to farmers, ranchers, and any other individual or business whose livelihood depends on the ability to use the land." Do you agree with this assessment?  
***No, I do not agree. I think the rule will give us a better long term plan how to protect our water. Cost must be measured both in the short and long term. Water is a resource we share and do not own.***
2. For businesses that rely on the availability of clean water, do you believe that there is an impact if water quality is allowed to degrade over time because of a lack of comprehensive efforts to protect water quality? Can you give specific examples of business decisions where the availability of clean water was critical to the location or continued operation of a business?  
***One that comes quickly to mind is Saxapahaw, North Carolina, once a textile village on the Haw River in southern Alamance County. Like so many textile communities, it suffered lost jobs over the past few decades. Now, however, this***

*community has been reborn and is now home to about a dozen businesses, two restaurants, a brewery, a butcher shop, a coffee shop, an entertainment venue and a charter school. Recently, they even started selling \$300k condos on the bank of the Haw River. Clean water made this economic rebirth possible and polluted water would destroy it.*

3. Several of the witnesses at the Subcommittee hearing spoke about the perceived costs of the administration's proposed rule to protect the nation's water quality; however, few spoke of the potential benefits of these efforts. Do you see specific instances where these proposed rules would provide a potential benefit to the nation, including your business, or other members of the American Sustainable Business Council? Can you give specific examples of these benefits?

*Water will be the most valuable asset in future generations as we look at 9 billion people on the planet and the impact climate change will have on our economy. Society cannot prosper without clean water and a lot of future conflicts will be fought over it. As a business owner, water is still a cheap resource, but our business can't survive without it. I am willing to pay more to make sure this resource is protected for my business, but also for my community and future generations.*

4. Finally, you made the suggestion in your testimony that "[we] need to be the world leader in setting the bar for a better world, not just one with a cheaper, more polluted future." Can you expand upon this suggestion?

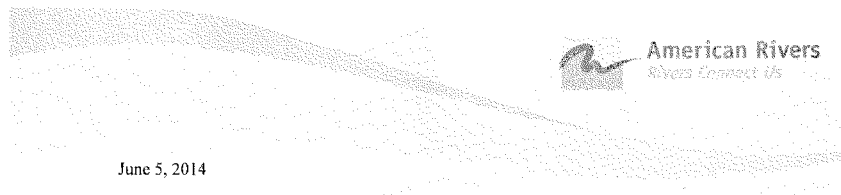
*We have to look at the value of water beyond just the cost we are paying for it, but also our long term costs from not protecting our water. Water is a global resource and the US is a global economic leader; we should set the bar on protecting our resources so we can continue to maintain this leadership role.*

The Committee has provided 30 calendar days for additional materials for the record, so please provide written responses no later than July 10, 2013. Please submit your responses via U.S. mail to the attention of Chelsea Welch, at B-375 Rayburn House Office Building, Washington, D.C. 20515. Additionally, please provide an electronic version of your response via email to [Chelsea.welch@mail.house.gov](mailto:Chelsea.welch@mail.house.gov).

Again, thank you for your testimony.

Sincerely,

Tim Bishop  
Ranking Democrat  
Subcommittee on Water Resources  
and Environment



June 5, 2014

The Honorable Bob Gibbs  
Chairman, Water Resources and Environment Subcommittee  
Transportation and Infrastructure Committee  
329 Cannon House Office Building  
Washington, DC 20515

The Honorable Timothy Bishop  
Ranking Member, Water Resources and Environment Subcommittee  
Transportation and Infrastructure Committee  
306 Cannon House Office Building  
Washington, DC 20515

**Re: Testimony in Support of the Environmental Protection Agency and the Army Corps of Engineers' Efforts to Clarify the Scope of the Clean Water Act**

Dear Chairman Gibbs and Ranking Member Bishop:

American Rivers thanks the Committee for the opportunity to provide written testimony for the hearing entitled "Potential Impacts of Proposed Changes to Clean Water Act Jurisdictional Rule" on June 11, 2014 regarding the Environmental Protection Agency and the Army Corps of Engineers' proposed Clean Water Rule to clarify the scope of the Clean Water Act. The proposed Clean Water Rule is an important step forward to better protect and restore our nation's rivers, providing greater clarity regarding protections for critical upstream waters that contribute to our drinking water supplies, filter out pollutants, and protect us from flooding.

For nearly thirty years following its enactment in 1972, the Clean Water Act was broadly interpreted to provide comprehensive protections for our nation's waters. Two Supreme Court cases in 2001 and 2006 put protections for small streams and wetlands into question, leaving them vulnerable to pollution and degradation. These waters contribute to the drinking water supplies of 117 million Americans and provide critical flood storage, pollutant removal, and habitat for fish and wildlife. The proposed rule is based on sound science, drawing from the Scientific Advisory Board's "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" which compiles more than 1,000 peer-reviewed scientific publications.<sup>1</sup> The proposed rule was noticed in the Federal Register on April 21, 2014 and is currently available for public

<sup>1</sup> Office of Research and Development U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, External Review Draft, September 2013, Available online < [http://www.epa.gov/sab/sabproduct.nsf/fedregstr\\_activities/7724357376745F48852579C60043E88C/\\$File/WQHS\\_LR02\\_Sep2013.pdf](http://www.epa.gov/sab/sabproduct.nsf/fedregstr_activities/7724357376745F48852579C60043E88C/$File/WQHS_LR02_Sep2013.pdf) >. Accessed 22 April 2014.

comment and review. It provides a public process through which to engage on this issue that is vitally important to the health of our rivers and the communities that rely upon them.

#### Clarifying the Scope of the Clean Water Act

The Clean Water Act (CWA) asserts federal jurisdiction over “navigable waters,” which are defined as “waters of the United States, including the territorial seas.” Following the Clean Water Act’s enactment in 1972, both the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Army Corps) developed regulations to define “waters of the United States,” taking a comprehensive view of their regulatory authority. When the Army Corps initially proposed a narrow definition of “waters of the United States,” a federal court revoked the definition and found that Congress had “asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability.”<sup>2</sup> The Army Corps revised their definition to be in line with the EPA’s definition of “waters of the United States” which was broadly interpreted for almost thirty years to “provide comprehensive federal protections for virtually all bodies of water throughout the United States—the navigable rivers and seas as well as the headwaters, intermittent and ephemeral streams, and intrastate wetlands and other waters that are critical to the health of the Nation’s interconnected aquatic ecosystems.”<sup>3,4</sup>

Following two Supreme Court decisions in 2001 and 2006 and the resulting Administrative guidance, protections for small streams and wetlands were put into question.<sup>5</sup> In *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, the Supreme Court in a 5-4 opinion ruled that the use of seasonal interstate ponds, or so-called “isolated” ponds, by migratory birds was not enough to protect those waters under the Clean Water Act.<sup>6</sup> Five years later, the Supreme Court in *Rapanos v. United States* was unable to reach a majority opinion on the question of whether wetlands that were near to tributaries of traditionally navigable waters were protected under the Clean Water Act. Four justices in the plurality opinion would protect only “relatively permanent waters,” excluding waters that flow seasonally or after rainfall, that are connected to traditionally navigable waters and only protect wetlands with a “continuous surface connection” to other protected waters. Justice Kennedy’s concurring opinion held that some wetlands

<sup>2</sup> Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

<sup>3</sup> See 40 Fed. Reg. 31,319 (July 25, 1975 interim final rule); 42 Fed. Reg. 37,122 (July 19, 1977 final rule).

<sup>4</sup> Austin, Jay E. and D. Bruce Meyers, Jr., Anchoring the Clean Water Act: Congress’s Constitutional Sources of Power To Protect the Nation’s Waters, American Constitution Society for Law and Policy, September 2007, Available online <

<http://www.acslaw.org/files/Clean%20Water%20Act%20Issue%20Brief.pdf>>, Accessed 19 March 2014.

<sup>5</sup> See Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Jurisdiction in *Rapanos v. United States & Carabell v. United States*, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 2 December 2008; Appendix A Joint Memorandum, 68 Federal Register 10 15 January 2003, 1995-1998.

<sup>6</sup> 531 U.S. 159, 162, 171-72, 176-77 (2001).



would require demonstration of a “significant nexus” to traditionally navigable waters through a case-by case basis to be protected under the Clean Water Act.<sup>7</sup>

Since these decisions, enforcement of the Clean Water Act has significantly declined, putting the health of our rivers and the communities that depend upon them at risk.<sup>8</sup> The proposed Clean Water Rule is an important step forward to reduce uncertainty, clarifying protections for these critical waters.

### **The Importance of Small Streams and Wetlands to Public Health, Clean Rivers**

Trees draw in water, nutrients, and oxygen from thousands of tiny roots in the soil. Damage to its small root structures can impact the health of the tree itself. A river system works in much the same way. Rivers don’t start in just one place, but rather arise from a network of small streams and wetlands that gradually join together as they flow downstream.<sup>9</sup>

Small headwater streams and wetlands provide the greatest connections between land and water, trapping and storing nutrients, providing critical habitat, storing floodwaters, contributing to drinking water supplies, and filtering out pollutants. Headwater streams that flow seasonally, known as intermittent streams, or only after rain, known as ephemeral streams and wetlands, even those that appear to be disconnected from stream networks, have biological, chemical, and hydrologic connections to downstream waters.<sup>10</sup> Across the country, approximately 60 percent of streams are either intermittent or ephemeral.<sup>11</sup> Scientific studies repeatedly demonstrate that the health of downstream lakes, rivers, and estuaries are tied to the health of small streams and wetlands upstream.<sup>12</sup> Leaving these critical waters vulnerable to pollution puts the health of our rivers and the communities that depend upon them at risk.

<sup>7</sup> 126 S. Ct. 2208 (2006).

<sup>8</sup> Memorandum: Decline of the Clean Water Act Enforcement Program, Committee on Oversight and Government Reform and Committee on Transportation and Infrastructure, 16 December 2008, Available online < <http://oversight-archive.waxman.house.gov/documents/20081216113810.pdf> >, Accessed 23 April 2014.

<sup>9</sup> Meyers, Judy L., Louis A. Kaplan, Denis Newbold, et. al., Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands, February 2007, Available online < <http://www.americanrivers.org/assets/pdfs/reports-and-publications/WhereRiversAreBorn1d811.pdf> >, Accessed 22 April 2014.

<sup>10</sup> *Ibid*.

<sup>11</sup> Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction, U.S. Environmental Protection Agency, 27 April 2011, Available online < [http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa\\_guidance\\_impacts\\_benefits.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf) >, Accessed 24 April 2014.

<sup>12</sup> See Hynes, H.B.N., 1975, The stream and its valley, *Proceedings of the International Association for Theoretical and Applied Limnology*, 19:1-5; Pringle, C.M., 1997, Exploring how disturbance is transmitted upstream: Going against the flow, *Journal of the North American Benthological Society*, 16:425-438; Ward, J.V., 1989, The four dimensional nature of lotic ecosystems, *Journal of the North American Benthological Society*, 8:2-8; Fausch, K.D., C.E. Torgersen, C.V. Baxter, and H.W. Li, 2002, Landscapes to riverscapes: Bridging the gap between research and conservation of stream fishes, *BioScience*, 52:483-498;

*Maintain Water Supplies for Drinking Water, Fish and Wildlife*

Small streams and wetlands are not only where rivers begin, but they are the dominant source of supply to downstream larger streams and rivers. This is critical for drinking water supplies, recreation, aquatic life, and commercial activity that rely on healthy flows. Wetlands store and release water over time, recharging groundwater supplies. Models from the U.S. Geological Survey (USGS) show that headwater streams are the source of 55 percent of flow to larger streams and rivers.<sup>13</sup> In arid and semi-arid climates, intermittent or ephemeral streams can provide a significant amount of groundwater recharge to local aquifers that may be used for drinking water or irrigation.<sup>14</sup> Small streams and wetlands, which under the status quo are left vulnerable to pollution and degradation, contribute to the drinking water supplies of 117 million Americans.<sup>15</sup>

*Filter out Pollutants, Protect Clean Water*

Healthy small streams and wetlands can protect clean water by filtering out or transforming pollutants, such as animal waste, heavy metals, chemical fertilizers, and polychlorinated biphenyls (PCBs).<sup>16,17</sup> When these waters are destroyed or degraded, they lose their ability to store or transform these pollutants. Instead, these pollutants may move more quickly downstream, impairing water quality. Excess nutrients, particularly nitrogen and phosphorous, can cause an overgrowth of algae which blocks sunlight and chokes aquatic life. Some types of algae can change the odor and taste of water or are toxic, which negatively impacts drinking water supplies. Excessive nitrate, a form of nitrogen, in drinking water is responsible for methemoglobinemia, where the nitrate or nitrite inhibits the blood's ability to deliver oxygen to the body. Babies and young children are particularly susceptible to methemoglobinemia, also known as "blue baby disease."<sup>18</sup>

<sup>13</sup> Meyers, Judy L., Louis A. Kaplan, Denis Newbold, et. al., *Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, February 2007, Available online < <http://www.americanrivers.org/assets/pdfs/reports-and-publications/WhereRiversAreBorn1d811.pdf> >, Accessed 22 April 2014.

<sup>14</sup> Nadeau, T. and M.C. Rains, 2007, Hydrological Connectivity Between Headwater Streams and Downstream Waters: How Science Can Inform Policy, *Journal of the American Water Resources Association*, (43)1:118-133.

<sup>15</sup> Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S., U.S. Environmental Protection Agency, 29 October 2013, Available online < [http://water.epa.gov/lawsregs/guidance/wetlands/surface\\_drinking\\_water\\_index.cfm](http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm) >, Accessed 23 April 2014.

<sup>16</sup> Schorer, M. and W. Symader, 1998, Biofilms as dynamic components for sorption of inorganic and organic pollutants in fluvial systems, pp. 187-196, in M.J. Haigh, J. Krecek, G.S. Rajwar, M.P. Kilmartin (eds) *Headwaters: Water Resources and Soil Conservation*, A.A. Balkema, Rotterdam, Netherlands.

<sup>17</sup> Meyers, Judy L., Louis A. Kaplan, Denis Newbold, et. al., *Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, February 2007, Available online < <http://www.americanrivers.org/assets/pdfs/reports-and-publications/WhereRiversAreBorn1d811.pdf> >, Accessed 22 April 2014.

<sup>18</sup> Effects of Nitrogen and Phosphorous Pollution, US Environmental Protection Agency. Accessed 9 January 2012, Available online < <http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/effects.cfm> >, Accessed 24 April 2014.

Protecting small streams and wetlands is critical to ensuring clean water downstream for people and wildlife.

*Provide Natural Flood Control*

Healthy small streams and wetlands upstream not only protect healthy base flows in downstream waters, but they also provide natural flood control to downstream communities. These waters are able to slow and store floodwaters, providing groundwater recharge as water seeps into the ground over time. A one-acre foot wetland can store approximately three acre-feet, about one million gallons, of floodwaters.<sup>19</sup> As small streams are filled in or degraded as a result of human activity, base flows in downstream waters decrease and the frequency and intensity of flooding downstream increases.<sup>20</sup> The combination of increased flooding and the loss of small streams results in increased erosion and movement of sediment downstream, which can impair water quality and threaten communities. For instance, during mountaintop removal mining, streams are filled in with mining waste and referred to as “valley fills” which can exacerbate flooding.<sup>21</sup> Water flowing from these valley fills contains chemicals that are toxic to aquatic life and pose risks to human health from consuming polluted fish to coming into contact with contaminated water.<sup>22</sup> Under the status quo, protections for these small streams are not guaranteed which puts public health at risk.

*Provide Economic Benefits to Communities*

Businesses across the country rely upon clean water supplies, from recreational outfitters to breweries. Clean, healthy flows in small streams and rivers support fish and wildlife and directly impact recreational boating.<sup>23</sup> Every year, 40 million anglers across the United States spend \$45 billion to fish. The commercial salmon industry, the third largest commercial fishery in the country, is estimated to bring in \$381 million annually. A 2006 U.S. Fish and Wildlife Service (USFWS) survey found that waterfowl hunting of ducks and geese resulted in \$2.3 billion in economic activity and created 27,000 jobs.<sup>24</sup> As an

<sup>19</sup> Wetlands: Protecting Life and Property from Flooding, U.S. Environmental Protection Agency, May 2006, Available online < <http://water.epa.gov/type/wetlands/outreach/upload/Flooding.pdf> >, Accessed 28 April 2014.

<sup>20</sup> Dunne, T. and L.B. Leopold, 1978, *Water in Environmental Planning*, W.H. Freeman and Company, New York.

<sup>21</sup> Wiley, J.B., R.D. Ewald, J.H. Eychaner, and D.B. Chambers, 2001, Reconnaissance of stream geomorphology, low streamflow, and stream temperature in the mountaintop removal coal-mining region, southern West Virginia, 199-2000, Water Resources Investigations Report 01-4092, U.S. Geological Survey.

<sup>22</sup> Palmer, M.A., E.S. Bernhardt, W.H. Schlesinger, et. al., 2010, Mountaintop Mining Consequences, *Science*, 327: 148-149, Available online < [http://www.filonverde.org/images/Mountaintop\\_Mining\\_Consequences\\_Science\[1\].pdf](http://www.filonverde.org/images/Mountaintop_Mining_Consequences_Science[1].pdf) >, Accessed 24 April 2014.

<sup>23</sup> Duffield, J.W., 1992, Recreation Benefits of Instream Flow: Application to Montana's Big Hole and Bitterroot Rivers, *Water Resources Research*, 28(9):2169-2181, Available online < [http://www.fs.fed.us/rm/value/docs/recreation\\_benefits\\_instream\\_flow.pdf](http://www.fs.fed.us/rm/value/docs/recreation_benefits_instream_flow.pdf) >, Accessed 24 April 2014.

<sup>24</sup> 2006 National Survey of Fishing, Hunting, and Wildlife –Associated Recreation, U.S. Fish and Wildlife Service, 2006, Available online < <https://www.census.gov/prod/2008pubs/fhw06-nat.pdf> >, Accessed 24 April 2014.

example, prairie potholes are critical habitat for ducks. In fact, over 50 percent of ducks in the United States are born in the prairie potholes region in the northern Great Plains.<sup>25</sup> Because prairie potholes are located outside of the floodplain and may not have a clear surface connection to downstream waters, they are currently vulnerable to pollution. The proposed Clean Water Rule would not preclude their inclusion, instead creating a defined process for these waters to be protected if a significant nexus is demonstrated. The current lack of clarity regarding the scope of the Clean Water Act can delay permits and create uncertainty.<sup>26</sup> Businesses operate best in an environment of regulatory certainty. The proposed Clean Water Rule would make clear what is protected and what is not protected under the Clean Water Act to improve certainty for businesses.

#### **The Proposed Clean Water Rule is an Important Step Forward to Clarify Protections for Small Streams and Wetlands**

Following the *SWANCC* and *Rapanos* cases and the resulting Administrative guidance, enforcement of the Clean Water Act has significantly declined, putting the health of our rivers and the communities that depend upon them at risk. Between July 2006 and December 2007, the EPA made a conscious decision not to pursue enforcement of as many as 300 Clean Water Act violations in part due to resource and budget constraints in demonstrating jurisdiction.<sup>27</sup> Over a four-year period, more than 1,500 major pollution investigations of companies that spilled oil, carcinogens, and bacteria into water bodies weren't being prosecuted.<sup>28</sup> The following examples illustrate how uncertainty surrounding what waters are protected under the law has resulted in delays and declining enforcement.

- **New York:** In 2008, a local homeowner's association in Monroe, New York sued a development company for allegedly dumping pollutants into the nine-acre Pine Tree Lake in violation of their permit. Despite the houses that lined the shore and the boats that used the lake, the judge ruled that Pine Tree Lake was not covered under the Clean Water Act because it lacked an interstate or foreign commerce connection despite being "navigable-in-fact."<sup>29</sup>

<sup>25</sup> Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction, U.S. Environmental Protection Agency, 27 April 2011, Available online < [http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa\\_guidance\\_impacts\\_benefits.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa_guidance_impacts_benefits.pdf) >, Accessed 24 April 2014.

<sup>26</sup> Vervier, Jenn, "Clean Water is Good for Business, and for Beer!," Huffington Post, 18 April 2012, Available online < [http://www.huffingtonpost.com/jenn-vervier/clean-water-act\\_b\\_1434511.html](http://www.huffingtonpost.com/jenn-vervier/clean-water-act_b_1434511.html) >, Accessed 25 April 2014.

<sup>27</sup> Memorandum: Decline of the Clean Water Act Enforcement Program, Committee on Oversight and Government Reform and Committee on Transportation and Infrastructure, 16 December 2008, Available online < <http://oversight-archive.waxman.house.gov/documents/20081216113810.pdf> >, Accessed 23 April 2014.

<sup>28</sup> Duhigg, Charles and Janet Roberts, Rulings Restricts Clean Water Act, Foiling EPA, 28 February 2010, Available online < <http://www.nytimes.com/2010/03/01/us/01water.html?pagewanted=all> >, Accessed 24 April 2014.

<sup>29</sup> Decision & Order, *Pine Tree Homeowners' Association, Inc. v. Ashmar Development Co., LLC*, No. 04-Civ-10006, at 15 (S.D.N.Y. Jan 29, 2008).

- **Connecticut:** A community group pursued action over concerns about lead pollution from lead shot from a shooting range that borders wetlands near the Farmington River in Connecticut, designated as a Wild and Scenic River in 1994. The wetlands are directly connected to the river during rainfall and the group was concerned about potential lead contamination of drinking water supplies. However, a district court used the *Rapanos* ruling to decide that there is no continuous surface connection and, therefore, the wetland would not be protected.<sup>30</sup>
- **Texas:** When crude oil was discharged into the seasonally flowing Edwards Creek near Talco, Texas, the EPA did not pursue enforcement of this spill because it was too complicated to prove that the creek was covered under the Clean Water Act. More than half of the County's residents get their drinking water supplies from these types of seasonally flowing creeks.<sup>31</sup>
- **Florida:** In 2003, the EPA and the Army Corps approved an Environmental Impact Statement (EIS) for the expansion of the Hamilton County Mines in Florida that would destroy 3,997 acres of forested wetlands. These wetlands were historically protected under the Clean Water Act, but were now found to be "isolated" from the Suwannee River and therefore outside of the Act's jurisdiction despite the Florida Department of Environmental Protection's findings that the wetlands had a significant impact on drinking water supplies, habitat for endangered species, and the health of the river. Where previously the mine owners would have required permits that put limits on pollution, the resulting uncertainty surrounding what types of wetlands are actually covered under the Clean Water Act essentially gave these polluters a free pass to destroy these wetlands.<sup>32</sup>

### Conclusion

The proposed Clean Water Rule is an important step forward to reduce uncertainty and better protect the small streams and wetlands that filter out pollutants, protect us from flooding, contribute to drinking water supplies, and support businesses that rely upon clean water. The combination of the *SWANCC* and *Rapanos* decisions along with resulting administrative guidance puts significant burdens on the EPA and the Army Corps to repeatedly prove that small streams and wetlands are intrinsically linked to the health of

<sup>30</sup> *Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club, Inc.*, United States District Court District of Connecticut, No. 3:04-cv-803, 37 ELR 20038, 31 January 2007. Available online < [http://www.ctd.uscourts.gov/sites/default/files/opinions/061405.JBA\\_Simsbury.pdf](http://www.ctd.uscourts.gov/sites/default/files/opinions/061405.JBA_Simsbury.pdf) >, Accessed 28 April 2014.

<sup>31</sup> See Sementelli, Shelby, "EPA Seeks to Clarify Federal Water Law," Texas Tribune, 1 April 2014, Available online < <http://www.texastribune.org/2014/04/01/epa-seeks-clarify-jurisdiction-regulate-water/> >, Accessed 28 April 2014; Waters of the United States, U.S. Environmental Protection Agency, Available online < <http://www2.epa.gov/uswaters> >, Accessed 28 April 2014.

<sup>32</sup> See Final Supplemental Environmental Impact Statement on White Springs Agricultural Chemicals, Inc. (cd/b/a Phosphate-White Springs), Hamilton County Mine Continuation Permitting, Hamilton County, Florida, March 2003; Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm, August 2004, Available online < <http://www.sierraclub.org/watersentinel/downloads/RecklessAbandon.pdf> >, Accessed 28 April 2014.

downstream waters. While the science is clear, the policy is not. The proposed Clean Water Rule initiates a process to better clarify the scope of the Clean Water Act and American Rivers will continue to work to ensure that protections are restored to the small streams, wetlands, and “other waters” that are vital to the health of our rivers and the communities that depend upon them.

Thank you for taking our testimony into consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Stacey Detwiler". The signature is fluid and cursive, with a long horizontal stroke at the end.

Stacey Detwiler  
Associate Director, Clean Water Supply and Government Relations  
American Rivers



**Potential Impacts of Proposed Changes to the Clean Water Act  
Jurisdictional Rule**

**Statement of the  
American Road and Transportation Builders  
Association**

**Submitted to the  
United States House of Representatives  
Transportation & Infrastructure Committee  
Subcommittee on Water Resources and Environment**

**June 11, 2014**

On behalf of the American Road and Transportation Builders Association (ARTBA) and its more than 6,000 member firms and public agencies nationwide, the association would like to thank Subcommittee Chairman Gibbs and Ranking Member Bishop for holding today's hearing, "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule."

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Transportation construction is directly tied to the economic health and development of this country. According to Federal Highway Administration data, every \$1 billion spent on highway and bridge improvements supports almost 28,000 jobs, many of which are in small businesses. Given these broad direct and indirect economic contributions, the impact on transportation development should be taken into account when analyzing new federal regulations.

ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the Clean Water Act (CWA). ARTBA actively works to combine the complementary interests of improving our nation's transportation infrastructure with protecting essential water resources.

One of the main reasons for the success of the CWA is the Act's clear recognition of a partnership between the federal and state levels of government in the area of protecting water resources. The lines of federal and state responsibility are set forth in Section 101(b) of the CWA:

“It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources...”<sup>1</sup>

This structure of shared responsibility between federal and state governments allows states the essential flexibility they need to protect truly ecologically important and environmentally sensitive areas within their borders while, at the same time, making necessary improvements to their transportation infrastructure. The success of the federal-state partnership is backed by dramatic results. Prior to the inception of the CWA, from the 1950s to the 1970s, an average of 458,000 acres of wetlands were lost each year. Subsequent to the CWA's passage, from 1986-1997, the loss rate declined to 58,600 acres per year and between 1998-2004 overall wetland areas increased at a rate of 32,000 acres per year.<sup>2</sup>

ARTBA supports the reasonable protection of environmentally sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements. Much of the current debate over federal jurisdiction, however, involves overly broad and ambiguous definitions of “wetlands.” Many states define wetlands as well other types of water resources and prescribe regulatory regimes that are appropriate to each body of water. However, the federal government often uses a one-size fits all approach essentially requiring water resources viewed by states as not being wetlands to be regulated as if they were wetlands under federal law.

In its recently proposed rule regarding federal jurisdiction under the CWA, the U.S. Environmental Protection Agency (EPA) seeks to expand federal jurisdiction by stating, essentially, that all waters in the U.S. are “connected,” and therefore subject to federal regulation. Such a view of federal jurisdiction will increase the amount of instances in which permits would be required—regardless of ecological value or demonstrated need—for transportation improvements. While the benefit of additional wetlands permits in the transportation arena are in doubt, it is clear the new requirements would contribute to already lengthy delays in the project review and approval process. Further, in instances where the federal government declines to require a permit, the door would still be left open to unnecessary, time-consuming litigation initiated by project opponents.

Over-inclusive views as to what constitutes a wetland are frequently used by anti-growth groups to stop desperately needed transportation improvements. For this reason, ARTBA

<sup>1</sup> CWA §101(b).

<sup>2</sup> *Draft 2007 Report on the Environment: Science*, USEPA, May 2007, available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917>



has, and continues to, work towards a definition of “wetlands” that would be easily recognizable to both landowners and transportation planners and is consistent with the original scope of the CWA’s jurisdiction. As an example of this, official ARTBA policy recommends defining a “wetland” as follows: “If a land area is saturated with water at the surface during the normal growing season, has hydric soil and supports aquatic-type vegetation, it is a functioning wetland.”

ARTBA is particularly concerned with the treatment of ditches under EPA’s proposed rule. Roadside ditches are an essential part of the nation’s transportation network and contribute to the public health and safety of the nation by dispersing water from roadways. While current regulations say nothing about ditches, EPA’s expansive view of connectivity could be used to regulate all roadside ditches that have common characteristics, such as a channel or an ordinary high water mark. The purpose of roadside ditches is unique and distinct from the waters EPA seeks to connect. As such, ditches should not be regulated as traditional wetlands.

In addition, the EPA proposal utilizes the concept of allowing for “aggregation” of the contributions of all similar waters “*within an entire watershed*,” making it far easier to establish a significant nexus between these small intrastate waters and newly expanded roster of traditional navigable waters. This novel concept results in a blanket jurisdictional determination for an entire class of waters within an entire watershed.

Such an interpretation of jurisdiction will literally leave no transportation project untouched from federal wetlands jurisdiction regardless of its location, as there is no area in the United States not linked to at least one watershed. Further, “connecting” all waters in order to establish federal jurisdiction is exactly what the Supreme Court has, on multiple occasions, told the EPA it cannot do. Rather, EPA may assert jurisdiction over only those water bodies with a “significant” connection to a traditionally navigable water. Instead of attempting to discern where there are truly “significant” connections between water bodies, EPA “connects” all of the waters of the United States and asserts essentially limitless jurisdiction. This completely eviscerates the federal/state partnership the CWA was founded on and leaves no wet area untouched by the possibility of federal regulation.

It should also be noted that there has been recent bipartisan progress in the area of streamlining the project review and approval process for transportation projects. Members of both parties agree that transportation improvements can be built more quickly without sacrificing necessary environmental protections. The current surface transportation reauthorization law, the “Moving Ahead for Progress in the 21<sup>st</sup> Century” (MAP-21) Act contained significant reforms to the project delivery process aimed at reducing delay. Recently, the Obama Administration released the “Generating Renewal, Opportunity, and Work with Accelerated Mobility, Efficiency, and Rebuilding of Infrastructure and Communities throughout America” (GROW AMERICA) reauthorization proposal which continues MAP-21’s efforts at improving project delivery.

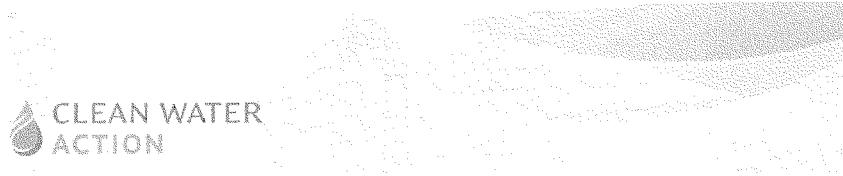
If EPA's rule is finalized, the progress of MAP-21 and the potential progress of the project delivery reforms in GROW AMERICA would be jeopardized. Any reduction in delay gained from improvements to the project delivery process would likely be negated by the increased permitting requirements and opportunities for litigation caused by the rule's expansion of federal jurisdiction.

ARTBA instead, has urged EPA on multiple occasions to establish clarity in CWA regulation by developing a classification system for wetlands based on their ecological value. This would allow increased protection for the most valuable wetlands while also creating flexibility for projects impacting wetlands that are considered to have little or no value. Also, there should be a "de minimis" level of impacts defined which would not require any permitting process to encompass instances where impacts to wetlands are so minor that they do not have any ecological effect. A "de-minimis" standard for impacts would be particularly helpful for transportation projects, as it could reduce needless paperwork, delay and regulatory requirements where a project's impacts do not rise to the level of having a significant effect on the environment.

This committee should also note that there have been multiple legislative attempts in recent years to expand the jurisdiction of the CWA to include all "waters of the United States." Each of these efforts have met with broad bipartisan opposition and none have resulted in new law or even a successful committee mark-up. It is clear that a consensus among policymakers and affected stakeholders has not yet been reached regarding appropriate federal wetlands jurisdiction. This committee should direct EPA to take note of these developments and instead of seeking to "connect" all waters, work with the regulated community to identify those specific types of water bodies which are currently not being covered and craft more appropriate, targeted measures to protect them.

Finally, ARTBA is disheartened that EPA's proposed rule was published prior to the conclusion of efforts by the agency's own Science Advisory Board (SAB) to determine what constitutes a "significant" connection between water bodies. As ARTBA understood the process, the SAB's work should have been finalized before any regulatory efforts began. Given that EPA's rule has already been released, ARTBA is highly skeptical that any findings by the SAB will change a rule that has already been drafted. EPA should suspend its rulemaking efforts and start anew after the SAB findings have been finalized, allowing all members of the regulated community to have proper input into this conversation about where CWA jurisdiction begins and ends.

ARTBA looks forward to continuing to work with the committee in order to continue to protect, sustain and improve our nation's infrastructure while addressing the future challenges of the CWA.



June 10, 2014

The Honorable Bob Gibbs  
Chairman, Subcommittee on Water Resources  
and Environment  
Committee on Transportation and  
Infrastructure  
B-370A Rayburn House Office Building  
Washington, DC 20515

The Honorable Timothy H. Bishop  
Ranking Member, Subcommittee on Water  
Resources and Environment  
Committee on Transportation and  
Infrastructure  
B-375 Rayburn House Office Building  
Washington, DC 20515

**RE: Transportation & Infrastructure Subcommittee on Water Resources and Environment  
Hearing on "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule"**

Dear Chairman Gibbs and Ranking Member Bishop:

Clean Water Action, on behalf of our one million members, writes in strong support of the US Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed *Definition of "Waters of the United States" Under the Clean Water Act*. We respectfully request that this statement be submitted into the formal record for the Transportation & Infrastructure Subcommittee on Water Resources and Environment June 11, 2014 hearing, *Potential Impacts of Proposed Changes to Clean Water Act Jurisdictional Rule*.

This rulemaking by the EPA and the Corps is long overdue. Congress, the Supreme Court, public interest organizations, and numerous regulated industries, have all asked EPA and the Corps to issue a rule to clarify the scope of the Clean Water Act. For over a decade, there has been confusion over which streams and wetlands are protected by the Act. The proposed rule, published in the Federal Register on April 21, 2014, will help to ensure the streams and wetlands that feed into our nation's rivers and bays are better protected from pollution and destruction. The agencies' proposal is commonsense, based on sound science, and is consistent with the law. A robust public comment period and review of the rule is currently underway, and we urge you to oppose any legislation that might undermine this important public process.

When a bipartisan Congress passed the landmark Clean Water Act in 1972, it intended the Act to be broad, and for 30 years, virtually all streams and wetlands were safeguarded from pollution and destruction in order to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." Despite the law's dramatic progress at combating water pollution nationally, two Supreme Court cases in 2001 and 2006 and subsequent agency guidance questioned protections for many headwater, ephemeral and intermittent streams and so-called "isolated" wetlands. This

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regulatory confusion has exposed nearly 60 percent of our nation's stream miles and 20 million acres of wetlands to greater risk of pollution or destruction.

This confusion has impacted the livelihood of all Americans, who want and expect water that is safe for them to drink, clean for them to swim in, and healthy enough to support abundant fish and wildlife. One in three Americans depend on drinking water sources that are fed by headwater or seasonally flowing streams – precious resources that support the water quality of our nation's rivers and lakes, but are now vulnerable to pollution because of this regulatory confusion. Wetlands also support the water quality of our nation's rivers and lakes by filtering pollution, and protect our communities from floods. Protecting all streams and wetlands from pollution and destruction not only safeguards our drinking water and communities, it protects hundreds and thousands of jobs that are vital to our economy.

The commonsense proposed rule reduces regulatory uncertainty by clarifying which waters are covered by the Clean Water Act. It does this by affirming historic protections for all tributary streams – regardless of size or frequency of flow – and for all wetlands adjacent to tributary streams. Categorically protecting these waters will eliminate the need for resource intensive case by case jurisdictional determinations. A review of over 1000 peer-reviewed scientific publications overwhelmingly found that these waters have a significant impact on downstream rivers.

Opponents of this rule have framed the proposal as an “overreach” of federal authority, but in reality, if the proposal is finalized in its current form, the net result will be a slight *decrease* in the number of waters protected during the Reagan administration. In fact, the federal government asserted broader jurisdiction over streams and wetlands under Presidents Richard Nixon through George W. Bush. For example, for the first time, upland drainage ditches are explicitly exempt from Clean Water Act protections, as are artificial lakes and stock watering ponds, and water filled depressions created by construction activities. The proposal also preserves all existing exemptions from Clean Water Act permitting requirements for farming, forestry, ranching and certain other land-use activities.

This rule has also been mischaracterized as being bad for the economy. Yet clean water is the foundation of a robust economy and healthy communities– supporting virtually every business in America – from farming to clean tech industries to craft brewing. Small and independent craft brewers contributed almost \$34 billion to the U.S. economy in 2012. In 2011, an estimated 90 million people spent \$145 billion participating in hunting, fishing and birding activities that rely on clean water. The Administration's economic analysis of the proposed rule conservatively estimates \$388 million to \$514 million in annual benefits to the public, including from reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. These benefits significantly outweigh the estimated costs of about \$162 million to \$279 million per year for mitigating impacts to streams and wetlands, and taking steps to reduce water pollution. The health and the long-term sustainability of all businesses and communities depend on clean water.



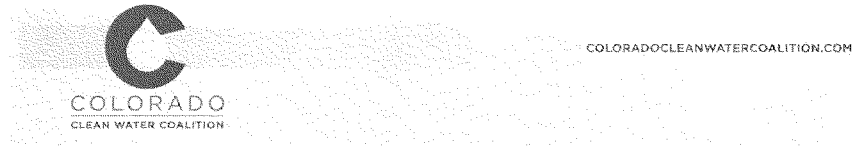
The Agencies' commonsense proposal is based on the best scientific understanding of how streams and wetlands affect downstream water quality. The public benefits of the rule – in the form of flood protection, filtering pollution, providing wildlife habitat, supporting outdoor recreation and recharging groundwater – far outweigh the costs. The public must have an opportunity to comment on the proposed rule and we urge you to oppose any legislation that would prevent the EPA and the Corps from proceeding with this much needed rulemaking process. When finalized, this rule will provide the regulatory assurance that has been absent for over a decade, eliminate permit confusion and delay, and better protect the critical water resources on which our communities depend.

Thank you for considering our views.

Sincerely,

Jennifer Peters  
National Water Campaigns Coordinator  
Clean Water Action

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HEARING BEFORE THE  
HOUSE TRANSPORTATION COMMITTEE  
WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE  
ON  
POTENTIAL IMPACTS OF PROPOSED CHANGES TO THE  
CLEAN WATER ACT JURISDICTIONAL RULE

TESTIMONY OF  
HONORABLE JACK HILBERT, CHAIRMAN  
COLORADO CLEAN WATER COALITION

JUNE 11, 2014



COLORADOCLEANWATERCOALITION.COM

Chairman Gibbs, Ranking Member Bishop, and members of the subcommittee, my name is Jack Hilbert and I am a Commissioner with Douglas 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 House Transportation and Infrastructure Committee Hearing is our initial comments available on the most recent proposed ruling of Definitions of "Waters of the United States" Under the Clean Water Act (CWA) (USEPA-HQ-OW-2011-0880), referred herein as the Proposed Rule. We are in the process of preparing additional comments to submit to USEPA before July 21, 2014. We believe our comments are unique to the COALITION.

The COALITION is concerned with the Proposed Rule as written and the potential impact 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.

We have many questions and considerations for the Proposed Rule and we ask the House Transportation and Infrastructure Committee to assist the COALITION with communicating the local impacts related to the Proposed Rule.

The COALITION has requested time extensions from the USEPA regarding the scientific study and the Proposed Rule, as the scientific study and economic analysis peer reviews were incomplete prior to the Federal Register posting. These extensions were never granted.

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. The following comments are organized as follows: connectivity; Proposed Rule; and economic and other impacts on society.



### **CONNECTIVITY**

1. The Proposed Rule is based on the report *The Connectivity of Streams and Wetlands to Downstream Waters: A review and Synthesis of Scientific Evidence*. The USEPA has only identified the presence of connections between streams, wetlands and downstream waters. We believe further study by the USEPA on specific literature references and with assistance from the Science Advisory Board Panel for the Review of the USEPA Water Connectivity Report to identify the connectivity impacts, if any, and the extent of the impacts of those connections has to be specifically documented prior to the finalization of the Proposed Rule.
2. The definition of Significant Nexus Determination – Under the Proposed Rule, jurisdictional waters must have a significant nexus to navigable and/or interstate waters. As stated on page 22193, ““Significant nexus” is not itself a scientific term. The relationship that waters can have to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas is not an all or nothing situation.” The significant nexus determination requires case-specific determinations. We request the USEPA/USACE recapture “and” when referring to biological, chemical, and physical properties. Currently, industry has the availability to scientifically model groundwater and surface water quality, however, industry does not have accepted tools of practice to scientifically model biological quality to the extent proposed. Removing “and” and replacing it with “or” creates an implementation problem with the Proposed Rule and the USEPA should conduct further research to ensure implementation is available prior to the finalization of the Proposed Rule.
3. Adjacent Wetlands Definition– Under the proposed guidance, “wetlands adjacent to non-wetland interstate waters are similarly jurisdictional without the need of demonstrating a significant nexus.” If a wetland is adjacent to a ditch that has a significant nexus to jurisdictional waters, the agencies must establish a significant nexus to that water. Determinations could be made based on effects to water quality, wildlife habitat, flood retention, recreation, and overall ecology. Flood control and water quality ponds in the developed semi-arid western regions, such as COALITION Members jurisdictions, will fall under this category. This could require COALITION Members to obtain 404 permits for basic routine public safety maintenance of ponds that have manmade wetlands as a water quality feature to meet existing CWA stormwater regulations. This will increase time and maintenance expenses with the potential for reducing the design effectiveness of flood control and water quality ponds. We request the USEPA/USACE research this subject and reduce the potential local public safety maintenance permit process on existing CWA regulations prior to finalization of the Proposed Rule.





4. **Tributary Definition** – Under the Proposed Rule, a tributary (i.e., manmade or natural ditch/channel/culvert) is jurisdictional if it has a bed, bank, and an ordinary high water mark (OHWM). It appears that to maintain these tributaries under the Proposed Rule will require COALITION Members to obtain a 404 permit from the USACE/USEPA. The Proposed Rule and potential increased permitting will increase time and cost to local jurisdictional routine public safety maintenance projects for ditches, routine water quality detention and flood control pond maintenance, and culverts. We request the USEPA/USACE research this subject and reduce the potential local public safety maintenance permit process prior to finalization of the Proposed Rule.
5. The semi-arid regional climate in Colorado and included within COALITION membership areas has many ephemeral stormwater conveyance systems that are connected to many hydrologic waterways. Examples of ephemeral systems are road side ditches, irrigation ditches for agriculture, and detention flood control/ water quality ponds. Currently, our members are required to meet existing CWA regulations during the water quality treatment of stormwater runoff from developed land, public right-of-way, residential, and commercial properties. It is unclear if the Proposed Rule will expand the current definition and increase the permitting processes, delay maintenance schedules, increase costs, and increase public safety maintenance concerns. We request the USEPA/USACE research this subject and eliminate the potential addition of the local public safety maintenance permit process prior to finalization of the Proposed Rule.

#### **PROPOSED RULE**

1. We believe that additional USEPA scientific review and associated changes to identify different types of conveyances, including ditches, needs to be conducted to ensure that “ditch exemptions” are readily available to our local jurisdictions for existing CWA regulated activity and routine public safety maintenance of stormwater infrastructure such as detention flood storage/water quality ponds, storm sewer culverts, and ditch maintenance activities.
2. In the semi-arid western region of the U.S. including areas within the COALITION, there are rural land examples of prior converted cropland and ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow. The Proposed Rule exempts a certain type of uplands ditch and there is little consensus on how this language would (or would not) impact ditches. The USEPA/USACE need to determine and document whether these types of ditches will be considered in part or in whole under the Proposed Rule, as well as whether other ditches, not strictly in uplands, would be regulated, including those ditches adjacent to a “Waters of the U.S.”



3. Seasonal Waters – A water conveyance is seasonal when it has predictable flow during wet seasons in most years. The time period constituting “seasonal” varies across the country. This may include perennial, intermittent and ephemeral streams. The length or extent of seasonal may be highly variable and dictated by a multitude of factors including associated annual precipitation, evapotranspiration, and land and water use practices. One of our members has a specific portion of land which is approximately 843 square miles and has appreciable geographic relief. Due to over half of the this area being undeveloped land, the local area has limited hydrologic data compared to urbanized areas of the U.S., much of which is less than 5-years duration and represents over half of the drainage basin area. By using data from adjacent watersheds for available data, estimated seasonal flows have the high potential of being inaccurate. In addition, we ask the USEPA to identify a regional basis of estimating or determining seasonal flows with respect to different geographical locations for annual precipitation, evapotranspiration, and land and water use practices. We request the USEPA to re-evaluate, consider, and document solutions to eliminate regional inaccuracy’s associated with determining seasonal flows for regions with limited hydrologic data prior to finalization of the Proposed Rule.

#### **ECONOMIC AND OTHER IMPACTS ON SOCIETY**

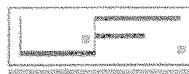
1. The document developed for the Proposed Rule, *The Economic Analysis of Proposed Revised Definition of the Waters of the United States*, prepared March 2014 by the USEPA and USACE, states on Pg. 26 – “It is unclear specifically how a broader assertion of CWA jurisdiction under this Proposed Rule would affect MS4 (Municipal Separate Storm Sewer System permits).” The MS4 permits are administered by the USEPA in 40CFR Part 122.2. USEPA must identify the economic impacts from the Proposed Rule to identify objective financial measurements of impacts to MS4 permit holders.
2. Another issue is wastewater treatment systems, including treatment points or lagoons, designed to meet CWA requirements. Under the Proposed Rule, only those wastewater treatment systems, designed to meet CWA requirements, would be exempt. For wastewater treatment systems that were built to address non-CWA compliance issues, it is uncertain whether the system would also be exempt. We request clear direction on this exemption, since this ruling may impact a current development project within the boundaries of the COALITION.
3. Emergency Response – As local government agencies refine their disaster preparedness plans, we are concerned with this Proposed Rule interfering with streamlining future public disaster response, mitigation, and recovery processes with an unforeseen additional regulatory process. We request the USEPA/USACE research this concern to ensure the proposed ruling is not impeding disaster recovery operations prior to the finalization of the Proposed Rule.



COLORADOCLEANWATERCOALITION.COM

4. Pesticide/Herbicide Permit – The USEPA is moving forward with a pesticide/herbicide permit requirement for all “Waters of the U.S.” within threshold guidelines. This means anytime a pesticide/herbicide is applied on or near “Waters of the U.S.”, a permit is needed. This pesticide/herbicide permit includes tight documentation requirements for communities of over 10,000 population. Most COALITION members use herbicide and pesticides in a number of ways, including treatment of weeds in roadside ditches and treatment of mosquitoes and other pests. Potentially under the Proposed Rule guidance, more ditches, flood control, and water quality ponds will be declared “Waters of the U.S.” Those local government jurisdictions that have “Waters of the U.S.” ditches will be required to develop and follow another regulated strict program and paperwork requirements for local pesticide/herbicide use. The increased time and expenses to reduce noxious weeds required by weed control programs under the current Colorado Noxious Weed Act Title 35, Article 5.5 is unclear at this time, and we request the USEPA eliminate compounding regulations with the Proposed Rule prior to the finalization of the Proposed Rule.

Thank you for your time, consideration, and integration of these initial comments. The Coalition is expending considerable local staff time to provide additional review of the Proposed Rule. I would be happy to answer any questions regarding this testimony or this issue. Please feel free to contact me at 303-660-7365.



FRANK A.  
LOGOLUSO FARMS, INC.

June 19, 2014

Congressman Bob Gibbs  
Chairman  
House Transportation and Infrastructure  
Subcommittee on Water Resources and  
Environment  
B-370A Rayburn House Office Building  
Washington, DC 20515

Congressman Tim Bishop  
Ranking Member  
House Transportation and Infrastructure  
Subcommittee on Water Resources and  
Environment  
B-375 Rayburn House Office Building  
Washington, DC 20515

**Statement of Frank A. Logoluso Farms, Inc. re: EPA's "Waters of the U.S." Proposed Rule**

Dear Chairman Gibbs and Ranking Member Bishop:

On behalf of Frank A. Logoluso Farms I thank you and your Committee for holding a hearing on June 11, 2014 regarding the EPA's "Waters of the U.S." proposed rule. We request this letter be included in the record for that hearing as testimony of Logoluso Farm's position on the rule.

Frank A. Logoluso Farms is a 3<sup>rd</sup> generation family farm in Madera, CA. Our farm is comprised of just over 2,000 acres located in Fresno County on which we grow a variety of specialty crops including fresh grapes, apricots, cherries, nectarines, pomegranates, and almonds. We have a dry creek bed on our property through which water flows during wet years. Although it has been three years since enough rainfall has filled the creek, we fully expect water flows in the future. We are concerned that the expanded definition of US regulated water proposed under the EPA rule could have a serious negative impact on us. At a minimum it brings additional uncertainty to our operations, potentially restricting the current use of our farmland. At the maximum it will impose significant additional costs and delays due to regulatory reports and filings.

As discussed by the witnesses at the June 11<sup>th</sup> hearing, the proposed EPA rule would dramatically expand the scope of "navigable waters" subject to the Clean Water Act by regulating small and remote waters never before regulated by the Act. The proposed rule includes a number of vague or undefined terms: "riparian area," "floodplain," "tributary" and "significant nexus." Ditches and other areas that are dry most of the year – now more than ever, given the ongoing drought disaster in California – could suddenly fall under the Clean Water Act, requiring us to obtain permits from the EPA and making it more difficult and costly to use our farm and grow America's food.

This significant expansion of the existing definition of "waters of the U.S." comes with no EPA outreach to the agricultural community that would bear a disproportionate impact of the rule. Nor has EPA conducted the required Regulatory Flexibility Act analysis in order to issue this rule. If EPA had reached out to farms like ours, we would have explained that the proposed rule does not offer the clarity or certainty that EPA intended, but rather creates ambiguity and doubt.

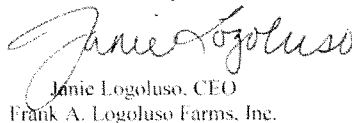
The delays and expense involved in new EPA permitting if this rule takes effect as drafted could cripple our ability to respond quickly to water preservation needs, to apply fertilizer or pesticides, or even to do something as simple as building a fence or clearing a ditch. Water is already at a premium for us and no one takes water conservation more seriously than the growers that rely on it every day. This proposed rule would not solve any problems with the current application of the Clean Water Act, but would add substantial burdens to us.

In addition to the tens or hundreds of thousands of dollars required to obtain a Section 404 permit from EPA, the proposed rule also points the way to unforeseen future liability under Section 311 (oil and hazardous substance liability) and Section 505 (citizen suits). Frank A. Logoluso Farms is a small business and these additional costs and litigation exposure could drive us out of business.

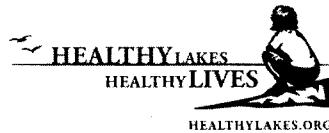
The proposed rule is fatally flawed, due to its imprecise language, broad definitions, and absolute lack of outreach or analysis regarding the projected impact on small businesses, generally, and family farms, in particular. If EPA is intent on moving forward with a rule like this, we support your Committee's request that the Agency conduct this outreach and analysis and issue a new proposed rule that better reflects the needs of agriculture and small businesses.

Thank you again for your Committee's leadership on this issue and for all your hard work in protecting farms like ours. Please consider Frank A. Logoluso Farms as a resource that you can call upon at any time to assist on this issue or any other issues that affect California agriculture. Thank you for your consideration of our comments.

Sincerely,



Janie Logoluso, CEO  
Frank A. Logoluso Farms, Inc.



## Healing Our Waters-Great Lakes Coalition

June 11, 2014

The Honorable Bob Gibbs  
Chairman, Water Resources and Environment Subcommittee  
Transportation and Infrastructure Committee  
B-370A Rayburn House Office Building  
Washington, DC 20515

The Honorable Timothy Bishop  
Ranking Member, Water Resources and Environment Subcommittee  
Transportation and Infrastructure Committee  
B-375 Rayburn House Office Building  
Washington, DC 20515

*Re: Support of the Environmental Protection Agency and the Army Corps of Engineers' Efforts to Clarify the Scope of the Clean Water Act*

Dear Chairman Gibbs and Ranking Member Bishop:

On behalf of the Healing Our Waters-Great Lakes Coalition, thank you for the opportunity to provide this testimony for the hearing entitled "Potential Impacts of Proposed Changes to Clean Water Act Jurisdictional Rule" regarding the Environmental Protection Agency and the Army Corps of Engineers' proposed Clean Water Protection Rule to clarify the scope of the Clean Water Act (CWA). I ask this letter be submitted for the formal hearing record.

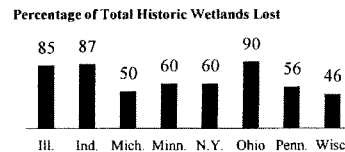
The HOW Coalition believes that the proposed Clean Water Protection Rule is the important next step to protect and restore our Great Lakes. We understand that the agencies have undertaken the authority granted to them by Congress under the Clean Water Act to legally clarify the statute's jurisdiction. Our coalition strongly supports this rulemaking and the rule and urges the subcommittee to support both the public process now underway and the broader attempt to protect our Great Lakes.

### **Clean Water Protections at Risk**

For years the Clean Water Act protected all Great Lakes wetlands and tributaries — those by the shore and those inland. However, many of these wetlands, streams, and small lakes have been at increased risk of pollution and destruction following Supreme Court decisions in 2001 (SWANCC) and 2006 (Rapanos). These rulings and subsequent agency guidance have created a confusing, time-consuming, and frustrating process for determining what waters of the nation are protected under the Clean Water Act and state laws.

This lack of protection has taken its toll, especially for wetlands and intermittent and headwater streams, slowing permitting decisions for responsible development and reducing protections for drinking water supplies and critical habitat. 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 37 million in Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York who get their drinking water from surface water in their

state. According to the U.S. Fish and Wildlife Service, the rate of wetlands loss accelerated nationally by 140 percent from 2004 to 2009, the years immediately after the Supreme Court rulings. The Great Lakes region has already lost 66 percent of their historic wetlands.



#### **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 review of more than a thousand publications from peer-reviewed scientific literature, streams, tributaries (e.g., headwater, intermittent, ephemeral), and wetlands are clearly connected to downstream waters. The pollution is carried downriver polluting bigger and bigger waterways. Healthy wetlands improve water quality by filtering polluted runoff from farm fields and city streets that otherwise would flow into rivers, streams and great water bodies across the country, including the Great Lakes. Headwater streams supply most of the water in rivers. Wetlands and tributaries provide vital habitat to wildlife, waterfowl, and fish, reduce flooding, and replenish groundwater supplies.

#### **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 restoration plan that calls for the restoration of more than 1 million acres of wetlands. 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. The Clean Water Protection Rule will help ensure that restoration gains are protected so that as we take one step forward we aren't also taking two steps back. Maintaining a strong Clean Water Protection Rule will support Great Lakes restoration efforts; weakening the rule will undermine restoration efforts.

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. Research from Grand Valley State University shows that the return for certain projects is closer to 6-to-1. 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. Great Lakes businesses and individuals account for about 28 percent of the U.S. gross domestic product, according to Bureau of Economic Analysis data.

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**

- Provides clear and predictable protections for many streams, wetlands, and other waters while giving greater certainty to the regulated community by providing better guidance to federal and state regulators, which helps streamline the permitting process.
- Covers only water bodies that the Clean Water Act has traditionally covered, such as intermittent headwater streams that have a defined bed and bank and flow to water already covered by the Act.
- 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.
- Relies on the best scientific understanding of stream and wetland science to clarify the scope of the Clean Water Act, and enhance protection for streams, wetlands, and other waters nationwide.

**What the Proposed Rule Does Not Do**

- Cover any new types of waters that have not historically been covered under the Clean Water Act, such as groundwater. The proposed rule actually applies to fewer waters than were historically covered under the Nixon, Ford, Carter, Reagan, Bush, and Clinton administrations.
- Expand coverage to any new ditches. In fact, upland drainage ditches with less than perennial water flow are explicitly excluded.
- 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.
- Cover agricultural practices 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 proposed rule.

In conclusion, the HOW Coalition strongly supports this rulemaking and the proposed rule. We urge the subcommittee to support both the public process now underway and the broader attempt to protect the Great Lakes. 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 [REDACTED] or [clord@npca.org](mailto:clord@npca.org) with questions.

Sincerely,



Todd Ambbs  
Coalition Director





STATEMENT OF  
INTERNATIONAL COUNCIL OF SHOPPING CENTERS  
  
BEFORE THE HOUSE COMMITTEE ON TRANSPORTATION AND  
INFRASTRUCTURE  
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

HEARING ON  
“POTENTIAL IMPACTS OF PROPOSED CHANGES TO THE CLEAN WATER ACT  
JURISDICTIONAL RULE”

WASHINGTON, D.C.

JUNE 11, 2014

Thank you for the opportunity to add testimony for the record of your June 11, 2014 hearing to examine the potential impacts of a United States Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps) proposed joint rulemaking to change the scope of federal jurisdiction under the Clean Water Act (CWA).

The International Council of Shopping Centers (ICSC) is concerned with the impact of the proposed rule from EPA and the Corps to expand CWA authority and make changes to the “Waters of the U.S.” (WOTUS) definition. In light of the impacts listed below, we encourage EPA and the Corps to make substantive changes to its proposed rule to regulate additional natural, man-made, temporary and isolated water features and wetlands as federally regulated WOTUS.

Founded in 1957, ICSC is the premier global trade association of the shopping center industry. Its more than 63,000 members in over 100 countries include shopping center owners, developers, managers, marketing specialists, investors, retailers and brokers, as well as academics and public officials. As the global industry trade association, ICSC links with more than 25 national and regional shopping center councils throughout the world.

The CWA, since its inception in 1972, has helped commercial real estate developers and their tenants make significant strides in improving the quality of water resources while continuing to grow the economy. However, ICSC’s members fear the proposed changes to the CWA could have unintended consequences on their ability to grow jobs in the commercial real estate, construction, and retail industries. The proposed rule will increase the likelihood of costly litigation and restrict the ability of local governments to make land use decisions. Tenant companies seeking to expand or relocate their operations to new locations will be impacted, as project scheduling, timing, and cost will be affected by the need to determine whether a permit is required for construction of new or expansion or renovation of existing properties in these areas.

In order to build new or expand existing properties, commercial real estate developers depend on the certainty of understanding federal jurisdiction under the CWA. The proposed rule does not specify limits to CWA federal jurisdiction, and provides no guidance on what factors actually determine whether a water is actually “in” or “out” of the federal waters definition. Instead, the proposal establishes new and unclear definitions such as “tributary,” “neighboring,” “adjacent,” “floodplain,” and “riparian area” that will result in drastic expansion of federal authority. Any proposal to regulate waters within a floodplain, riparian, or any other general area must include a clear definition, including the specific boundaries, of the floodplain, riparian, or other area subject to the rule.

Construction and renovation activities that have heretofore not required a federal permit may be subject to CWA permitting requirements since projects that cross multiple stream crossings, roadway and right-of-way crossings, ditches, gullies, and other structures will now be considered WOTUS under the proposed rule. Under the current regime, the costs of obtaining Corps permits are significant: averaging 788 days and \$271,596 for an individual permit; 313 days and \$28,915 for a nationwide permit. Because compliance costs for regulations are often incurred prior to the start date of a leased retail space, builders and developers of shopping centers often have to finance these additional costs until space is occupied. Carrying these additional costs only adds more risk to an already risky business. Adding uncertainty to lease terms further augments the challenges already endured by the shopping center industry.

Additionally, we are concerned that the proposed rule could also significantly increase municipal and industrial stormwater prevention requirements by expanding the number of waterbodies requiring protection. The newly proposed definitions contained in the proposed rule raise questions regarding whether some ditches that are part of a municipal separate stormwater system (MS4) conveyance system could be considered a WOTUS if they contribute flow per the proposed definition of “tributary.” A more expansive review of the CWA, EPA’s regulations and guidance, and related case law would suggest that MS4s, including ditches that may be part of the MS4, should not and cannot be considered waters of the U.S., even if they otherwise meet the definition in the proposed rule. MS4s are already regulated by National Pollution Discharge Elimination System (NPDES) permit program; Congress intended for the NPDES permit program to regulate pollutants going into “navigable waters,” by requiring permits to control such pollutants passing through “point sources” into such waters. Congress also made clear that ditches are “point sources” by specifically including them in its definition of the term “point source.”

In your engagement with stakeholders and decision-makers, ICSC asks that you consult with the retail and commercial real estate industry to discuss how to best balance the needs of our nation’s precious environment with the dynamics of its economic recovery.

On behalf of over 63,000 members of the International Council of Shopping Centers, thank you for the opportunity to submit testimony. Please direct any questions or comments relating to this testimony to Abby Jagoda, ICSC’s Director of Federal Government Relations, at [REDACTED]



7373 West Saginaw Highway, Box 30960, Lansing, Michigan 48909-8460  
Phone (517) 323-7000

June 11, 2014

To the Honorable members of the House Transportation and Infrastructure Subcommittee on Water Resources and Environment, Michigan Farm Bureau appreciates the opportunity to be heard on the Environmental Protection Agency's proposed rule redefining "waters of the United States" under the Clean Water Act. Michigan Farm Bureau is the state's largest general farm organization, with nearly 50,000 regular members. Our grassroots, member-driven policy states clearly that we oppose attempts by the EPA to broaden the reach of the Clean Water Act. We recognize the limits placed on EPA authority by Congress and the Supreme Court.

While the EPA has stated this proposed rule will offer clarity, simplify the regulatory process, and improve water resources protection, we believe it does none of those things. Instead, this rule will hurt the agriculture industry as well as many other businesses, and damage the American economy that depends on them. Further, it will interfere with states' efforts to develop water protection programs that really work and which do not depend on burdensome regulation, thus hindering environmental benefits. We oppose the rule, and urge the Subcommittee to communicate to the EPA that the rule must be rescinded.

This proposed rule limits private property rights by telling farmers where and how they can farm. Under rule's language, many man-made ditches, tiny broken streams, and wet areas in fields which may contribute water downstream would now be subject to EPA regulation even if they rarely have water in them. That was not Congress' intent when it wrote the Clean Water Act, and it goes beyond limits set in multiple Supreme Court decisions. Congress intended states to have the authority to make their own land use and water quality decisions, so for the EPA to ride roughshod over state authority is a gross overreach of the agency's jurisdiction.

The EPA's definitions of terms such as "adjacent," "neighboring," "riparian," "floodplain," and "significant nexus" are vague and provide little direction to landowners on jurisdictional boundaries. This will not only prompt confusion over regulatory requirements, but will also increase the potential for citizen groups and agency staff to apply inconsistent and overly broad interpretations of the rule, which can subject farmers to burdensome regulatory and legal action.

Agricultural exemptions do not cover all normal farming practices, apply only to prior converted farm lands, and do not apply to discharge activities under Part 402 of the Clean Water Act. Therefore, farmers may need permits for nutrient application or pest control in any location impacting "waters of the United States." Farmers making permit applications to the U.S. Army Corps of Engineers or EPA may have to wait months or years to receive responses, and the agencies can deny permits at any time. Further, mitigating wet areas that would now be considered "waters of the United States" could cost tens of thousands of dollars per acre. This

puts farmers into situations of uncertainty rather than clarity, and adds tremendous burden and cost to them for little or no environmental benefit, given the weak evidence for connection some wet areas to the navigable waters the Clean Water Act was intended to protect.

If farming gets harder and more expensive, food gets more expensive. This hurts the American consumer even if they are unaware of what their tax dollars will now pay to regulate. The EPA's assumption that Americans value a rarely flowing man-made agricultural ditch to the same degree as they value the Florida Everglades, as suggested in the agency's economic analysis, is absurd. That economic analysis additionally fails to reflect the true cost for farmers, landowners, and businesses, who can be hurt badly by the expanded regulations.

Farmers in Michigan are particularly at risk of impact by the proposed rule change. Michigan has 11,000 lakes, 42,000 miles of streams, and 20,300 miles of ditches or drains, some which flow year-round, others which flow only seasonally. The state additionally has over 18,000 miles of "water features" determined to be intermittent, including areas in farm fields where water flow may eventually lead to a ditch that may eventually connect with a stream. Under Michigan's Right to Farm guidance, farmers should not apply manure within 150 feet of a regulated stream. If just 25% of intermittent features run through farm fields and become regulated, Michigan farmers would lose over 165,000 acres of farm ground for this valuable nutrient application. Examined another way, if a 10 foot "buffer" of restricted activity is placed around **only the intermittent features**, over 44,000 acres would be affected in Michigan. This far exceeds the EPA's estimation that the proposed rule will impact 1,300 acres nationwide.

This rule would put Michigan's Wetlands Law in violation of the Clean Water Act. Michigan could lose its delegated authority over Part 404 of the Clean Water Act, which the state uses to provide valuable protection of wetlands. Additionally, Michigan has the Michigan Agriculture Environmental Assurance Program (MAEAP) that helps farmers protect water quality across the state. This voluntary program, with over 2,000 verifications since its recent inception, provides tremendous environmental benefit and is better for farmers than additional regulation.

In conclusion, this rule so wrongfully changes the definition of "waters of the United States" that we oppose the rule in its entirety. It would put a heavy burden on farmers, will force an increase in prices for vital American-grown food, and will take away states' ability to manage their own programs that have real environmental benefit. The rule must be rescinded to fix these problems. Thank you for your time and attention.

Sincerely,



Laura A. Campbell, Manager  
Agricultural Ecology Department



500 New Jersey Avenue, N.W.  
Washington, DC 20001-2020

Steve Brown  
2014 President

Dale A. Stinton  
CAI®, CPA, CMA, RCE  
Chief Executive Officer

GOVERNMENT AFFAIRS  
Jerry Giovaniello, Senior Vice President  
Gary Weaver, Vice President  
Joe Ventrone, Vice President  
Scott Reiter, Vice President  
Janie Gregory, Deputy Chief Lobbyist

## STATEMENT OF THE

**NATIONAL ASSOCIATION OF REALTORS®**

**SUBMITTED FOR THE RECORD TO**

**THE UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT**

**HEARING TITLED**

**POTENTIAL IMPACTS OF PROPOSED CHANGES TO THE CLEAN  
WATER ACT JURISDICTIONAL RULE**

**JUNE 11, 2014**

REALTOR® is a registered collective membership mark which may be used only by real estate  
Professionals who are members of the NATIONAL ASSOCIATION OF REALTORS®  
and subscribe to its strict Code of Ethics



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.

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.<sup>1</sup> 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.<sup>2</sup> 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)<sup>3</sup>, 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).

<sup>1</sup> <http://www2.epa.gov/uswaters> – for links to the examples, click “Enforcement of the law has been challenging.”

<sup>2</sup> [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_proposed\\_rule\\_economic\\_analysis.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf)

<sup>3</sup> American Housing Survey, 2009.

Table 1. Proposed changes to “Waters of the U.S.” regulatory definition

<b>Column A</b> <b>(Regulated without analysis)</b>	<b>Column B</b> <b>(Analysis required for regulation)</b>
<p>Navigable or Interstate</p> <ul style="list-style-type: none"> <li>• The Ocean</li> <li>• Most Lakes</li> <li>• Most Rivers</li> </ul> <p>Non-Navigable and Intrastate</p> <ul style="list-style-type: none"> <li>• <b>All</b> <del>Some</del> Tributaries (Streams, Lakes, Ponds)               <ul style="list-style-type: none"> <li>◦ Perennial</li> <li>◦ Seasonal</li> <li>◦ <b>Ephemeral</b></li> </ul> </li> <li>• <b>Most</b> <del>Some</del> Wetlands               <ul style="list-style-type: none"> <li>◦ Adjacent to navigable water</li> <li>◦ <b>Adjacent to Directly Abutting</b> covered stream</li> </ul> </li> </ul>	<p>Non-Navigable and Intrastate</p> <ul style="list-style-type: none"> <li>• <del>Rest of the Tributaries</del> <ul style="list-style-type: none"> <li>◦ <del>Ephemeral</del></li> </ul> </li> <li>• Rest of Wetlands               <ul style="list-style-type: none"> <li>◦ <del>Adjacent to tributary</del></li> <li>◦ Not adjacent</li> </ul> </li> <li>• Any other water               <ul style="list-style-type: none"> <li>◦ <del>Adjacent to navigable water</del></li> <li>◦ <del>Adjacent to tributaries</del></li> <li>◦ Not-adjacent</li> </ul> </li> </ul>

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.<sup>4</sup> 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.

<sup>4</sup> For EPA’s synthesis: <http://cfpub.epa.gov/ncca/cfm/recorddisplay.cfm?deid=238345>

In addition, scientists with GEI Consultants<sup>5</sup> 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.”<sup>6</sup>

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.”<sup>7</sup>

#### **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.

<sup>5</sup> For GEI's credentials, see: <http://www.geiconsultants.com/about-gei-1>

<sup>6</sup> For NAR's summary and link to GEI's comments: <http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report>

<sup>7</sup> 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

<u>Significant Nexus</u>	<u>Synthesis of Research</u>
Proves that regulation of a stream or wetland will prevent pollution to an ocean, lake or river	Shows <i>presence</i> of a connection between streams, wetlands, and downstream, and not <i>significance</i>
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:<sup>8</sup>

- “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.”

<sup>8</sup> 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](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.<sup>9</sup> 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.<sup>10</sup>

The home buying process<sup>11</sup> 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

<sup>9</sup> American Housing Survey, 2009.

<sup>10</sup> <http://www2.epa.gov/uswaters> -- for the examples, click on “Enforcement of the law has been challenging”

<sup>11</sup> 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.<sup>12</sup>

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<sup>12</sup> 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.<sup>13</sup> Others just south of here in Hampton Roads, Virginia, will read the cautionary tales of buyers suing sellers over lack of wetlands disclosures<sup>14</sup> or neighbor-on-neighbor water wars for mowing grass or planting seedlings.<sup>15</sup> 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*<sup>16</sup>). 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.

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- K.R. Ihlanfeldt, The Effect of Land Use Regulation on Housing and Land Prices. *Journal of Urban Economics* 61 (2007) 420-435.

<sup>13</sup> For the chilling facts of case, see: <http://www.pacificlegal.org/Sackett>

<sup>14</sup> <http://hamptonroads.com/2010/05/cautionary-tale-wetlands-violations-will-cost-you>

<sup>15</sup> <http://hamptonroads.com/2012/05/newport-news-gets-swamped-wetlands-dispute>

<sup>16</sup> 210 US Dist LEXIS 53729, at \*1 (W.D. Wash. 2010)

Based on a report by the Environmental Law Institute (ELI),<sup>17</sup> 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.<sup>18</sup>

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.

<sup>17</sup> <http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience>

<sup>18</sup> 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).”<sup>19</sup>

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)<sup>20</sup>
- Stabilizing a river bank (U.S. v. Lambert)
- Removing small saplings and grading the deeded access easement (Catchpole v. Wagner)<sup>21</sup>

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

<sup>19</sup> [http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP\\_29\\_2012.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_29_2012.pdf)

<sup>20</sup> 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.

<sup>21</sup> 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.<sup>22</sup>

- 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.”<sup>23</sup> 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

<sup>22</sup> [http://www2.epa.gov/sites/production/files/2014-03/documents/cwa\\_404\\_exempt.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_404_exempt.pdf)

<sup>23</sup> <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 Corps'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.<sup>24</sup> 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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<sup>24</sup> 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.<sup>25</sup>

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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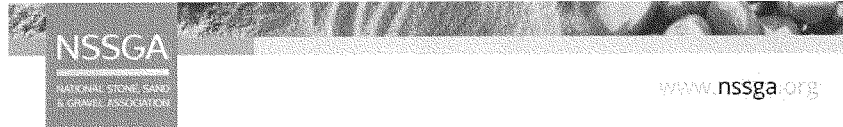
<sup>25</sup> 77 Fed. Reg. 10190 (Feb. 21, 2012)

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 RECORD  
OF THE  
COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE  
HEARING ON  
"THE POTENTIAL IMPACTS OF THE PROPOSED CLEAN WATER ACT  
JURISDICTIONAL RULE"**

**SUBMITTED BY THE  
NATIONAL STONE, SAND & GRAVEL ASSOCIATION  
JUNE 11, 2014**

On behalf of the National Stone, Sand and Gravel Association, we appreciate the opportunity to submit testimony to the Transportation and Infrastructure committee hearing “Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule” on the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) proposed rule defining the scope of waters protected under the Clean Water Act (CWA) (Docket ID No. EPA-HQ-OW-2011-0880).

NSSGA is the world’s largest mining association by product volume. NSSGA member companies represent more than 90% of the crushed stone and 70% of the sand and gravel consumed annually in the U.S., and there are more than 10,000 aggregates operations across the United States.

Through its economic, social and environmental contributions, aggregates production helps to create sustainable communities and is essential to the quality of life Americans enjoy. Aggregates are a high-volume, low-cost product. Due to high product transportation costs, proximity to market is critical; unlike many other businesses, we cannot simply choose where we operate. We are limited to where natural forces have deposited the materials we mine. There are also competing land uses that can affect the feasibility of any project. Generally, once aggregates are transported outside a 25-mile limit, the cost of the material can increase 30% to 100%, in addition to creating environmental and transportation concerns. Because so much of our material is used in public projects, any cost increases are ultimately borne by the taxpayer.

Aggregates are the chief ingredient in asphalt pavement and concrete, and are used in nearly all residential, commercial, and industrial building construction and in most public works projects, including roads, highways, bridges, dams, and airports. Aggregates are used for many environmental purposes, including pervious pavements and other LEED building practices, the treatment of drinking water and sewage, erosion control on construction sites, and the treatment of air emissions from power plants. While Americans take for granted this essential natural material, they are imperative for construction of our infrastructure. Without aggregates, the roads that move our economy could not exist.

As the industry that provides the basic material for everything from the roads on which we drive to purifying the water we drink, NSSGA members are deeply concerned that the EPA’s proposed rule will stifle our industry at a time when we are just now recovering from the economic downturn. The aggregates industry removes materials from the ground, then crushes and processes them. Hazardous chemicals are not used or discharged during removal or processing of aggregates. When aggregates producers are finished using the stone, sand or gravel in an area, they pay to return the land to other productive uses, such as residential and business communities, farm land, parks, or nature preserves.

Over the past eight years, the aggregates industry has experienced the most severe recession in its history. This expansion of jurisdiction will have a severe impact on industry by increasing the costs and delays of the regulatory process, causing further harm to an industry that has seen production drop by 39% since 2006. While stone, sand and gravel resources may seem to be ubiquitous, construction materials must meet strict technical guidelines to make durable roads and other public works projects. Because many aggregate deposits were created by water, they

are often located near water. The availability of future sources of high quality aggregates is a significant problem in many areas of the country and permitting issues has made the problem worse.

The aggregates industry requires large land areas to process and remove the extensive quantities of material needed for public works projects. This proposed rule could effectively place many areas "off limits" due to cost of new permits and/or the mitigation required to off-set losses to now regulated streams. Having a clear jurisdictional determination for each site is critical to the aggregates industry. These decisions impact the planning, financing, constructing and operating aggregates facilities. Because the Clean Water Act 404 "dredge and fill" permitting process and the corresponding states' 401 Certification process is so long and costly that many companies attempt to avoid jurisdictional areas.

Under the proposed revisions, many previously non-jurisdictional areas like floodplains, wet weather conveyances, upland headwaters, ephemeral streams or any riparian area could be considered jurisdictional. It will make nearly any area our members try to access regulated and in need of additional permits.

Even obtaining a jurisdictional determination can be a significant undertaking. While jurisdictional determinations are good for five years, as an industry we make business decisions to buy or lease properties to extract aggregates for very long terms, 15 to 30 years is not uncommon. The companies in our industry are very concerned that past understandings of what would be jurisdictional will now be subject to review. A change in what is considered jurisdictional can have significant impacts on our material reserves, which will affect the life of our facilities and delay the start-up of new sites. Ultimately this change will disrupt the supply of aggregates to our biggest customers, government agencies; thus affecting highway programs, airports, and municipal projects.

EPA claims this rule change is needed because so many waters are unprotected, but that is not true: states and local governments have rules that effectively manage these resources. For example, states and many municipalities regulate any potential negative impacts to storm water run-off and require detailed storm water pollution prevention plans. These plans are required for every project; both during construction and continuously after operations begin. States and local governments are best-suited to make land use decisions and balance economic and environmental benefits, which is what Congress intended.

There is much inefficiency in the current regulatory system; however, adding vague terms and undefined concepts to an already complicated program is not the way to fix the problem. In some cases this rule could have a negative effect on the environment and safety. Ditches without maintenance can degrade and lead to increased erosion and sediment problems. EPA claims this rule is based on sound science, but the Science Advisory Board, the group of independent scientists reviewing it, are still not near completion; in fact they have raised serious questions EPA has not answered.

EPA's economic analysis of this rule does not accurately show what businesses will end up paying if this rule is finalized. It is not even close. One NSSGA member calculated that to do the additional mitigation of a stream required under this rule would be more than \$100,000; this is just for one site in our industry. This is more than EPA has estimated the stream mitigation costs are for entire states in its economic analysis. For our industry, time is money. Any new requirements lead to a long learning curve for both the regulators and the regulated. Simply receiving a jurisdictional determination can take months - permits can take years; how much longer will it take to break ground with so many vague and undefined terms in this rule? The proposed rule has no clear line on what is "in" and what is "out," making it very difficult for our industry and other businesses to plan new projects and make hiring decisions.

If it is determined development of a site will take too long or cost too much in permitting or mitigation, then the aggregates industry won't move forward. That means a whole host of economic activity in a community will not occur--all of this in the name of protecting a ditch or farm pond.

Taken further, a significant cut in aggregates production could lead to a shortage of construction aggregate, raising the costs of concrete and hot mix asphalt products for state and federal road building and repair, and commercial and residential construction. NSSGA estimates that material prices could escalate from 80% up to 180%. As material costs increase, supply becomes limited, which will further reduce growth and employment opportunities in our industry. Increases in costs of our materials for public works would be borne by taxpayers, and delay road repairs and other crucial projects. Given that infrastructure investment is essential to economic recovery and growth, any change in the way land use is regulated places additional burden on the aggregates industry that is unwarranted and would adversely impact aggregates supply and vitally important American jobs.

We urge that EPA withdraw this rule until a more thorough economic analysis has been performed, a Small Business Regulatory Flexibility Act (SBRFA) panel has been conducted, and the Science Advisory Board has finished their analysis and allowed stakeholders to comment on their conclusions. Without a thorough outreach to affected communities – which EPA has not conducted – this rule will harm not only aggregates operators and our transportation infrastructure, but the economy as a whole.

NSSGA appreciates this opportunity to submit a statement on the devastating effects of a broad expansion of Clean Water Act jurisdiction on the aggregates industry.





June 11, 2014

The Honorable Bob Gibbs  
Chairman, Water Resources and Environment Subcommittee  
Transportation and Infrastructure Committee  
B-370A Rayburn House Office Building  
Washington, DC 20515

The Honorable Timothy Bishop  
Ranking Member, Water Resources and Environment Subcommittee  
Transportation and Infrastructure Committee  
B-375 Rayburn House Office Building  
Washington, DC 20515

*Re: Support of the Environmental Protection Agency and the Army Corps of  
Engineers' Efforts to Clarify the Scope of the Clean Water Act*

Dear Chairman Gibbs and Ranking Member Bishop:

On behalf of the National Parks Conservation Association and our more than 850,000 members and supporters, thank you for the opportunity to provide this testimony for the hearing entitled "Potential Impacts of Proposed Changes to Clean Water Act Jurisdictional Rule" regarding the Environmental Protection Agency and the Army Corps of Engineers' proposed Clean Water Protection Rule to clarify the scope of the Clean Water Act (CWA). I ask this letter be submitted for the formal hearing record.

NPCA believes that the proposed Clean Water Protection Rule is the important next step to better protect and restore our national park waters. 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. NPCA strongly supports this rulemaking, which we requested, and the rule and urges the committee to support both the public process now underway and the broader attempt to protect America's great waters.

NPCA is committed to the protection of our national parks and the waters that surround and flow through them. From Acadia to the Grand Canyon, Everglades to Glacier, water is central to the health of natural systems, features, wildlife, recreation, aesthetics, and visitor experience. National parks are inseparable from their watersheds, and waterways transcend park boundaries – boundaries that usually include only a portion of watershed lands that are critical to park waters.

Because of this, the most serious threats to park waters arise from activities on watershed lands that lie upstream and outside of park boundaries. These threats include point source pollution from landfills, toxic dumps, mining practices, inadequate septic and wastewater disposal systems, and contaminated runoff from agriculture and urban development. Because EPA and the Army Corps have primary responsibility for implementing and enforcing the CWA, the National Park Service relies on these partner agencies to help prevent impairment of park waters from activities that take place beyond park boundaries. It is imperative that the CWA protect all waters that feed into national park units and wetlands as they provide flood protection, safe drinking water, and wildlife habitat, among other things, that directly affect park ecosystems.

For the past 13 years, many of the wetlands, streams, lakes, and headwaters, which are critical to the protection of park water, have been threatened because of the regulatory confusion and legal uncertainty created by both the Supreme Court and agency guidance. This confluence of legal and policy decisions has potentially removed protection for at least 20 million acres of wetlands, including prairie potholes and seasonal wetlands and jeopardized tens of thousands of miles of intermittent and headwater streams that comprise 60 percent of stream miles in the United States. According to the U.S. Environmental Protection Agency, over 117 million Americans depend on drinking water from public water systems that are fed in whole or in part by intermittent, headwater, or ephemeral streams that have now been potentially left unprotected due to the current uncertainty about which waters are jurisdictional under our nation's laws.

The uncertainty of which waters are protected under the CWA as “waters of the United States” is leaving waters that provide numerous services to national park units vulnerable. For example, a 2009 National Park Service report found that northern prairie wetlands, which provide essential habitat for many wildlife populations, are at risk of being lost due to changes in land use and climate. Current CWA guidance exacerbates this threat leaving this region more vulnerable to wildfires, wildlife habitat loss, and vegetation shifts in grassland communities. With 31 park units located in this region of the country, the impact on the natural and cultural resources could be damaging.

The national park units located in southern regions have also been altered and affected by water quality problems, which threaten the viability of protected areas and jeopardize the economic benefits that these natural systems provide. In South Florida, urban development and nutrient and pesticide pollution currently impact waters that flow into Everglades National Park. According to EPA data, 30 percent of streams in Florida are at risk of losing protection under the CWA because they are headwater streams. Seasonal wetlands, which provide flood protection and critical wildlife habitat, are also at risk of being lost to development and land use changes under the current interpretation of the CWA. Without adequate protection of waterways upstream, polluted water will further degrade the water quality of Lake Okeechobee, subsequently flowing downstream and polluting Everglades and Biscayne National Parks and Big Cypress National Preserve. This would be directly adverse to the goals of the Comprehensive Everglades Restoration Plan (CERP), the Aquatic Ecosystem Restoration Program, and the Presidential “no net loss” policy pertaining to Florida’s wetlands.

Aquatic habitats that are signature features of the national parks in the Midwest will also be better protected under the proposed rule. Indiana Dunes National Lakeshore contains many streams and wetlands, including dunal ponds, marshes, lagoons, seasonally-flooded pannes, and bogs. These sensitive aquatic habitats are readily impacted by

activities occurring near waterways outside park boundaries. Without CWA protections, these adjacent and directly connected water bodies will be subject to degradation that will negatively impact park resources. According to a 2006 NPCA technical report, Indiana Dunes' water resources – including Lake Michigan, the source of drinking water for 10 million people – has been severely impacted by outside factors including contamination from urban and agricultural runoff, industrial pollution, and sewage systems. Maintaining the resource conditions and quality of the waters within the park is dependent on protecting outside waters that transcend park boundaries.

NPS studies show that nonpoint source pollution and sedimentation are responsible for more than 70 percent of the known threats to park water quality and wetland loss. At Big Hole National Battlefield in southwestern Montana, the North Fork of the Big Hole River flows through the park and is impaired from flow alterations and nonpoint source pollution from upstream creeks and tributaries. At Colonial National Historic Park, upstream rural and urban land disturbances on watersheds are polluting creeks and streams. Ultimately, these waterways flow into the James River and subsequently in the Chesapeake Bay. As a result, the marshes and wetlands of Colonial National Historic Park are being harmed by increased streambank soil erosion and sediment deposition. At Acadia National Park and St. Croix National Scenic Riverway, nutrient runoff from expanded residential development on watershed lands adjacent to these parks are polluting park waters. Similarly, the unique mineralized and freshwater springs of Chickasaw National Recreation Area, which lures in visitors as the park's main attraction, are being degraded from leaky sewer pipes from municipalities.

Now, the U.S. EPA and the U.S. Army Corps of Engineers have proposed a clarification that should restore former protections to America's waters. NPCA believes that the proposed rule provides clearer and more predictable guidelines and a science-based and legal framework for determining which waters are protected by the CWA. In particular, the proposal clarifies how smaller and seasonal streams and wetlands – waters that are particularly important to the visitors and wildlife in national parks – are connected physically, chemically, and biologically to larger water bodies downstream and will now be covered under federal law similar to coverage prior to 2001. The proposed rule would also:

- Provide clear and predictable protections for many streams, wetlands, and other waters while giving greater certainty to the regulated community by providing better guidance to federal and state regulators, which helps streamline the permitting process.
- Cover only water bodies that the Clean Water Act has traditionally covered, such as intermittent headwater streams that have a defined bed and bank and flow to water already covered by the Act.
- Reiterate existing exemptions for farming, forestry, and mining and very explicitly for the first time exclude many ditches, ponds, and other upland water features important for farming and forestry.
- Rely on the best scientific understanding of stream and wetland science to clarify the scope of the Clean Water Act, and enhance protection for streams, wetlands, and other waters nationwide.

The proposed rule also sets clear lines for what is not covered:

- Cover any new types of waters that have not historically been covered under the Clean Water Act, such as groundwater. The proposed rule actually applies to

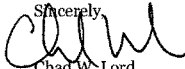
fewer waters than were historically covered under the Nixon, Ford, Carter, Reagan, Bush, and Clinton administrations.

- Expand coverage to any new ditches. In fact, upland drainage ditches with less than perennial water flow are explicitly excluded.
- 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.
- Cover agricultural practices 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 proposed rule.

In conclusion, NPCA strongly supports this rulemaking, which we requested, and the rule. We urge the committee to support both the public process now underway and the broader attempt to protect America's great waters. The National Park Service cannot protect national park waters alone. They need the help from the Clean Water Act to ensure all the rivers, streams, and wetlands within and surrounding parks can provide clean drinking water for visitors, 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 me at [REDACTED] or [REDACTED] with questions.

Sincerely,



Chad W. Lord  
Senior Director, Water Policy



June 9, 2014

The Honorable Bob Gibbs  
Chairman  
Subcommittee on Water Resources &  
Environment  
Committee on Transportation & Infrastructure  
B-370A Rayburn House Office Building  
Washington, DC 20515

The Honorable Timothy H. Bishop  
Ranking Member  
Subcommittee on Water Resources &  
Environment  
Committee on Transportation &  
Infrastructure  
B-375 Rayburn House Office Building  
Washington, DC 20515

**Re: NWF Statement for the June 11, 2014 Hearing Record: *Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule***

Dear Chairman Gibbs and Ranking Member Bishop:

The National Wildlife Federation and its four million members, partners and supporters write in strong support of the proposed “Waters of the United States” rule. We respectfully request that this statement be included in the formal record for your June 11, 2014 hearing, *Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule*.

This landmark rulemaking initiated by the Environmental Protection Agency and the Army Corps of Engineers is a deliberate and scientifically backed attempt to clarify and restore longstanding Clean Water Act protections to vital headwater streams and wetlands across the country. **We ask you to oppose any legislation that might undermine this important rulemaking process.**

Since its enactment in 1972, the Clean Water Act has served as a safeguard against wetland loss and water pollution. However, for the past decade its protections for streams, lakes and wetlands have been undermined by two Supreme Court cases, (*Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers* (2001) and *Rapanos v. United States* (2006)) and subsequent agency guidance. Overriding thirty years of legislative intent and legal precedent, these decisions have exposed 60 percent of the nation’s stream miles to greater risk of pollution and destruction, threatening a major source of drinking water for 117 million Americans. The rate of wetlands loss also increased by 140 percent from 2004-2009, the years immediately following the Supreme Court decisions. This is the first documented acceleration of wetland loss since the passage of the Clean Water Act.

This increased risk of pollution and destruction for our nation’s streams and wetlands also threatens fish and wildlife and a robust outdoor recreation economy which accounts for more than \$200 billion in

economic activity each year and supports over 1.5 million jobs, often in rural communities. Moreover, clean water is crucial for other businesses as well. For example, our nation's brewers rely on as the key ingredient in beer.

Beyond these immediate damages, the confusion created by these decisions has forced agencies to resolve the fundamental question of Clean Water Act jurisdiction on a case by case basis, which leaves businesses operating in a climate of uncertainty that can hinder their ability to plan and grow. Stakeholders on all sides of the issue *and the Supreme Court* have called on the U.S. Army Corps of Engineers and Environmental Protection Agency to conduct a formal rulemaking to clarify which waters the Act protects.

This proposed rule is simple, straightforward, and based on years of precedent, while faithfully addressing the Supreme Court cases. It is informed by extensive input in recent years from stakeholders and scientists alike. It clarifies which waters are- and are not- covered by the Clean Water Act, and affirms protections for historically protected streams and wetlands; including coverage for tributaries and adjacent wetlands. All of these waters have a significant impact on downstream waters, and are covered in a way that is consistent with the *SWANCC* and *Rapanos* decisions.

The proposed rule wisely asks for input from the public about how best to treat a third category of waters – so-called “other waters” -- which are not categorically included in the proposed rule. Many waters of this type provide important flood storage, water filtration, and fish and wildlife habitat, and we look forward to the opportunity to demonstrate how and why they should be recognized as “waters of the U.S.” consistent with the law and the science.

This proposed rule is designed to clarify the scope of the Clean Water Act, adding clarity, certainty, and consistency in implementation. It does not expand the historic scope of jurisdiction and it does not subject any businesses of any size to any specific regulatory burden. Ultimately, the final rule will define “waters of the U.S.” such that the Act's regulatory protections constitute an area smaller than historic Clean Water Act coverage under the administration of President Reagan. Nevertheless, once finalized, the proposed rule will have a clearly positive impact on hunters, anglers, fish and wildlife, the outdoor recreation economy, and businesses and communities nationwide. This rule offers a major economic benefit to the public that directly supports the industries that rely on clean water. In their economic analysis, the EPA estimated that this rule would ultimately provide \$388-\$514 million in benefits by reducing flooding, filtering pollution, supporting hunting and fishing, and recharging groundwater.

The agencies proposing this rule have also taken care to preserve all existing exemptions from Clean Water Act permitting requirements, including many farming, ranching, and silvicultural 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 actually codifies specific exempted waters, including many upland drainage ditches, artificial lakes and stock watering ponds, and water filled areas created by construction activity. The proposed rule, as well as the related interpretive rule regarding exemptions for conservation practices on agricultural lands, reflect extensive input from the U.S. Department of Agriculture and agricultural stakeholders

We believe this rulemaking represents the best chance to clarify and restore much needed protections for our streams and wetlands and our drinking water supplies, to cut through regulatory confusion, and to maintain healthy fish and wildlife habitat for our sportsmen and women and for a robust outdoor recreation economy. This proposed rule supports American business interests by clarifying Clean

Water Act jurisdiction, streamlining jurisdictional determinations, and protecting water supplies, outdoor recreation and tourism, and flood protection on which businesses and communities depend.

We strongly oppose any legislation that would bar the administration from proceeding with the rulemaking process. Not only would this impede the public's ability to comment and improve upon the proposed rule, but it will forcibly extend a muddled status quo that no one supports. We urge the Committee to respect this much-needed "Waters of the United States" rulemaking process.

Sincerely,

Jan Goldman-Carter  
Senior Manager, Wetlands and Water Resources  
Daniel Hubbell, Water Resources and Restoration  
National Wildlife Federation



June 10, 2014

The Honorable Bob Gibbs  
Chairman  
Subcommittee on Water Resources &  
Environment  
Committee on Transportation &  
Infrastructure  
B-370A Rayburn House Office Building  
Washington, DC 20515

The Honorable Timothy H. Bishop  
Ranking Member  
Subcommittee on Water Resources &  
Environment  
Committee on Transportation &  
Infrastructure  
B-375 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Gibbs and Ranking Member Bishop:

On behalf of the Natural Resources Defense Council and our 1.4 million members and online activists, I write to express NRDC's strong support for strengthening and finalizing the Clean Water Protection Rule that the Environmental Protection Agency and the U.S. Army Corps of Engineers have developed. We also will vigorously oppose any attempt to undermine this initiative through legislation, and respectfully request that you do so as well. Please make this letter part of the official record of your June 11 hearing, titled "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule."

Prior to 2001, virtually all streams, wetlands, lakes and other water bodies were understood to be covered by the pollution control programs in the Clean Water Act, pursuant to a Reagan administration policy. This approach was developed in recognition of Congress's intent to comprehensively protect waterways. The law's inclusive scope begins with its application to "navigable waters," which Congress broadly defined as the "waters of the United States," and which Congress understood to include all kinds of surface waters. Under this approach, important physical, chemical and biological connections between upstream wetlands and tributaries and downstream, generally larger, waters were accepted and presumed to exist. In the mid-80s, for instance, the Supreme Court unanimously rejected industry arguments that wetlands were not "waters of the United States," deferring to the experts at EPA and the Corps to identify water resources the law must protect to serve the law's clean water goals.

Beginning in 2001, this all changed. That year, the Supreme Court invalidated the Reagan-era policy, which treated waters that could serve as habitat for birds migrating interstate as protected "waters of the U.S." Though that specific ruling was very narrow, the Court's opinion included



some language that industry lobbyists and their allies have argued calls into question the status of many upstream tributaries and wetlands. A subsequent Supreme Court case in 2006 reached no majority opinion, further confusing the question of what is protected by the law. To make matters worse, administration policies issued after each decision made it even harder to protect certain streams, wetlands, and other waters. Feeder, seasonal, and rain-dependent streams and nearby wetlands are now particularly at risk, and so-called “isolated” waters have been effectively cut out of the law.

It is difficult to overstate the scope of this problem. Headwater and irregularly-flowing creeks make up more than half the river miles in the continental United States, while wetlands filter polluted water, reduce the risk of flooding, and provide important wildlife habitat. Nearly two million miles of the stream miles outside of Alaska -- about 60 percent -- do not flow year-round. Approximately 117 million people in the continental U.S. receive drinking water from public utilities that depend at least in part on intermittent, ephemeral or headwater streams for supply. Thousands of individually-permitted dischargers are located along these same kinds of vulnerable streams; an estimated 28 percent of these permittees are sewage treatment facilities. Further, 20 percent of an estimated 110 million acres of wetlands in the continental United States are considered geographically isolated (because they lack an obvious surface water connection to other waters), meaning that they have been ignored under the Act for more than a decade. In short, the legal mess that exists today jeopardizes critical water resources that help prevent flooding, filter pollution, supply drinking water to millions of Americans, and provide critical fish and wildlife habitat.

In the intervening years since the Supreme Court ruled in 2001, organizations and decision-makers with dramatically diverging views on the level of protection that the law should afford our water bodies have agreed on at least one thing -- that EPA and the Army Corps should develop rules that spell out where the law applies and where it does not. Supreme Court justices as well have urged the agencies to reform their rules, and the Court’s decisions clearly allow for the agencies to protect at least those waters that the scientific evidence shows to have more than an insubstantial impact on downstream waters, when considered in the aggregate. Therefore, when EPA and the Corps proposed a new rule for public comment in April and based the proposal on an extensive review of more than 1,000 peer-reviewed pieces of scientific literature, the agencies were doing precisely what they had been asked to do.

The rule is modest, though vital. Once finalized, the agencies’ rules would provide much-needed clarity, certainty, and efficiency to Clean Water Act programs. The rule would also restore protections to many important wetlands, lakes, and streams that have been at increased risk of pollution and destruction as a result of the uncertainty created by the Supreme Court and the previous administration’s extreme interpretation of those decisions. If anything, the rule needs to be strengthened, so that it fully protects water bodies that perform important functions for downstream waters in the watersheds in which they are located, even if they appear not to have surface water connections to other waters.


Moreover, the proposal reflects significant accommodation of concerns that industry organizations expressed about the rule. It would enormously improve clarity about what waters are covered and what ones are not, making regular implementation and enforcement of the law far more efficient and predictable. It leaves unchanged existing regulatory exemptions from the law, codifies a number of exemptions that had previously only been followed as a matter of agency policy, and specifically excludes a category of ditches (upland ditches without perennial flow) from coverage. And, it is paired with a new formal declaration that 56 different agricultural/conservation practices qualify as "normal farming," making them generally exempt from Corps' permitting.

Reforming the clean water rules will help support our regional and national economies. Outdoor recreation is a multi-billion dollar industry that enhances rural communities and supports millions of jobs across the country. In addition, destroying streams and draining and filling wetlands can cause or exacerbate flooding downstream with significant public safety and economic implications. A single acre of wetland can store 1 to 1.5 million gallons of flood water. Wetlands in the continental United States can save as much as \$30 billion in annual flood damage repair costs. Wetlands also help filter pollutants from water, preventing downstream contamination. EPA has estimated that wetlands provide hundreds of thousands of dollars in benefits per acre, considering factors such as flood control, pollution filtering, and recreation. The agencies estimate that the proposal, if finalized, would generate between \$388 and \$514 per year in economic benefits, far exceeding expected costs (\$162 to \$278 million annually).

This proposed rule is a commonsense step forward, and EPA and the Corps should be commended for the open, transparent process by which they are seeking input. It would be a grave mistake to kill this initiative and we strongly urge you to reject legislative proposals to do so.

Thank you very much for the opportunity to provide this input.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Devine", with a stylized flourish extending to the right.

Jon P. Devine, Jr.  
Senior Attorney  
Water Program  
Natural Resources Defense Council



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June 11, 2014

The Honorable Bill Shuster  
Chairman  
Transportation and Infrastructure Committee  
2165 Rayburn Building  
Washington, DC 20515

The Honorable Nick J. Rahall II  
Ranking Member  
Transportation and Infrastructure Committee  
2163 Rayburn Building  
Washington, DC 20515

The Honorable Bob Gibbs  
Chairman  
Subcommittee on Water Resources and Environment  
B370 Rayburn Building  
Washington, DC 20515

The Honorable Timothy H. Bishop  
Ranking Member  
Subcommittee on Water Resources and Environment  
B375 Rayburn Building  
Washington, DC 20515

Dear Chairman Shuster, Ranking Member Rahall, Subcommittee Chairman Gibbs and Ranking Member Bishop:

Thank you for holding today's hearing, entitled, "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule." The Portland Cement Association (PCA) represents twenty-seven (27) cement companies operating eighty-two (82) manufacturing plants in thirty-five (35) states, with distribution centers in all fifty (50) states, servicing nearly every congressional district. PCA members account for approximately eighty (80) percent of domestic cement-making capacity. On behalf of PCA, I wish to share the views of America's cement manufacturing industry.

PCA has serious concerns with the proposed changes to the Clean Water Act and the economic ramifications the rule would have on the building and construction sectors. The interpretative effects of the rule would directly impact domestic cement production as plant operators determine the new law's jurisdiction on their property. In terms of production, the cement industry is regional in nature. Most cement manufacturing plants are located in rural areas near limestone deposits, the principal ingredient in producing cement. Cement manufacturing is a capital-intensive industry, and manufacturing sites are constructed near limestone deposits where possible with the presumption that the mineral will continue to be accessible. PCA is concerned that the proposed rule would prevent facilities from fully accessing these limestone deposits. At a minimum, the rule would require hydrological and geological surveys and increased layers of regulation that are costly and time consuming.

Land developers also would be more susceptible to citizen lawsuits challenging local actions based on regulations that are poorly defined. Increased project delays and production costs for critical infrastructure and commercial development projects would be severe and damaging to a sector that continues to recover from the severe economic downturn.

America's cement manufacturers urge lawmakers to communicate industry concerns to the Environmental Protection Agency and the U.S. Army Corps of Engineers. PCA supports measures, including legislation, that address industry concerns, including withdrawal of the rule and limitations on funding to implement the rule.

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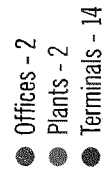
Thank you for holding today's hearing. PCA looks forward to working with you and Members of the Committee on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Cohrs". The signature is fluid and cursive, with the first name "Cary" being more prominent and the last name "Cohrs" following in a similar style.

Cary Cohrs  
Chairman of the Board  
Portland Cement Association  
President  
American Cement Company, LLC

Cc: Members of the Transportation and Infrastructure Committee



### Economic Data

- Clinker capacity: 1.1 million metric tons
- Cement consumption: 2.7 million metric tons
- Cement employees: 125 in 2012 from 223 in 1997
- Cement & concrete-related employees: 16,211 with a payroll of \$333.4 million
- Cement contribution to state revenue: \$1.6 million
- Cement & concrete-related contribution to state revenue: \$206.5 million

Year	Thousands of Metric Tons
'01	4,000
'02	4,000
'03	4,000
'04	4,000
'05	4,000
'06	3,800
'07	3,200
'08	2,800
'09	2,200
'10	2,500
'11	2,800
'12	2,800

Source: PCA



America's Cement Manufacturers™

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## OHIO CEMENT INDUSTRY

### PORTLAND CEMENT MANUFACTURING AND USE

The Portland Cement Association (PCA) represents more than 80 percent of US cement manufacturing capacity with nearly 90 plants in 33 states and distribution facilities in all 50.

**Cement or concrete?** Concrete is basically a mixture of aggregates and paste.

The aggregates are sand and gravel or crushed stone; the paste is water and cement. Portland cement is not a brand name, but the generic term for the type of cement used in virtually all concrete, just as stainless is a type of steel and sterling a type of silver.

Cement is manufactured by heating lime, silica, alumina, iron, and other materials at high temperature. The resulting substance is a marble-like ball called clinker that is ground, mixed with limestone and gypsum, and used to create concrete.

The U.S. cement industry has long been committed to minimizing emissions, waste, energy consumption, and the use of virgin raw materials. For example, the cement industry began to address climate change in the mid-1990s—one of the first industries to do so.

Portland cement is an essential construction material and is uniquely positioned for the rebuilding of American infrastructure.

- U.S. cement companies have annual shipments valued at approximately \$8.6 billion.
- Cement manufacturers in the U.S. employ nearly 13,200 workers with an annual payroll of about \$909 million. When including related industries such as concrete and related industries, the number of employees grows to 490,691 with a payroll of \$22.5 billion.

Concrete is a responsible choice for sustainable, durable development. It offers an economic way to build resilient communities and infrastructure.

- Building owners, builders, architects, and designers have come to recognize that durable concrete public buildings, private homes, and businesses resist damage from natural disasters and reduce the impact entire communities have on our planet.
- A National Institute of Building Sciences Multi-Hazard Mitigation Council study reported that every dollar spent on reducing the potential impact of disasters saves society an average of \$4. With durable construction, the damage from major storms can be less severe, reducing the amount of energy and resources that the local community will have to spend on emergency response, reconstruction, repair, and recovery.
- The heating, cooling, and general operations of buildings and homes in the United States accounts for approximately 70 percent of national energy consumption each year and more than 40 percent of CO<sub>2</sub> emissions generated in the U.S.
- Studies by MIT have shown that homes with concrete walls can use 8 to 15 percent less energy than other homes.
- MIT research has also shown that pavements with greater stiffness produce a better fuel economy for the vehicles that travel on them. To achieve optimal fuel consumption figures, asphalt pavement would need to be about 60 percent thicker than concrete pavement. Concrete pavements not only cost less to build, but would in this case, use less virgin material.

OHIO • Senators Sherrod Brown (D) and Rob Portman (R)

Company	Plant Location	House Members
CEMEX	Fairborn	Michael Turner (R-Oh)
Lafarge NA	Paulding	Robert Latta (R-Sh)



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Fax 202-499-2078  
SouthernEnvironment.org

June 9, 2014

**The Honorable Bob Gibbs**  
**Chairman, Subcommittee on Water Resources and Environment**  
**Committee on Transportation and Infrastructure**  
**B-370A Rayburn House Office Building**  
**Washington, DC 20515**

**The Honorable Timothy H. Bishop**  
**Ranking Member, Subcommittee on Water Resources and Environment**  
**Committee on Transportation and Infrastructure**  
**B-375 Rayburn House Office Building**  
**Washington, DC 20515**

**RE: Subcommittee Hearing on Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule**

Dear Chairman Gibbs, Ranking Member Bishop and Members of the Subcommittee:

Southern Environmental Law Center (SELC) thanks the Subcommittee for the opportunity to provide written comments for the hearing on "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule," which will discuss the recent U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) proposed rule regarding the Clean Water Act. Please consider accepting these comments for the hearing's official record. SELC is a regional non-profit organization, working in six states in the Southeast to champion the special resources of the South: clean water, healthy air, mountains, forests, rural countryside, and the coast. Our organization has a strong interest in the rulemaking that is the subject of this hearing, as it could influence whether or not important streams and wetlands are protected in our region.

This hearing was initially scheduled last month, but postponed so that Members of Congress could pay their respects to Chairman James L. Oberstar, who passed away in May. Among the many issues Chairman Oberstar was passionate about was the Clean Water Act, and he was well-known for giving a speech about the history of the Clean Water Act to anyone who would listen to him. On behalf of SELC and anyone who was fortunate enough to be his staff, I would like to acknowledge and express gratitude for his many years of service to this Committee and Congress and for his tireless efforts over the years to ensure the Clean Water Act was properly interpreted and enforced. He cared about our nation's small streams and wetlands, and special places, with a passion unrivaled by many, and leaves behind a great legacy.



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The proposed EPA/Corps Clean Water Rule is a long-overdue step forward to better protect and restore our nation's streams and wetlands. The rule will provide greater clarity and restore longstanding protections for critical upstream waters across the country that contribute to our drinking water supplies, filter out pollutants, and protect our communities from flooding.

Since the Clean Water Act was enacted in 1972, great progress has been made in cleaning up our nation's waters. However, two Supreme Court cases, (*Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (2001) and *Rapanos v. United States* (2006)) and subsequent agency guidance, have resulted in a decade of uncertainty over and lost protections for countless streams, lakes, and wetlands. These decisions and their implementation, have left 60 percent of the nation's stream miles at risk for pollution and destruction, and threatened sources of drinking water for 117 million Americans.

This rulemaking is long overdue. Stakeholders on all sides of this issue have requested a rulemaking. From state and local governments, to advocacy organizations and the regulated community, including the National Association of Homebuilders and the American Farm Bureau Federation, there has been widespread support for a rulemaking by the agencies.<sup>1</sup> The increased confusion after the Supreme Court cases has forced agencies to resolve questions of Clean Water Act jurisdiction on a case-by-case basis. This creates additional work for the agencies and increased uncertainty for the regulated community. The EPA/Corps proposed rule will provide that certainty and clarity to Clean Water Act regulation when it is finalized.

The proposed rule is based on peer-reviewed science that has undergone an intense level of scrutiny. The rulemaking is underpinned by an EPA science report, entitled, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." The Connectivity Report confirms the well-established scientific principle that the network of small interconnected wetlands and headwater streams that pervade our watersheds are critically important to the health of our larger downstream waters. It is clear that pollutants entering headwaters can end up in downstream waters. Further, wetlands and small streams can help protect downstream waters from flooding, as well as capture waterborne pollutants.

Wetlands are recognized as some of nature's most valuable resources.<sup>2</sup> The Southeast is home to unique formations called Carolina Bays and a large number of smaller wetlands in the

<sup>1</sup> See Persons and Organizations Requesting Clarification of "Waters of the United States" By Rulemaking, Available at <[http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_request\\_rulemaking.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf)>, Accessed June 3, 2014.

<sup>2</sup> See Tiner, R.W., *Wetlands of the United States: Current Status and Recent Trends* 3, 13-25 (U.S. Fish and Wildlife Service, 1984)





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southern Coastal Plain. Carolina Bays are elliptical, sand-rimmed oval depressions scattered in parallel, northwest-to-southeast alignment across the Coastal Plain.<sup>3</sup> There are multiple theories regarding their formation: a meteor shower was once speculated as the cause, but the more current theory is ancient wave action associated with prevailing southwesterly winds.<sup>4</sup>

Carolina Bays, like other wetlands, are important to maintaining the health of larger waters; they attenuate flood waters; and provide habitat for diverse plant and animal life. Bays help clean surface waters and recharge groundwater supplies. In times of drought and during floods, Carolina Bays store water. They are also world-class "hot spots" of biological diversity and serve as critical habitat for rare species. Given the available evidence, as well as evidence laid out in the EPA Connectivity Report, SELC supports the EPA/Corps rulemaking including Carolina Bays as a class of waters protected under the Clean Water Act.

SELC supports the efforts of the EPA and the Corps to issue the proposed Clean Water Rule and looks forward to participating in the public comment period to ensure that the best and strongest rule possible is finalized by the agencies.

Thank you for opportunity to weigh in on this important topic. If you have any questions or need additional information, please do not hesitate to contact me at [REDACTED] or 202.838.8382.

Sincerely,

Navis A. Bermudez  
 Deputy Legislative Director  
 Southern Environmental Law Center

cc: Members of the Committee on Transportation and Infrastructure

<sup>3</sup> See *Invertebrates in Freshwater Wetlands of North America: Ecology and Management* 167-71 (D.P. Batzer, R.B. Rader, and S.A. Wissinger, eds. 1999)

<sup>4</sup> Sharitz, Rebecca R., *Carolina Bay Wetlands: Unique Habitats of the Southeastern United States*, WETLANDS, Vol. 23, No. 3, September 2003, pp. 550-562 at 550.



*His Vision*

~

*Our Mission*

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June 10, 2014

The Honorable Bob Gibbs  
Chairman, Subcommittee on Water  
Resources and Environment  
Committee on Transportation  
and Infrastructure  
B-370A Rayburn House Office Building  
Washington, DC 20515

The Honorable Timothy H. Bishop  
Ranking Member, Subcommittee on  
Water Resources and Environment  
Committee on Transportation  
and Infrastructure  
B-375 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Gibbs and Ranking Member Bishop:

The Theodore Roosevelt Conservation Partnership (TRCP), a coalition of 38 sportsmen organizations committed to conservation and the preservation of our sporting traditions, appreciates the opportunity to comment on your hearing titled *Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule*. The TRCP requests that you address the concerns of America's 47 million hunters and anglers while deliberating efforts to clarify the reach of the Clean Water Act by including this statement in 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 more than a decade because of a pair of 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 of the decisions, 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 U.S. Army Corps of Engineers and Environmental Protection Agency jointly proposed a rule on March 25, 2014, to clarify the jurisdiction of the Clean Water Act. This rule represents the best chance in a generation to restore protections to waters upon which hunters and anglers rely while preserving all exemptions for agricultural activities – and, in some cases, enhancing them.

Sportsmen have been requesting a rulemaking to resolve Clean Water Act confusion for years, because, simply put, better habitat 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" and, therefore, within the jurisdiction of the Clean Water Act. 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."

The proposed rule asks for input from the public about how best to treat 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 for hunting and fishing, and we look forward to the opportunity to comment on how to treat them in the final rule. We are urging stakeholders to use the public comment period as a chance to improve the proposed rule rather than calling for the rule to be withdrawn, as some critics have done, which would deprive sportsmen's organizations and the public the chance to contribute their views.

The impacts of the proposed rule on the sporting communities will be dramatic and overwhelmingly positive. It will reverse much of the damage done by the *SWANCC* and *Rapanos* decisions, and 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, too. Now, when fewer kids are spending time outdoors, we cannot afford to continue to lose quality habitat and days in the field due to confused federal laws.

We cannot maintain the integrity of downstream waters without protecting the headwater streams and wetlands that feed into them. That is what this proposed rule is designed to do. I urge your support for the rulemaking process so we can improve and ultimately finalize this much needed rule and – at long last – restore some Clean Water Act protections and clarify where those protections apply.

Sincerely,

A handwritten signature in dark ink, appearing to read "Whit Fosburgh". The signature is fluid and cursive, with the first name "Whit" being more prominent and the last name "Fosburgh" following in a similar style.

Whit Fosburgh  
President and CEO



**Steve Moyer**

*Vice President for Government Affairs*

June 10, 2014

The Honorable Bob Gibbs  
Chairman  
Subcommittee on Water Resources and Environment  
Committee on Transportation and Infrastructure Committee  
Washington, DC 20515

The Honorable Timothy H. Bishop  
Ranking Member  
Subcommittee on Water Resources and Environment  
Committee on Transportation and Infrastructure Committee  
Washington, DC 20515

Dear Chairman Gibbs and Ranking Member Bishop:

On behalf of Trout Unlimited's (TU) 153,000 members nationwide, I am writing to provide testimony for your hearing today titled: Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule. 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. Based on our long experience working in the field with the Clean Water Act, and the detailed analysis completed by the agencies and OMB for the proposal, we believe that the new rule is worthy of your engagement and support. It will provide landowners, conservationists, and businesses with substantial improvements in how the law is implemented. Improving the implementation of the Clean Water Act for all Americans should be the primary goal of this Subcommittee which first created the Clean Water Act over 40 years ago. In that light, we urge the Subcommittee to engage the agencies' proposal with an eye towards making suggestions that will improve the rule and ask for support for its finalization.

The Clean Water Act is very valuable to TU. 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 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 the Mississippi River headwaters in Wisconsin, removing acidic pollution caused by abandoned mines in Colorado, or protecting the world famous salmon-producing, 14,000-jobs-sustaining, watershed of Bristol Bay, Alaska, the Clean Water Act is the safety net on which we rely.

As the Subcommittee ponders the jurisdictional proposal, please consider all of the good that has been done by implementation of the Act over the past 40 years. When the Clean Water Act was

*Trout Unlimited: America's Leading Coldwater Fisheries Conservation Organization*  
1300 N. 17<sup>th</sup> St. Suite 500, Arlington, VA 22209  
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first enacted, many of Ohio's waters, such as Lake Erie and the Cuyahoga River, were so polluted that the goal of making these waters "fishable and swimmable" was nearly unthinkable in some locations. Similarly, Long Island Sound and many New York waterways were plagued by pollution problems. More than 40 years later, Lake Erie hosts thriving steelhead and other sport fisheries, the Carmans River on Long Island hosts one of the most unique brook trout fisheries in the eastern U.S., and Montauk is a world class saltwater fishing destination. These successes would not have been possible without the Clean Water Act.

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 decade, 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, as well as isolated wetlands. 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.

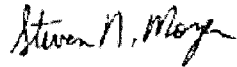
I hope that the Committee recognizes the fact that, because of the uncertainties caused by the Supreme Court cases, a rulemaking was sought by many business interests, as well as by Supreme Court Justice Roberts who presided over the *Rapanos* case.

I also urge the Committee to recognize 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. 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 landowners, on the ground, and on their properties.

Lastly, we urge Subcommittee members to remember the great, and direct, benefit, clean water and healthy watersheds has to their districts and states. Ohioans depend 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 1.8 million people hunted, fished, or both in Ohio in 2011. Together, they directly spent more than \$2.5 billion on gears and trip expenditures alone. In New York, more than 2.7 million hunters and anglers spent more than \$3.5 billion on their trips and equipment. These hunting and fishing depend on healthy habitat and clean water and the benefits they provide to fish and game. They depend on the Clean Water Act.

Your Subcommittee helped to give birth to Clean Water Act in 1972. Now 40 years later the law has come to a major crossroads. The agencies which the Committee authorized to implement the 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. As you scrutinize the proposal, we urge you to strongly consider the views of sportsmen and women in Ohio, New York, 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,

A handwritten signature in black ink, reading "Steven A. Moyer". The signature is written in a cursive, flowing style.

Steve Moyer  
Vice President of Government Affairs  
Trout Unlimited



*Sustainable Solutions for a Thirsty Planet®*

June 25, 2014

The Honorable Robert Gibbs, Chairman  
 The Honorable Timothy Bishop, Ranking Member  
 Water Resources and Environment Subcommittee  
 Transportation and Infrastructure Committee  
 U.S. House of Representatives  
 Washington, D.C. 20515

Re: Comments on the Potential Impacts of Proposed Changes to Clean Water Act Jurisdictional Rule to Water Reuse and Recycling Infrastructure

Dear Chairman Gibbs and Ranking Member Bishop:

On behalf of the WaterReuse Association (WaterReuse), I appreciate the opportunity to submit our concerns about the proposed “waters of the United States” rule for the June 11, 2014 oversight hearing record before the House Transportation and Infrastructure Water Resources and Environment Subcommittee.

The WaterReuse Association represents 400 organizational members, including water agencies and corporations throughout the United States who actively practice and support water reuse and recycling. Water recycling and reuse remains the one reliable and readily available new source of fresh water across the Nation. The infrastructure and technologies used to recycle and reuse water often incorporate features that could become jurisdictional under the Clean Water Act (CWA) if the new rule defining “waters of the U.S.” is not properly promulgated by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). This issue deserves the Committee’s attention and oversight, and we must understand the potential unintended consequences of the proposed rule – especially at a time when the Nation is clearly moving toward utilizing water reuse to help make our communities more drought resilient.

As such, the scope of jurisdiction under the CWA is of fundamental importance not only to our membership, but also to the Nation. Given the significance of the proposed rule, WaterReuse intends on thoroughly reviewing and commenting on the EPA’s proposed rule as well as its supporting documentation, including its lengthy Appendices (Appendix A – Scientific Evidence, Appendix B – Legal Analysis), Economic Analysis, and the Draft (and Final) Connectivity Report.

WaterReuse has significant concerns with the proposed rule as written and its potential impact upon water reuse and recycling infrastructure. We note some of our concerns below.

**The impacts of the proposed rule on water reuse and recycling facilities must be addressed.**



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We believe there will be potential impacts of the proposed rule on water reuse and recycling infrastructure. While the proposed rule reiterates the exemption for wastewater treatment facilities under the CWA, water reuse and recycling infrastructure many times will not fall into this category and thus could become jurisdictional. In fact, EPA officials have clearly stated in past meetings with industry representatives that recycled water facilities are not covered by the wastewater treatment exemption.

Many of these facilities are located in areas the proposed rule would deem jurisdictional, such as adjacent to traditional navigable waters, in the riparian areas of a river or stream, or in hydric soils containing plants associated with natural wetlands. These recycled water facilities can be over 100-acres in size and most likely have subsurface hydrological connection to navigable waters, creating the distinct possibility of regulation, or at least the threat of third-party claims that they should be regulated, under the proposed rule. Yet, these facilities are man-made, actively managed water recycling facilities used to treat water for reuse, and expanding the usable water supplies in areas that are water short.

We believe making water reuse and recycling infrastructure and related facilities jurisdictional under the CWA through this rule will substantially hinder our ability to access this major new source of fresh water supplies so important to the future of many communities in the U.S. These facilities are maintained several times per year, and must enjoy the maximum flexibility in order to keep them operational. The CWA permitting process alone, if applied to water reuse and recycling facilities considering both the additional costs and time involved, could render these important water supply sources useless. For these reasons alone, the rule should specifically and clearly exempt water reuse and recycling infrastructure from CWA jurisdiction.

**The agencies must complete their review of the underlying science before the rulemaking can commence.**

The EPA/Corps' proposed rule purports to rely on the scientific conclusions of the EPA's draft Connectivity Report, which is currently still under review by the EPA Science Advisory Board (SAB). As we understand the current status of that review, the SAB is still questioning what proper criteria should be used for determining under which circumstances a connection amounts to a "significant nexus" for the purposes of establishing CWA jurisdiction.

The EPA has acknowledged publically that the SAB and the agency are still considering options for review of the adequacy of the science to support the proposed rule. Given the ongoing SAB review, and the fact that EPA has not yet determined how to review the adequacy of the science to support the proposed rule, we believe the proposed rule await the final SAB recommendations on the supporting science before the rule is allowed to move forward. We also believe that the public should have the opportunity to comment on the proposed rule after the SAB finalizes the scientific underpinnings of the proposal.





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Throughout the 300-plus page preamble to the proposed rule, the agencies ask the public to provide complex technical information regarding the proposed rule's scientific justifications. We believe the purpose of the SAB Panel review of the draft connectivity study was to evaluate the state of the science evolving around the connectivity of water bodies, and the public deserves the opportunity to respond at the conclusion of the review process. We also understand that the SAB will also provide an informal review of the proposed CWA rule, and we believe the public also deserves the opportunity to comment on this review as well.

**The proposed rule's impacts and implications across the many Clean Water Act programs has not been adequately analyzed or clearly communicated.**

The proposed rule will replace the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, including Section 404 discharges of dredge or fill material, the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the Section 401 state water quality certification process, and Section 303 water quality standards and total maximum daily load (TMDL) programs. We do not believe the agencies have truly considered or analyzed the complex implications that this proposed rule will have for the various CWA programs.

Analyzing the implications of the proposed rule will be complicated, and will require significant resources on the part of our membership to comment on these concerns. We believe these issues must be fully addressed by the agencies during the rulemaking process, explaining in detail how the agencies will deal with these programmatic impacts.

Again, we appreciate the Committee's continued oversight of this important rulemaking. If you wish to discuss any of these concerns, please contact me directly at (703) 548-0880 Ext. 102, or at [mmeeker@watereuse.org](mailto:mmeeker@watereuse.org).

Sincerely,

Melissa L. Meeker, Executive Director



June 10, 2014

The Honorable Robert Gibbs  
Chairman  
House Subcommittee on Water  
Resources and Environment  
Washington, D.C. 20515

The Honorable Timothy Bishop  
Ranking Member  
House Subcommittee on Water  
Resources and Environment  
Washington, D.C. 20515

Dear Chairman Gibbs and Ranking Member Bishop:

On behalf of the Waters Advocacy Coalition (WAC), I appreciate the opportunity to submit our concerns about the proposed “Waters of the United States” rule for the record of the June 11 hearing before the Subcommittee on Water Resources and Environment. WAC is an inter-industry coalition representing the nation’s construction, real estate, mining, agriculture, forestry, manufacturing, and energy sectors, and wildlife conservation interests. As WAC’s trade association members have worked with their respective members to identify how the proposed rule is likely to affect their ability to generate jobs and create economic activity, WAC’s concerns with the proposed rule have increased. Accordingly, we urge the Subcommittee and Congress to take action to halt the proposed expansion of federal authority under the Clean Water Act (CWA).

Under the proposed rule, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have crafted a complicated set of regulatory definitions, including new and poorly defined terms, based on ambiguous and untested legal theories and regulatory exclusions. The result is a proposal that expands the scope of waters protected under the CWA beyond those waters currently regulated. This could trigger additional permitting and regulatory requirements for both the regulated community and state regulators.

The proposal asserts jurisdiction over waters, including many ditches, conveyances, isolated waters, and other waters, that were previously under the jurisdiction of the states. The rule asserts that most waters categorically have a “significant nexus” to traditional navigable waters and then provides a catch-all category to sweep in any remaining waters by allowing the EPA or the Corps to establish a “significant nexus” on a case by case basis. The criteria for establishing a significant nexus is very low and equally ambiguous—“more than speculative or insubstantial effect....” The result will increase federal control over water and land, subjecting activities that might impact these areas to more complicated and layered reviews and potential citizen suits. This will substantially impact job creation, economic investment, and growth.

Moreover, the EPA and the Corps’ proposed rule redefines the fundamental term “Waters of the United States” (WOTUS) for all sections of the CWA: Sections 303, 304, 305 (state water quality standards), 311 (oil spill prevention), 401 (state water quality

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certification), 402 (effluent/stormwater discharge permits) and 404 (dredge and fill permits). At a minimum, this is likely to require substantial state resources to administer and issue additional permits, and to develop and/or revise water quality standards and total maximum daily loads (TMDLs), as third parties are likely to argue that they are required for all waters subject to the CWA. Third party actions will also almost certainly precipitate litigation, leading to further delays in project implementation and a climate of regulatory uncertainty and disorder. The EPA has not provided any meaningful analysis of the potential for impact on CWA programs. In fact, the economic analysis accompanying the rule downplays non-404 impacts, concluding that only an artificially small increase in jurisdictional waters will occur. Many questions remain about the definitions used in the proposal and the impacts to most CWA programs, leaving these to become known only after the proposed rule is finalized and implementation begins.

The regulatory changes suggested by the rule will have significant direct economic impacts on our sectors of the economy. For example:

- In light of the scope of the proposed jurisdictional expansion, it will be nearly impossible for private property owners, state and local governments and industry to use or develop public or private land containing water that is arguably subject to the rule's expansive jurisdictional reach without first obtaining a costly federal CWA permit. Many activities that could previously have been carried out under a nationwide general permit may no longer qualify, and regulated entities (and state counterparts) will be forced to obtain individual permits, which are far more costly, time consuming and administratively resource intensive. The costs alone of obtaining a Corps 404 permit are significant: averaging 788 days and \$271,596 for an individual permit and 313 days and \$28,915 for a nationwide permit—not counting costs of mitigation or design changes. “Over \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.”<sup>1</sup> This will have negative impacts on activities ranging from farming and ranching to energy production and critical infrastructure development, and the construction of affordable housing.
- Under the proposal, third parties could assert that features such as drainage ditches, stormwater ditches and water storage or treatment ponds, utilized by municipalities, states and industry to manage and convey water in order to protect jurisdictional waters, would now become jurisdictional waters. As a result, the continued use, care and maintenance of these features (*e.g.*, allowing sediment to settle out of stormwater, adding chemicals to adjust pH, dredging solids, pesticide application) could require federal permits. Likewise, conveyances used for collecting and directing stormwater such as green infrastructure (*e.g.*, roof gardens and permeable pavement) could be regulated as WOTUS, effectively forcing permittees to create federally jurisdictional waters on their property to meet other requirements of the CWA.

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<sup>1</sup> David Sunding and David Zilberman, “The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,” 2002

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- The proposed rule would subject private land conservation projects to added regulatory burdens and costs therefore creating a disincentive to landowners pursuing important and needed conservation projects that benefit watersheds, waterfowl and riparian habitats. The majority of wildlife habitat in the continental United States is on private land and there should be no disincentives to their improved conservation and management. Requiring landowners to obtain Corps permits for routine erosion control and soil stabilization work, including improving and protecting riparian areas, would reduce the number of those projects on private lands and habitat and wildlife may suffer.

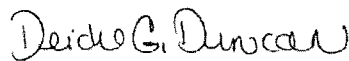
The EPA and the Corps have completed only a cursory analysis of the proposed rule's many implications for states, the regulated community, and for small entities. Furthermore, the agencies' unnecessary haste to complete the rulemaking has cut short the time necessary for stakeholders to collect data and comment on the agencies' economic assertions.

The rush to a final rule has also produced a proposal based on highly speculative, incomplete science, which EPA has itself admitted. Recently, an EPA representative, speaking on a teleconference of the agency's Science Advisory Board (SAB) reviewing EPA's draft report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, announced that "the agency is still trying to figure out how best to review the science." Notwithstanding EPA's confusion about how to interpret the underlying science, the agency, nevertheless has forged ahead to propose a rule.

Finally, we believe the proposal is inconsistent with congressional intent, the language of the CWA and Supreme Court precedent. Twice the Supreme Court has affirmed a limit to federal jurisdiction and rejected, first, the agencies' broad assertion of jurisdiction based on potential use of isolated waters by migratory birds and, second, the agencies' assertion of jurisdiction based on "any hydrological connection." Yet, the proposed rule defines jurisdiction as broadly as these theories rejected by the Supreme Court, and does so to such an extent that the agencies have to specifically exempt swimming pools and ornamental ponds from being considered "Waters of the United States."

A list of WAC members is attached. We encourage your continued oversight of the agencies' proposed rule, and appreciate your attention to our concerns. We urge you to stop the agencies from finalizing their proposed rule, and welcome the opportunity to discuss any of these concerns with you.

Sincerely,



Deidre G. Duncan

Attachment



**WAC Members:**

Agricultural Retailers Association  
 American Coke & Coal Chemicals Institute  
 American Exploration & Mining Association  
 American Farm Bureau Federation  
 American Forest & Paper Association  
 American Gas Association  
 American Iron and Steel Institute  
 American Petroleum Institute  
 American Public Power Association  
 American Road & Transportation Builders Association  
 Associated Builders and Contractors  
 The Associated General Contractors of America  
 CropLife America  
 Dairy Farmers of America  
 Edison Electric Institute  
 The Fertilizer Institute  
 Florida Sugar Cane League  
 Foundation for Environmental and Economic Progress (FEEP)  
 The Independent Petroleum Association of America (IPAA)  
 Industrial Minerals Association – North America  
 International Council of Shopping Centers (ICSC)  
 Interstate Natural Gas Association of America (INGAA)  
 Irrigation Association  
 NAIOP, the Commercial Real Estate Development Association  
 National Association of Home Builders  
 National Association of Manufacturers  
 National Association of Realtors  
 National Association of State Department of Agriculture  
 National Cattlemen's Beef Association  
 National Corn Growers Association  
 National Cotton Council  
 National Council of Farmer Cooperatives  
 National Industrial Sand Association  
 National Mining Association  
 National Multifamily Housing Council  
 National Pork Producers Council (NPPC)  
 National Rural Electric Cooperative Association  
 National Stone, Sand and Gravel Association (NSSGA)  
 Portland Cement Association  
 Public Lands Council  
 Responsible Industry for a Sound Environment (RISE)  
 Southern Crop Production Association  
 Texas Wildlife Association  
 Treated Wood Council  
 United Egg Producers  
 U.S. Chamber of Commerce