

November 12, 2014

VIA ELECTRONIC FILING AND ELECTRONIC MAIL

The Honorable Regina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
Department of the Army, Civil Works
108 Army Pentagon
Washington, DC 20310-0108

Re: Proposed Rule: Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (April 21, 2014); Docket No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The undersigned 375 groups from each of the 50 states, representing a broad range of businesses, industries, and commercial interests of every size, in every part of the country, write to express our strong opposition to the revised definition of “Waters of the United States” proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE) (collectively “the Agencies.”)¹ Along with many other affected interests, the undersigned groups believe they will be seriously and adversely affected by the revised definition, for the reasons explained in detail below.

At the most fundamental level, the proposal as written represents an unjustified expansion of Clean Water Act jurisdiction far beyond the limits of federal regulation explicitly established by Congress and affirmed by the courts. The proposal would, for the first time, give federal agencies direct authority over land use decisions that Congress has intentionally reserved to the States. It would intrude so far into traditional State and local land use

¹ 79 Fed. Reg. 22,188 (April 21, 2014).

authority that it is difficult to imagine that any discretion would be left to State, county and municipal governments.

Despite repeated assurances from the Agencies that the proposal is merely a non-substantive definitional change, the Agencies' proposal would subject countless ordinary commercial, industrial, and even recreational and residential activities to new layers of federal requirements under the Clean Water Act. This would happen solely because low-lying or wet areas on or near their properties would, for the first time, be defined as being jurisdictional. In addition, the unusually vague and confusing definitions the Agencies use in the proposal make it virtually impossible for businesses to even comprehend that they would have to meet federal—rather than State and local—requirements when they perform routine operations. Instead of creating more regulatory certainty for businesses, the introduction of terms like “significant nexus” and expansive new definitions of terms like “tributary” guarantees that many years of additional litigation will be necessary to delineate the boundaries of federal jurisdiction.

We believe that the Agencies have not demonstrated that this proposal—as written—is either necessary or desirable, particularly because such a sweeping expansion of federal authority would not actually result in new environmental benefits or increased regulatory certainty. While this revised definition is ostensibly intended merely to clarify the scope of federal jurisdiction, the proposal essentially rewrites the Clean Water Act to make EPA and the Corps a central authority that makes the key decisions on many kinds of land and water uses. Cooperative federalism, which has worked well in the water quality context for over 40 years, would be set aside as the Agencies commandeer State and local agencies to carry out federal directives.

The Agencies' proposed approach is contrary to the approach wisely adopted by Congress. The Agencies have neither the resources nor the on-the-ground capability to assume control of the nation's water infrastructure **and** associated land uses. If it were finalized, the Agencies' proposed rule would have profoundly negative economic impacts on business, States, local governments, and ultimately, on EPA and the Corps themselves. As the U.S. Supreme Court recently stated concerning EPA's assertion of expansive authority to regulate greenhouse gases from very small sources:

EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools and churches—and to decide, on an ongoing basis and without regard for the thresholds

prescribed by Congress, how many of those sources to regulate.²

All of the undersigned groups want clean water—and in many cases depend on it for their businesses to survive. They have supported efforts under the Clean Water Act to protect water quality. The proposed rule is not really about addressing threats to clean water, however. The proposed rule is really about the Agencies’ overreaching attempt to replace longstanding state and local control of land uses near water with centralized federal control.

In light of the overwhelming evidence that the proposed rule would have a devastating impact on businesses, States, and local governments without any real benefit to water quality, the Agencies should immediately withdraw the waters of the U.S. proposal and begin again. The current proposed rule is simply too procedurally and legally flawed to repair. The Agencies are not issuing this rule under a legally- or statutorily-required timetable, so they have ample time to start over, work with affected entities, including other federal, State, and local authorities, to develop consensus-based modifications to current regulations that protect waters, encourage economic prosperity, and are legally defensible. Any revision of the proposed definition and its underlying terms must be written in a way that is clear and understandable. EPA also must explain why such a revision is necessary and what environmental benefits, if any, the revision would yield.

I. BACKGROUND

The Agencies published the “waters of the United States” (WOTUS) proposed definition rule in the *Federal Register* on April 21, 2014.³ The Agencies’ stated purpose for issuing the proposal is to “clarify the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview*, *Rapanos v. United States*, and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.”⁴ The Agencies assert that the proposed rule would “enhance protection of the nation’s public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of ‘waters of the United States’ protected under the Act.”⁵

² *Utility Air Regulatory Group v. EPA*, 573 U.S. __ (2014).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

The Agencies cite the U.S. Supreme Court’s 2001 *SWANCC*⁶ and 2006 *Rapanos*⁷ decisions, which, as described in detail below, sharply limited the scope of federal jurisdiction over some waters. As a result of the two decisions, the Agencies have been obliged to evaluate the jurisdiction of individual waters on a case-by-case basis. The agencies assert that the proposed rule would allow them to avoid having to make these case-by case jurisdictional determinations so frequently.

The proposed rule is based in part upon EPA’s Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. On the date the Agencies published the proposed rule, the Report had not been reviewed by EPA’s Science Advisory Board. The Report is apparently intended to establish a scientific basis for the connectivity of more waters—including “waters” that might otherwise be viewed as remote or isolated—to traditional “navigable” waters under the CWA (rivers, bays, estuaries, etc.). The Agencies argue that the hydrologic, ecological, or chemical “connectivity” of these remote waters establishes federal jurisdiction. These waters, which are currently subject to only state and local jurisdiction, will become “waters of the U.S.” under the proposed rule.

The proposal retains the existing CWA definitions for “wetlands” and “adjacent,” but the Agencies would add the terms “neighboring,” “riparian area,” “floodplain,” “tributary,” and “significant nexus.” As discussed below, by itself or in combination with others, each of these terms has enormous regulatory significance. For example, in evaluating the impact of the proposal on its own operations, one manufacturer observed that:

[A]dditional acreage will likely fall under one or more of the proposed definitions for tributary, adjacent, neighboring, riparian, floodplain or other waters . . . One major concern is the incremental, cumulative nature of these proposed definitions. If an area isn’t a water body, it may be a tributary. If it is isolated and does not contribute direct flow, flow might nevertheless be indirect, the groundwater beneath it may be connected to a water body, or it might be in the floodplain, riparian area, or watershed and become significant when combined with other waters. It is the potentially unlimited nature of this definition, where very few limits exist, that causes concern.⁸

⁶ 531 U.S. 159 (2001).

⁷ 547 U.S. 715(2006).

⁸ Analysis of WOTUS proposal prepared by a manufacturing company (September 9, 2014).

Despite industry’s “major concerns,” the Agencies contend that “the scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations.”⁹ Based in part on this assertion, the Agencies certified or otherwise promised that (1) the proposed rule would not have a significant economic impact on a substantial number of small entities, (2) it would not impose new Federal mandates on State, local, or tribal governments, and (3) it would not have any substantial direct effects on the States.

II. UNDERSTANDING THE REAL-WORLD IMPACTS OF THE AGENCIES’ PROPOSED “WATERS OF THE UNITED STATES” RULE

Despite the Agencies’ written and oral assurances that the proposed rule would have no substantive regulatory impact,¹⁰ and that it would actually reduce the amount of federally jurisdictional areas, all of the available evidence shows the opposite to be true.¹¹ As written, the proposed WOTUS rule gives businesses, institutions, and commercial interests grave concerns about the real-world impacts it would impose.

⁹ 79 Fed. Reg. at 22,189. EPA’s comparison of current and potentially jurisdictional federal waters is based on the difference between the current WOTUS definition (last codified in 1986), and the proposed definition. However, the jurisdictional boundaries of the 1986 definition have been significantly limited by the U.S. Supreme Court in *SWANCC* and *Rapanos*. Therefore, any comparison of the jurisdictional scope of the proposed definition to the theoretical scope of the original 1986 definition is both misleading and irrelevant in the wake of these key Supreme Court decisions.

¹⁰ *See, e.g.*, Testimony of Robert Perciasepe, EPA Deputy Administrator, before the House Small Business Committee (July 30, 2014) (“it [the WOTUS rule] doesn’t directly impact large businesses or small businesses in any direct way”); Statement of EPA Administrator Gina McCarthy made on farm tour in Missouri, as reported in FarmPolicy.com post (July 10, 2014) (“this [the WOTUS rule] has been characterized as the largest land grab ever in the United States. We’re not regulating land. We’re simply trying to protect drinking water, knowing that’s important for agriculture.”). These no-impact assertions appear to contradict the Agencies’ 2003 Advance Notice of Proposed Rulemaking (ANPRM) soliciting comment on a revised WOTUS definition designed to restore federal jurisdiction over isolated waters in the wake of the *SWANCC* case. *See* 68 Fed. Reg. 1,991 (January 15, 2003). In the 2003 ANPRM, the Agencies listed potentially regulated entities as including “State/Tribal governments,” “local governments,” “Industrial, commercial, or agricultural entities,” and “land developers and landowners.” *Id.* at 1,992. The Agencies have not demonstrated that these same entities would not be regulated under the proposed rule.

¹¹ Even if the Agencies’ contrary interpretation of the scope and effect of the rule had some rationale, the textual definitions and language in the proposal will have to be applied and interpreted by businesses, State and local governments, lawyers, interest groups, and—ultimately—the courts.

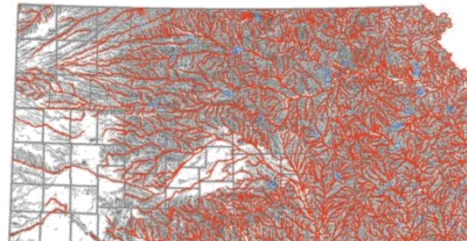
EPA’s Own Maps Show Vastly Expanded Federal Jurisdiction Over Waters

Significantly, **EPA itself** has developed detailed maps that indicate vastly expanded areas of federal Clean Water Act jurisdiction under the proposed WOTUS rule. These detailed maps, developed by EPA and the U.S. Geological Survey, were released to the public by the House Science Committee on August 27, 2014.¹² The maps indicate more than **8.1 million miles** of rivers and streams across the 50 states could be included under the revised WOTUS definition.¹³ This sharply contrasts with a January 2009 EPA report to Congress that estimated **3.5 million miles** of rivers and streams categorized as WOTUS.¹⁴ Based on these new EPA maps, the proposed rule represents a potential expansion in federally jurisdictional stream miles of at least **130%**. This increase is over and above the expansion of federal jurisdiction to “other” or “adjacent” waters under the proposal.

Likewise, analyses by the States of their own waters reveals that the revised definition would increase the amount of stream miles under federal jurisdiction by orders of magnitude. For example, the state of Kansas has estimated that the inclusion of “ephemeral” streams as “waters of the U.S.” would increase the amount of jurisdictional stream miles from 32,000 miles to 134,000 miles, as shown below, an increase of more than **400%**.¹⁵



Current WOTUS Streams in Kansas



WOTUS Streams Under Proposed Rule

¹² Press Release, House Committee on Science, Space & Technology, “Smith: Maps Show EPA Land Grab” (August 27, 2014) (the map hyperlink is embedded in the release).

¹³ EPA and the Corps consider these revised maps to be good indicators of the extent of federal jurisdiction. The agencies noted that “[w]hen considering whether the tributary being evaluated eventually flows to [a navigable] water, the tributary connection may be traced using direct observation or **U.S. Geological Survey maps**, aerial photography or other reliable remote sensing information, or other appropriate information.” 79 Fed. Reg. 22,202 (April 21, 2014) (emphasis added).

¹⁴ EPA Office of Water, National Water Quality Inventory: Report to Congress, EPA 841-R-08-001 (January 2009).

¹⁵ See Letter to Nancy Stoner, Acting Assistant Administrator for Water, U.S. Environmental Protection Agency from Sam Brownback, Governor of Kansas (July 14, 2011) (“For Kansas, we can easily see where this [the WOTUS definition] would bring up to 100,000 miles of ephemeral drainages under the purview of the Clean Water Act and subject those drainages to its numerous mandatory requirements – requirements producing little if any demonstrable improvement in water quality.”).

The expanded jurisdictional areas depicted in maps prepared by EPA and the States, respectively, are based primarily on the Agencies' proposal to define "ephemeral" streams—those that only flow after rains, perhaps only once every few years—as waters of the U.S. Ephemeral streams are currently regulated in the majority of States as "waters of the State."¹⁶ Regulating these waters (which look more like land than "waters" to most people)—and any small wetlands and ponds "adjacent" to them—as WOTUS would be one of the largest regulatory expansions in history.

The Rule's New and Existing Definitions Will Have a Huge Impact on Ordinary Business Activities

The proposed rule adds several new definitions that, although critical to understanding the true scope of the rule, are so vague as to allow virtually any interpretation of their limits. These definitions include "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus." These definitions work in conjunction with one another so that if an area channels water and contributes flow (directly or indirectly, in any amount) to downstream waters, it is a *tributary*. If the area does not contribute flow, but holds water enough (which may not be much) to be deemed a "wetland" or pond or other water feature, it may be considered jurisdictional due to shallow subsurface water connection to a water body, or because it lies in a *floodplain* or *riparian area*, or because it may have a *significant nexus* when combined with all similar features in the region. Thus, it will often be impossible for landowners and businesses to determine whether small features on their property—which may not even look like waters—are WOTUS under the revised definition. All that is certain is that most any occasionally wet feature *could* be deemed WOTUS.

Thus, the Agencies' assertion that the change in the WOTUS definition has no substantive effect is clearly erroneous. The revised definition will have the immediate impact of greatly expanding federal jurisdiction over waters that are currently regulated by the States. In *National Association of Home Builders v. Army Corps of Engineers*,¹⁷ the D.C. Circuit Court of Appeals found that a revised Clean Water Act definition had the effect of restricting developers' eligibility for general wetland permits, forcing them to apply for more burdensome and costly individual permits in many more situations. The court found that the developers had suffered a substantive injury from the definition change. The proposed WOTUS definition rule would have

¹⁶ The Association of State Wetland Managers, "Report on State Definitions, Jurisdiction, and Mitigation Requirements in State Programs for Ephemeral, Intermittent and Perennial Streams in the United States" (April 2014).

¹⁷ 417 F.3d 1272 (D.C. Cir. 2005).

precisely the same kind of immediate adverse effect on a wide variety of business activities, as described below.

Moreover, although the proposed rule is ostensibly intended to simply clarify the scope of federal jurisdiction, the rule will federalize a much larger universe of clean water programs now run by States and localities:

- Stormwater programs run by municipalities will be required to impose more stringent controls on facilities with parking lots, storage pads, or other large paved areas. These facilities would become subject to more stringent stormwater management requirements, potentially including the requirement to obtain National Pollutant Discharge Elimination System (NPDES) permits for the first time, and to treat their stormwater before it leaves the property. This is likely to impact grocery stores, shopping centers, big box stores, stadiums, airports, schools, churches, hospitals, and many other kinds of commercial and institutional facilities;
- The revised WOTUS definition would require businesses to update and expand their Spill Prevention, Control, and Countermeasure (SPCC) Plans under section 311, and their stormwater discharge permits/plans under section 402;
- The expansion of jurisdictional waters of the U.S. is also likely to result in a greater number of “impaired” federal waters under section 303, with additional burdens on States to evaluate and list these waters, and a greater likelihood that facilities with runoff will fall under Total Maximum Daily Load “budgets” that may significantly impact facility operations; and, Expanded federal jurisdiction over land features such as ephemerals and remote wetlands will trigger section 402 discharge and section 404 dredge and fill permit requirements for the first time for many activities. These requirements would apply to much more than just work that takes place in wetlands, impacting many other activities.

Real-World Impacts on Specific Industries

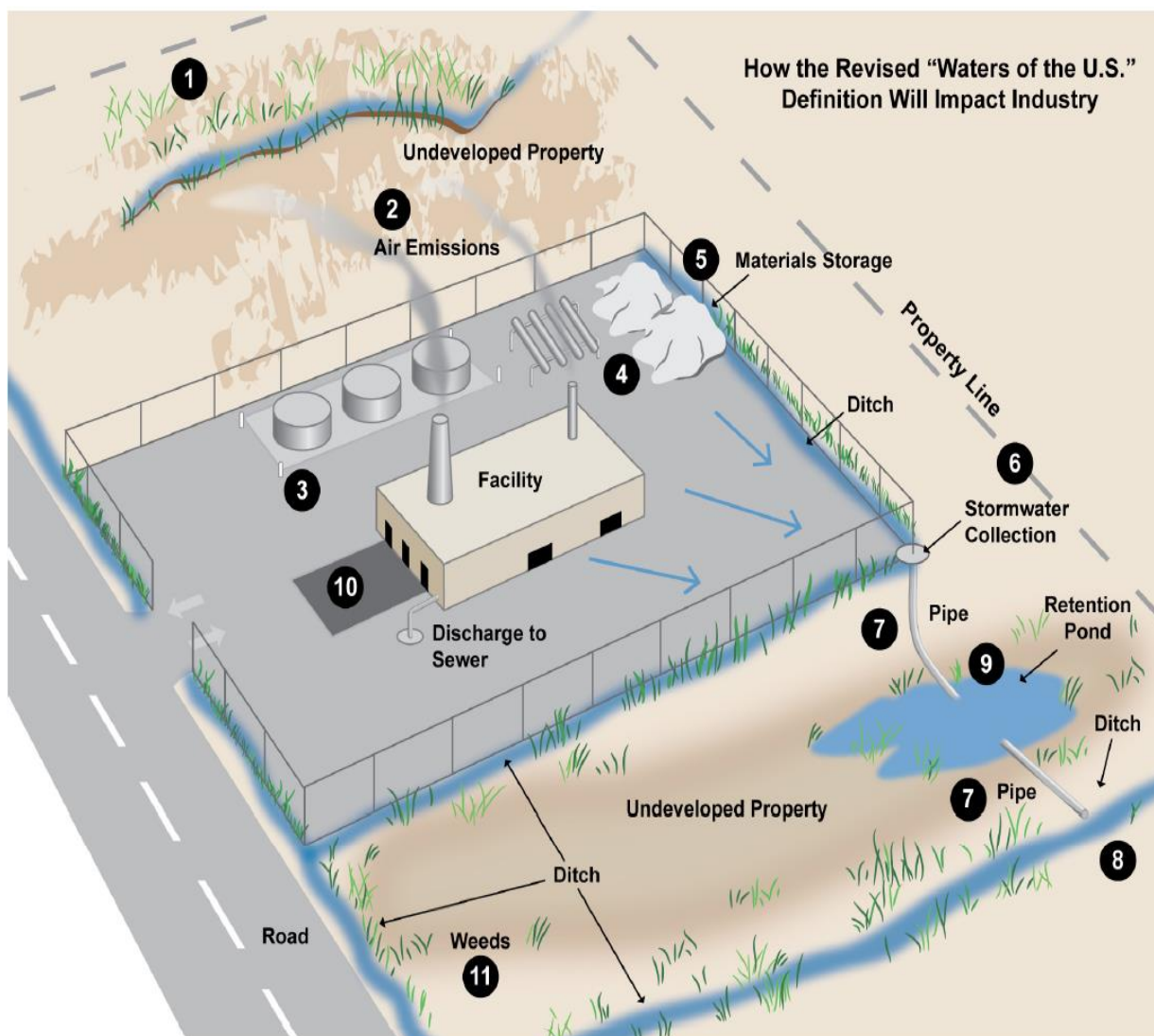
If the proposed rule were finalized, virtually any business that owns or operates a facility or has property could be adversely affected, particularly if it has ditches, retention ponds for stormwater runoff, fire/dust suppression ponds (since dust suppression is usually required under a facility’s air permit), or other surface impoundments on site. Moreover, unlike some agricultural water features, industrial ditches and impoundments are not exempted from federal permitting requirements under section 404. The

proposal would also effectively narrow even the exclusions for certain agricultural features.

The real-world impacts of the Agencies' proposed rule can be illustrated using a diagram of a typical industrial/commercial facility. Each number on the diagram corresponds to a potential new WOTUS impact under the proposed rule:

Diagram Illustrating WOTUS Impacts on Businesses/Facilities

Diagram © 2014 U.S. Chamber of Commerce



PERMITTING IMPACTS ON INDUSTRY FROM EXPANDED “WATERS OF THE UNITED STATES” DEFINITION

Many common situations/activities at industrial and commercial facilities could trigger Clean Water Act requirements because of the expanded “waters of the U.S.” (WOTUS) definition:

- ① When it rains heavily, water ponds in the vacant areas next to the facility and may run off into ditches. If these areas can be classified as “waters” (which the agencies have not proposed to define, but which could be stretched to include “ephemeral ponds” or “ephemeral pools”), the proposed rule would regulate them as “adjacent” waters or “other” waters subject to the Clean Water Act. Water (or other liquids, dust, soil, ash, etc.) moving from the facility onto these areas can trigger the requirement to get a section 402 or 404 permit; water quality standards under section 303 could apply, as well as more stringent spill control requirements under section 311. Also, the facility owner would have to get a section 404 permit to develop these vacant areas.
- ② Advocacy groups contend that air emissions from facilities that leave deposits, such as on the vacant areas (or other waters) in this example, will require a section 402 or 404 permit.
- ③ Oil storage tanks are currently subject to section 311 spill prevention requirements. More stringent requirements will be required under the revised WOTUS definition, because a spill can affect a far larger universe of jurisdictional “waters” near the facility (ponds, ditches, low lands).
- ④ The on-site storage of materials that drip over time onto paved areas will result in more stringent and extensive stormwater management requirements under section 402.
- ⑤ The on-site storage of materials that blow onto vacant areas (or are carried by rain in the facility’s stormwater) can trigger new/more stringent section 402/404 permitting requirements.
- ⑥ The stormwater collection point can, for the first time, itself be treated as a jurisdictional water and become subject to a section 402 permit for discharges from the facility.
- ⑦ The stormwater conveyance pipe may be classified as a “tributary” under the new WOTUS definition.
- ⑧ The ditches at the facility are likely to be regulated as “tributaries,” “adjacent waters,” or “other waters.” Maintaining these ditches, including clearing vegetation, removing silt, and stabilizing banks, will require a section 404 permit. Stormwater discharges into the ditches may require section 402 permitting or, in combination with other discharges, trigger area-wide TMDL requirements under section 303.
- ⑨ The retention pond may also be regulated as a tributary, adjacent water, or other water. Clearing vegetation, removing sediment, stabilizing the pond banks, or draining the pond can trigger a section 404 permit, and discharges into the pond may require a section 402 permit.
- ⑩ Materials used inside the facility (e.g., metal dust) are tracked outside via the loading dock and mixed with stormwater, triggering more stringent section 402 requirements. Routine dust suppression programs and/or vehicle washing will make this problem worse.
- ⑪ Control of weeds growing near ditches and impoundments, whether through mechanical techniques or herbicide applicators, can trigger section 404 or 402 permitting requirements.

Impacts from the WOTUS rule on specific industries¹⁸ include:

- *Manufacturers* – At one company’s facilities in the Midwest, projects such as building a loading dock and levelling a soil pile to reduce erosion were previously evaluated by the Corps. They were determined to be not subject to federal jurisdiction under the current definition. Under the proposed rule, these same areas are likely to be subject to federal permitting, increasing the potential for delay and possible denial. Moreover, other facilities report they will face increased federal jurisdiction because of their proximity to wetlands on or near the site.

Any ditch that contributes flow to these waters—directly or indirectly—becomes a tributary, and its use and management is regulated, which can trigger section 404 permits. Besides the cost and time required for the permit itself, companies may be required to comply with costly and resource-intensive mitigation/restoration requirements. In some cases, the cost of mitigation will exceed the cost of the project itself.¹⁹ These facilities are also likely to face more stringent federal requirements under sections 402 and 311. Companies anticipate that their ditches next to service roads will be automatically regulated as tributaries. At these types of facilities the roadways function as corridors connecting the plant to other areas. Maintenance and operation of these kinds of vital roads will be made more difficult. Also, work that is necessary to improve these roads may be delayed or prevented by more stringent permitting.

- *Mining operations* – A longwall coal mining company in the Northeast reports that it has ditches and culverts that are connected to other ditches that eventually flow to streams. While the company has a robust stormwater management monitoring and management

¹⁸ These impacts have been estimated using the available information about how the proposed WOTUS rule would (or, based on pressure from advocacy groups, *could*) be interpreted by the Corps and EPA. While the proposal is complex and confusing, the broad scope of the written definitions would easily allow for the expansion of federal jurisdiction in the ways described in this comment letter.

¹⁹ A business owner who wants to do a project in WOTUS must design the project to (1) avoid adverse impacts if possible, (2) minimize impacts if they can’t be avoided, (3) compensate for the impacts. If adverse impacts can’t be avoided, compensatory mitigation is required, and the land-owner or project sponsor must restore, create, enhance, or preserve wetland areas. The mitigation generally must be completed in the same watershed as the impacted area. The most common method of satisfying the compensatory mitigation obligation is to buy credits from a pre-approved wetlands mitigation bank. The amount of credits needed to offset the purported adverse impacts of a project is determined by the Agencies, using a formula that considers the amount and quality of impacted WOTUS areas. Wetland mitigation credits are already in short supply in arid regions and in watersheds with significant development activities. This means that even a small project that disturbs a few acres may have to buy credits at a 2:1 or 3:1 ratio. Mitigation credits typically cost anywhere from a few thousand dollars per credit to many thousand dollars per credit.

program, it has never had to obtain section 404 permits for its ditches, culverts and impoundments. Because the company stores coal, byproducts, and other materials that contribute sediment to the facility's stormwater, the company expects that it would have to obtain section 402 NPDES and section 404 permits if the WOTUS definition is finalized.

WOTUS Would Hit Building Products Manufacturers Hard

Building products manufacturers are located in every part of the country. Materials used in their products like sawdust, clay, and dust, can get into their stormwater and, ultimately, into their ditches. These ditches must periodically be cleaned out so they can flow properly. Currently, most of these ditches are regulated by the States through the section 402 stormwater program. Under the revised WOTUS definition, they would likely have to obtain section 404 permits to remove clay sediment from these ditches when maintaining them. Requiring building products companies to get section 404 permits for ditch maintenance would be a costly, time-consuming mandate that puts additional economic stress on the industry (as well as on the construction industry) while doing nothing to actually improve water quality.

Moreover, building products plants are likely to face much tougher stormwater management requirements under the WOTUS proposal. Facilities that have sediment in runoff would be more likely to have to get section 402 point source permits and treat their runoff. This has already happened at a plant in the Northeast, where the state agency's abrupt reinterpretation of its stormwater program resulted in a section 402 permit and treatment being required before rain water could be pumped out of an onsite clay pit. Despite the fact that the rain water was **already** the quality of drinking water, the company was required to treat it before allowing it to flow off-site. This struggling industry should not be required to waste precious resources to install treatment technologies that yield no environmental benefit.

- *Mineral processing* – A mineral processor in the West has a facility that processes bentonite. Although the State carefully regulates sediment in the plant's stormwater, the company has never had to obtain section 404 permits to remove sediment from its on-site ditches

and impoundments. The revised WOTUS definition will subject the facility to federal permitting requirements. The federal regulation of ditches beside roads also makes road maintenance more complicated and subject to delays. Moreover, facility expansion projects will be much more likely to require federal permits, including a section 404 permit, which would also likely trigger extensive environmental project reviews by multiple federal agencies.

- *Asphalt plants* – Asphalt plants typically store process materials and recycled asphalt on site. A company in the Southeast reports that they have ditches and impoundments that are currently regulated under the stormwater program. As part of that program, the asphalt plant must treat their stormwater by running it through an oil-water separator. These plants will probably have to obtain NPDES permits under the revised WOTUS definition, as well as section 404 permits for the maintenance work that is routinely done in their ditches and impoundments.
- *Pulp and paper plants* – A pulp and paper company in the West has several surface impoundments at its mill that can flow into bigger waterbodies during heavy rains. Routine maintenance and operations in or near these impoundments would likely trigger federal permitting requirements under sections 402 or 404 under the new WOTUS definition.
- *Paint manufacturers* – These facilities often have ditches that originate at a facility and flow into offsite ditches. They also typically have impoundments for stormwater and fire control. These ditches and impoundments are currently subject to local stormwater management plans, but may fall under federal permitting requirements if the WOTUS definition becomes final. Paint plants are also likely to need to have more extensive SPCC programs for the raw materials that they use and store onsite.

WOTUS: Coming to a Store Near You!

Retailers, shopping centers, and other businesses with paved parking lots will be more likely to be required to treat their stormwater/snowmelt runoff before it leaves their property. For example, “big box” retail stores with garden centers or vehicle maintenance services are particularly likely to face more stringent Clean Water Act permitting required by EPA and the Corps. In some cases, these businesses would be required to obtain NPDES permits for the first time for discharges to WOTUS.

- *Electric generation, transmission and associated activities* – The proposed rule will likely have negative impacts on electric utilities of all sizes by (1) delaying critical electric transmission line projects, thereby affecting grid resiliency, (2) hindering generation from domestic sources of energy and, (3) delaying the restoration of former utility sites. In order to streamline permitting of power line projects, utilities currently rely on the Corps’ nationwide permits—in particular NWP 12 for utility lines. Utilities may construct, maintain, and repair power lines, access roads, poles, towers, substations in or crossing WOTUS so long as less than 1/2 acre of water is affected. But NWP 12 can be used only if each “single and complete” project (separate and distant crossing) does not result in the loss of more than 1/2 acre of WOTUS. Utility companies are often able to configure transmission lines to avoid most wetland and stream impacts, and thereby stay within the 1/2 acre limit. But once ditches, ponds and other features – often found on rural land spanned by transmission lines – are considered jurisdictional, staying within NWP 12 limits will often be uncertain if not impossible. Utilities are concerned that individual crossings would no longer be evaluated separately, (not to mention corresponding concern associated with the treatment of adjacent waters in floodplains and riparian areas, and the scope of “other waters”) and the construction, maintenance or repair of any of these structures would require a far more expensive and time-consuming individual section 404 permit – a significant new burden with little or no corresponding environmental benefit.

Moreover, the infrastructure needed to construct and maintain transmission lines requires construction of access roads to bring equipment to the poles/towers. These access roads and related ditches are likely to trigger section 404 permitting, which in turn may trigger National Environmental Policy Act (NEPA) review and Endangered

Species Act (ESA) concerns. Expanding the amount of federal jurisdictional areas under the revised WOTUS definition makes these siting problems both more common and more difficult to navigate. In addition, utilities would likely also need section 402 NPDES permits to use herbicides to control vegetation within the line's right-of-way if there is a possibility for the herbicide to get into a WOTUS.

As the electric utility industry faces the issue of connecting more remote generation sources to the grid, projects will require the siting of hundreds of miles of new transmission lines. Both the generating facility and its transmission lines would face added costs and delays from the revised WOTUS definition described above. Significant costs and delays will result from uncertainty about whether ditches, swales and other features—either on the plant site itself or crossed by new transmission lines or pipelines that are often many miles long and cross various landscapes are jurisdictional.

Finally, the WOTUS rule would hamper efforts to restore former utility sites and make them available for other productive uses. These restoration efforts typically require cleaning and filling onsite ditches, canals and treatment ponds, as well as grading and other groundwork. These features often have not been treated as jurisdictional in the past, but may be deemed WOTUS under the proposed rule. Thus, the work would require a section 404 permit and burdensome compensatory mitigation. The added costs and delays could result in companies electing to mothball rather than restore sites.

- *Energy development companies* - The proposed definition's emphasis upon the “significant nexus” of a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest jurisdictional water), means that more hydraulic fracturing operations will likely have to obtain section 404 permits. Hydraulic fracturing operations now often occur under Nationwide Permits 12 (utility line activities) and 39 (commercial and institutional developments), which authorize certain limited activities. NWP 12-authorized activities must not result in impacts greater than 1/2 acre of waters of the U.S. for each single and complete project. With a more expansive definition of WOTUS it is likely that previous general permit authorizations would now require an individual permit. NWP 39 authorized activities also must not result in greater than 1/2 acre of loss of non-tidal waters of the U.S. If an individual 404 permit is required, practicable alternatives to the

dredging operation must be assessed. Under the expanded WOTUS definition, such alternatives will far be more difficult to identify.

Moreover, under the current regulations an operator does not need to obtain a permit from the Corps when building an access road that crosses a stream if the disturbance is less than one-tenth of an acre per crossing. Under the proposed WOTUS definition these crossings would likely require permits, significantly impacting oil and gas operations in these areas. Broadening the regulations to include “waters located within the riparian area” and “all adjacent waters in a watershed (with) significant nexus with their traditional navigable water” potentially expands WOTUS jurisdiction to include the drainage area of a tributary – from ridge top to ridge top on either side of a stream.

Trying to Make Sense of the WOTUS proposal

Energy companies have observed that it is very difficult to read the Agencies’ proposal and understand the extent of a “floodplain” when the concept is so poorly defined. The result of these many definitional changes effectively means any stream crossing and many well pads could require a nationwide section 404 permit, and, possibly, an individual permit. The costs associated with these potential new permitting requirements will be significant. These would likely result in extended permitting timelines and could render many projects uneconomical, particularly for small energy companies.

The proposal’s new emphasis upon adjacent waters and natural/manmade ditches means that more operations will likely be required to maintain a SPCC plan for the first time. Un-diked areas are required to have drainage systems to flow into ponds, lagoons, or catchment basins to retain oil and return such runoff to the facility. Under the proposed rule, if such catchment basins are within areas subject to periodic flooding, they may be adjacent to an “other water,” and SPCC plans could be required to be implemented or renewed.

WOTUS and Energy Projects in the High Mountain West

Any energy company operating where project sites are located “adjacent to” or “neighboring” an ephemeral or intermittent stream will likely find itself within this new expanded framework of WOTUS. Even in arid regions of the West in the vicinity of depressions that are dry a majority of the time, but which flow in heavy rains, projects could now be caught within the redefined WOTUS and subject to additional permit obligations.

Assessment of the effect on the chemical, physical, or biological integrity of such waters may be required to determine permitting obligations. While the agencies assert that the proposal will have no effect on permitting, if the landscape of jurisdictional waters is expanded, additional CWA permits will be needed that would delay and potentially halt energy projects.

- *Municipal Water Utility* – Municipal water utilities have to have section 404 and section 402 permits and in some instances the use of these permits can implicate the need for a section 401 water quality certification from the state. Western municipal utilities and water providers are interested in assisting EPA in pursuing “green infrastructure” options for stormwater control. 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.”

Killing Green Projects?

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 \$638 million pump-back reuse project which Aurora uses to recapture its treated re-usable return flows downstream of Aurora and, utilizing a thirty-four mile pipeline, three pump stations, and a state-of-the-art water treatment plant, deliver potable water back to its customer base. Aurora, 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 \$2 million 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 Aurora employed some re-design efforts and micro-tunneling to avoid traditional navigable waters, it nevertheless 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.

Under the proposed revised WOTUS definition, the Aurora project would be unlikely to avoid jurisdictional “waters of the U.S.,” triggering additional federal permits. Obtaining these permits would be much more costly and time-consuming, making it far less likely the project would have gone forward.

- *Sand, Stone, and Gravel Operations* - Aggregates, such as sand, stone, and gravel, are the chief ingredient in asphalt pavement and concrete. They are used in nearly all residential, commercial, and industrial building construction and in most public works projects, including roads, highways, bridges, dams, and airports. Many aggregate deposits were created by water, so the deposits are often located near water. The availability of future sources of high quality aggregates is now a significant problem in many areas of the country, and permitting issues have made the problem more acute. This proposed rule will make matters worse. A change in what is considered jurisdictional can have a significant impact on aggregate reserves, which affects the life of facilities and delays the start-up of new sites. The concern is not only that these facilities will face more uncertainty and significant new costs, but that other industries will also be affected. Without a supply

of readily available aggregates, the construction of highways, public works, and residential and commercial building projects would be seriously impacted.

- *Road Construction/Maintenance* - Major linear transportation projects such as roads, highways, bridges, or transit systems, can take years, if not more than a decade, to complete. Although only certain entities are involved in the financing and construction of these projects, almost all other surrounding entities are positively impacted and benefit from these projects.²⁰ In order for these projects to move forward, planners need to know that permits received at the beginning of a multi-year construction process will be valid throughout the entire time the project is being built. Further, planners also need to know that the specific conditions and mandates in a particular permit are not going to change after the permit is issued. The prospect of validly-issued permits being rescinded because of reinterpretation in the scope of federal jurisdiction, or the inability to obtain permits in the first place, are of great concern to potential investors. The expansion of jurisdictional waters under the WOTUS proposal would greatly exacerbate this uncertainty problem.
- *Landfills* – Landfills are highly regulated and face many siting restrictions that limit their placement. They serve a vital function in integrated waste management. Rising as a mound above ground with an impermeable liner beneath, they are constructed with numerous ditches and swales both on and around the landfill to convey stormwater off the hill. At times, these ditches and swales drain to stormwater retention or detention ponds designed to retain and release the flow based on local conditions. The ponds can be utilized for stormwater control, as fire ponds, and for sediment control. In order to operate as designed, routine maintenance of ditches, swales and the artificial ponds is necessary. However, these ditches, swales and ponds, not currently subject to CWA permitting, could become jurisdictional because they ultimately drain to waters of United States. As a result, landfills, already subject to intense public scrutiny, could become the target of unwarranted citizen suits filed as a result of this rule.
- *Homebuilders and Parties in Real Estate Transactions* - The uncertainty created by the WOTUS rule would also impact homebuilders and persons involved in real estate transactions.

²⁰ According to the Federal highway Administration, for every \$1 billion spent on highway and bridge improvements supports almost 28,000 jobs.

Homebuilders would face the problem of not knowing whether the property they intend to build on is actually WOTUS. The risk of building in a WOTUS without a section 404 permit is severe,²¹ and developers would have much more difficulty finding non-WOTUS areas to build in. Many properties that are not now WOTUS would become effectively off-limits to homebuilders and other developers. Moreover, as costs, regulatory burdens, and delays increase, the small businesses that make up a majority of the home building industry will face intense competition. This can include paying higher prices for land or purchasing smaller parcels, redrawing development or house plans, and/or conducting compensatory mitigation. All of these adaptations must be financed by the builder and ultimately results in a combination of higher prices for the consumers and lower output for the industry. 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.²² Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant, ranging from and estimated \$24,989 to \$49,207 per acre nationwide.²³

Because builders and developers are generally ill-equipped to make jurisdictional determinations under the CWA, they will have to hire outside consultants and seek jurisdictional determinations from the Agencies to ensure they are not disturbing land near a WOTUS. The resulting increase in the number of jurisdictional determination requests, across all industries, will create longer permitting delays as the Agencies are flooded with paperwork. In addition, because many federal statutes tie their approval/consultation requirements to those of the CWA, the builder will have to obtain approvals from other agencies – under laws including the Endangered Species Act and National Historic Preservation Act.

²¹ See, e.g., *Sackett v. EPA*, 566 U.S. ___, 132 S.Ct. 994 (2012) (property owner who planned to build home and cleared land received Compliance Order from EPA asserting that the property was jurisdictional wetlands in which the owner had placed illegal fill material. The property owner was ordered to restore the site to its original condition and pay up to \$75,000 per day for the illegal discharge of pollution.).

²² Sunding, David L. and Zilberman, David, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process. *Natural Resources Journal*, Vol. 42, No. 1, Winter 2002. At 81. Available online:

<http://are.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf>

²³ EPA, Economic Analysis of Proposed Revised Definition of Waters of the United States, at 12 (March 2014), <http://www.regulations.gov/#!documentDetail:D=EPA-HQ-OW-2011-0880-0003>.

Moreover, in the affordable housing sector even relatively small price increases can have a major impact on low to moderate income home buyers. As the price of a 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 the National Association of Home Builders 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.²⁴

Similarly, current real estate owners who wish to develop or sell their land would face new restrictions on the use or sale of their land if newly jurisdictional areas are created by virtue of the WOTUS rule. Even now, a new determination that a property contains jurisdictional waters will reduce the value of real estate. A recent example is instructive of a property seller in the West who had executed a sales contract with a buyer when a Jurisdictional Determination letter from the Corps arrived. The buyer backed out of the sale and the owner was unable to sell his property. Such situations—created because of a change in the WOTUS definition—could be repeated all across the country, destroying the value of thousands of properties by virtue of administrative fiat.

- *Railroads* - The revised WOTUS definition would have a profound impact on the nation's railroads. Rail plays a major role in the American economy, moving more freight (39.5%) than any other method. Freight rail companies must maintain a network of 140,000 miles of track,²⁵ along with associated rights-of-way, ditches, bridges, tunnels, switching equipment, poles, rail yards, and maintenance facilities. Railroad ditches may be WOTUS under the proposed rule even if they are dry nearly all of the year, or are not hydrologically connected to a traditional WOTUS. As one company has noted, “we have thousands of miles of ditches which could suddenly become subject to onerous regulation with absolutely no benefit to the environment.”

Routine track bed maintenance, ditch/culvert maintenance and clearing, or the repair of bridges or other crossings often currently do not require any permit or fall into a Nationwide Permit. Projects with

²⁴ NAHB, “State and Metro Area House Prices: the “Priced Out” Effect” (August 2014).

²⁵ U.S. Department of Transportation, Federal Railroad Administration, “Freight Rail Today” available at <https://www.fra.dot.gov/Page/PO362>.

any land disturbance that includes a ditch are much more likely to trigger a “dredge and fill” permit, and specifically an individual permit instead of a Nationwide permit under section 404 of the CWA. Railroad companies will have to incur the cost and project delays of many more of these permits—which EPA itself has estimated to have a median cost of \$155,000.²⁶

- *Air emissions from industrial plants* - In recent years, EPA has argued that a point source discharge occurs under the Clean Water Act when an industrial plant or other facility vents or emits dust or other materials to the ground outside, where they are carried by rainfall or snow runoff into jurisdictional waters. In EPA’s view, the facility (which is itself the point source) makes a regulated discharge when it exhausts dust or other airborne materials from an enclosed facility to the ground where rainwater carries it to receiving waters. Under the proposed rule, in many cases EPA would not even need to show that stormwater has carried materials to a current WOTUS. Instead, by regulating parts of the facility grounds as ephemeral tributaries or adjacent waters, the agency may claim an unlawful discharge simply by showing that air emissions have been deposited to the on-site features themselves.
- *Agriculture* – Agriculture is a diverse, land-intensive and water-dependent industry. Farmers and ranchers need adequate supplies of water for growing plants and raising animals. For this reason, farming and ranching tend to occur on lands where there is either plentiful rainfall or adequate water available for irrigation through canals and ditches. It is not surprising that America’s farm and ranch lands are an intricate maze of ditches, ponds, wetlands, and ephemeral drainages running in and around farm fields and ranchlands. Consequently, with the exception of very narrow section 404 exemptions, regulating drains, ditches, stock ponds, and other low spots within farm fields and pastures as “navigable waters” would mean that *any* discharge of a pollutant (e.g., soil, dust, pesticides, fertilizers and “biological material”) into those ditches, drains, ponds, etc. will be unlawful without a CWA permit. This will likely result in a drastic increase in permitting requirements for farmers seeking to plow through and generally farm ephemeral drains that cross through productive farmland. More farmers will need to obtain NPDES permits for pesticide applications on croplands with ephemeral drains and ditches, or lose crop acreage to avoid all of the newly deemed “navigable

²⁶ EPA and U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014) at 12.

waters.” It is unknown how the agencies will respond to farmers’ need to apply fertilizers to the wet spots and drains in farmlands, since fertilizer is undoubtedly a “pollutant” that cannot be discharged to any “navigable water” without a permit.

Real-World Impacts on the States

Like businesses, States would face a very heavy burden under the WOTUS proposal:

- States will be immediately responsible for developing and issuing tens of thousands—maybe hundreds of thousands-- of new and revised NPDES point source permits to sources under section 402;
- States will also be required to establish water quality standards under section 303 for all newly regulated waters—including potentially 4.6 million miles of “ephemeral” tributaries, and innumerable small wetlands and ponds. The states will be required to certify that Federal actions meet those standards under section 401;
- The expansion of jurisdictional waters is also likely to result in a greater number of “impaired” federal waters under section 303, with additional burdens on States to evaluate and list these waters, and assign Total Maximum Daily Load (TMDL) pollutant caps to these waters; and,
- States will be required to implement their own TMDLs, or EPA-issued TMDLs, to achieve water quality standards for each newly regulated feature.

The States would be responsible for implementing all of these expanded duties within their existing budgets and staffing levels. Because businesses depend on being able to get State-issued permits within a reasonable timeframe, the additional workload the revised definition would place on the States would become a serious obstacle to commercial activity.

Real-World Impacts on Counties and Local Jurisdictions

The proposed rule would impose a particularly heavy regulatory burden on counties and local government jurisdictions. Much of this burden would come in the form of new permits and approvals being required to conduct routine infrastructure maintenance. According to the National Association of Counties, the nation’s counties are responsible for building

and maintaining 45% of the roads in 43 states.²⁷ Because the proposed WOTUS definition would define “tributaries” to include ditches, flood channels, and other infrastructure, counties would immediately be required to obtain section 402 and/or 404 permits for work in those areas that may disturb soil or otherwise add any “pollutant” that could affect the “tributary.” Individual section 404 permits currently may take more than a year to obtain, and have a median cost of \$155,000.²⁸ County irrigation districts, flood control districts, road departments, weed control districts, pest control districts, etc., would be required to obtain these permits in addition to section 402 permits for discharges to these waters. These permits would be required by the CWA, regardless of the environmental benefit, if any, and their lack of resources to address this new federal requirement.²⁹ In fact, 1,542 of the 3,069 counties in the nation (50%) have populations of less than 25,000³⁰ and must operate with limited resources. The undersigned groups’ members are located in these communities and rely on local jurisdictions to maintain local infrastructure.

²⁷ Testimony of Warren “Dusty” Williams, General Manager, Riverside County Flood Control & Water Conservation District, submitted on behalf of the National Association of Counties, before the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment (June 11, 2014) at page 2.

²⁸ EPA and U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014) at 12.

²⁹ The Lake County, Oregon, Road Department, for example, located in a county with 7,711 residents in 2012, must maintain the county’s road network, including ditches, culverts, and bridges, with only a dozen or so employees. See www.lakecountyor.org/government/road.master.php. Brown County, North Dakota officials have also cited concerns about WOTUS permit delays “for something as simple as replacing a culvert.” Gary Vetter, Assistant to the Brown County Commissioners, cited in “EPA’s Proposed Definition Change Concerns County, Thune,” Aberdeen News, Local News (posted August 16, 2014).

³⁰ Testimony of Warren “Dusty” Williams, General Manager, Riverside County Flood Control & Water Conservation District, submitted on behalf of the National Association of Counties, before the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment (June 11, 2014) at page 2.

WOTUS Will Drive Up Local Water Costs

The Nampa and Meridian Irrigation District in Idaho was formed in 1904 and operates hundreds of miles of canals, laterals, ditches and drains to provide water to their hundred square mile service area. The District's operation depends on approximately eighty drains, and regular maintenance of these drains is needed to ensure safe and effective system use. If the District were required to obtain a section 404 permit for each such activity, as would be required under the proposed WOTUS rule, then 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.

These counties and districts are responsible under the law to maintain the integrity of ditches to prevent flooding, even if they cannot obtain a section 404 permit in a timely manner to do the work. In *Arreola v. Monterey County*, 99 Cal. App.4th 722 (2002), a California appeals court held that a county is liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the county had been forced to wait to obtain a section 404 permit to do the necessary work. Counties that perform essential maintenance work will have to hope that they can get a section 404 permit within a reasonable timeframe.

These section 404 impacts on county maintenance of roads, ditches, culverts, etc., are themselves more than sufficient to demonstrate that the proposed rule would have an enormous adverse impact. The thousands of projects undertaken in counties across the country that will be subject to federal dredge and fill permitting for the first time would cripple local efforts to deliver the basic services businesses and their surrounding communities depend on. This expanded permitting requirement would also delay or kill municipal projects to build or renovate schools, hospitals, community centers, local transit, parks, and other civic infrastructure in areas that most people would consider to be dry "land," but under the proposed rule are "water."

For stormwater discharges, counties and municipalities will feel the impact of the WOTUS proposal at two major levels. First, permits issued directly to municipal and industrial sources of stormwater will have to address discharges to newly covered jurisdictional waters. Second, municipalities will then have to address a wide variety of land uses within their borders through municipal ordinances and other mechanisms required

by their storm water management systems. EPA and the States currently issue “municipal separate storm sewer system” (MS4) permits to municipalities requiring those municipalities to implement various land use controls. These controls range from post-construction retention requirements to measures aimed at meeting TMDLs. This type of coerced local regulation of commercial, governmental and residential activity will increase substantially with the Agencies’ expansion of CWA jurisdiction.

III. THE AGENCIES’ PROPOSED DEFINITIONS ARE SO VAGUE AND POTENTIALLY EXPANSIVE THAT THEY COMPLETELY RE-WRITE THE SCOPE OF THE CLEAN WATER ACT

The Agencies’ proposed definition of “waters of the U.S.” contains several key new definitions. These new definitions, while important by themselves, would fundamentally change and expand current Clean Water Act definitions. Besides being extremely difficult to fully understand, the interplay of these new and existing definitions has the potential to fundamentally change the relationship between the federal government and the States—all in the absence of any new Congressional directive. The key definitions of concern include:

“Significant nexus”

The Agencies propose that any chemical, physical, or biological effect on jurisdictional waters not thought to be “speculative or insubstantial” will be considered “significant.” The practical result of the Agencies’ approach is that, if **any** effect exists, it is deemed significant. This expansion of federal authority is totally unjustified and lacks a rational basis. The concept of a “significant nexus” historically arose in the narrow context of wetlands areas that actually abutted—and were therefore “inseparably bound up with”—traditionally navigable waters. Now, the Agencies proposal would require an esoteric inquiry into whether an isolated water could theoretically have an impact on—or be impacted by—any other water within a region of indeterminate size. The meaning of “significant nexus” in the context of chemical, physical, and biological effects will likely occupy the federal courts for decades to come.

What is a “Significant Nexus?”

The Agencies’ proposed definition of “significant nexus” unjustifiably ensures that virtually any impact on downstream waters will be deemed significant. Coupled with the “cumulative effects” approach and the likelihood that a single water will determine the jurisdictional fate of

small waters spread over vast areas that are deemed to be “similarly situated,” the agencies’ proposal effectively leaves nothing out of the “other waters” category.

“Tributary”

The Agencies’ proposed definition of “tributary” is extraordinarily vague and overbroad. The definition would cover just about anything that conveys water and is not otherwise ruled out by narrow exclusions. A “tributary”:

- Need only demonstrate the bare minimum evidence of a water’s flow through any channel, a bed, bank and ordinary high water mark;
- Can be anything that “contributes” even the tiniest amount of water;
- May only “contribute” water infrequently, e.g., during rare, extreme precipitation events;
- May only contribute water to major waters by an “indirect” route through another “water,” which in turn also could convey only small, infrequent flows via indirect routes; and
- Can include even “upland” **ditches**, if they include areas that can be characterized as “wetland” anywhere along their entire length, or if they occasionally receive stormwater overflow from any “wetland” or other water.

In essence, the definition of “tributary” will cover virtually anything (not explicitly excluded) where water flows enough to make a mark (ordinary high water mark, which can be nothing more than disturbed vegetation or soil) that is capable of “contributing” any amount of flow (even a trickle) to a downstream location that eventually connects to larger water bodies.

Is a ditch a “tributary”?

In most cases, **yes**. This rulemaking is the first time the Agencies’ have specifically included ditches within the definition of “tributary.” Like many other aspects of the proposal, however, the jurisdictional coverage of ditches is unclear. The proposal provides, in part, that: “[a] tributary ... includes water such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this section.” 79 Fed. Reg. 22,207. Most industrial, municipal, and agricultural ditches will not be excavated *wholly* in uplands, drain *only* uplands, and have less than perennial flow. Most ditches will also eventually contribute some sort of flow to larger waters. This is precisely

why ditches exist in the first place—to carry water away, Therefore, most ditches will meet the definition of a tributary and would not be excluded from CWA permitting requirements.

“Adjacent Waters”

While the Agencies propose to retain the existing definition of “**adjacent**,” they also propose new definitions of “**neighboring**,” “**riparian area**,” and “**floodplain**.” These definitions not only expand the universe of jurisdictional waters far beyond the traditional concept of “adjacency” (and the Supreme Court’s interpretation of that concept), they create profound uncertainty as to which waters are likely to be jurisdictional. This problem is illustrated by the diagram below.

Significantly, the Agencies have not offered a defensible rationale to explain why the adjacency concept should be extended to non-wetland waters. There has long been a reasonable argument that wetlands that actually abut navigable waters without any clear boundary between the wetlands and waters should be jurisdictional WOTUS. This is based upon the view that such adjacent (*actually abutting*) wetlands are probably inseparably bound up with jurisdictional waters and therefore have a significant nexus with them. But there is no rationale for extending this adjacency concept to non-wetland waters because non-wetland waters will always be non-abutting (and therefore have no significant nexus).

“*Neighboring*” - The Agencies define “neighboring” to include waters located within the riparian area or floodplain of a traditional navigable water or a tributary, or a water with a shallow subsurface hydrologic connection³¹ to a jurisdictional water. These descriptions encompass potentially vast areas (e.g., the Mississippi River floodplain, the Missouri River floodplain) such that virtually all waters within that geographical area would be jurisdictional.

“*Riparian Area*” - The Agencies propose to define a “riparian area” as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.” Narrow strips of land directly abutting a waterway certainly “border” the waterway, but as one moves away from the waterway, the notion of “bordering” diminishes to the point of absurdity. The Agencies have provided no clarification as to how far a riparian area extends away from a water body. According to the proposal, the concept of “reasonable

³¹ While the Agencies assert that groundwater is not subject to regulation as WOTUS, the practical distinction between “shallow subsurface flow” and “groundwater” is unclear, particularly in areas where groundwater lies close to the surface (as in parts of the State of Florida, for example).

proximity,” which itself is subjective and vague, applies only when adjacency is established through a hydrologic connection for a “water” that lies “outside of the floodplain and riparian area of a tributary.” 79 Fed. Reg. 22,207-08 (emphasis added). For “waters” within the riparian area, the proposal does not explain how far from a waterway the “bordering” area would extend.

Moreover, the “bordering” area is further explained as a location “where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area,” but it is entirely unclear what the Agencies mean by the “area” where such influence exists. Because the Agencies are attempting to rely on a functional, rather than spatial, definition to describe “riparian area,” the proposed rule is hopelessly vague and subject to varying, case-by-case interpretations and applications to regulated parties. This is precisely the type of analysis that the Agencies claim that the WOTUS rule was designed to avoid.

“*Floodplain*” - The definition of “floodplain” relies on the undefined term “waters” and the concept of “bordering.” And while the definition employs a measurable concept – an area that actually has been inundated by, and was formed by sediment deposition from, actual waters – the return period for such inundation is not specified at all. Is this the 10-year, 50-year, 100-year, or 200-year floodplain? It is not reasonable for the Agencies to simply say, as they have in the proposal, that they will use their “best professional judgment” to answer this question on a case-by-case basis. 79 Fed. Reg. 22,209.

“Other Waters”

The Agencies propose to define “other waters” as follows: “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.” In support of the proposed definition of “other waters,” the Agencies propose to define “significant nexus,” in part, as follows: “The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest [traditionally navigable] water), significantly affects the chemical, physical, or biological integrity of a [traditionally navigable] water.”

What Are “Waters”?

The current regulatory definition of “waters of the United States” has been on the books since 1986.³² For the first time in nearly 30 years, the Agencies propose to redefine the term, and yet have only included a definition of “water” and “waters” as a *footnote* in the preamble. What’s more, the Agencies state that the terms “water,” “waters,” and “water bodies” are not limited to the water, in the traditional sense, contained within a river, stream, lake, pond, etc., but also include “chemical, physical, and biological features” associated with those waterbodies:

“The agencies use the term ‘water’ and ‘waters’ in the proposed rule in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems. The agencies use the terms ‘waters’ and ‘water bodies’ interchangeably in this preamble. *The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features.*”³³

In a rule that purports to redefine “waters of the United States” under the CWA, it is inappropriate for the Agencies to actually define “water” only in a footnote to the rule’s preamble, rather than in the regulatory text. Moreover, given the breadth of the revised definition, virtually any area where water pools after a rain could be deemed jurisdictional. If “ephemeral streams” are regulated, why not “ephemeral ponds” or “ephemeral pools”? The Agencies state in their proposal that they are **not** asserting jurisdiction over “puddles,” *see* 79 Fed. Reg. at 22,218. It is not at all clear, however, how a “puddle” is any different than an “ephemeral pool.”

The concept of considering a water “in combination with other similarly situated waters ... in the same region” is rife with uncertainties. In many instances, this would be a vast geographic area. The extraordinarily broad scope of the required evaluation immediately inhibits the ability of a land owner to make any reasonable judgment concerning the jurisdictional status of a single, local water.

Moreover, by considering a particular water “in combination with” other waters located in such a broad region, the Agencies would examine the cumulative impacts of multiple waters, ranging from large to very small, in

³² 51 Fed. Reg. at 41,206 (Nov. 13, 1986).

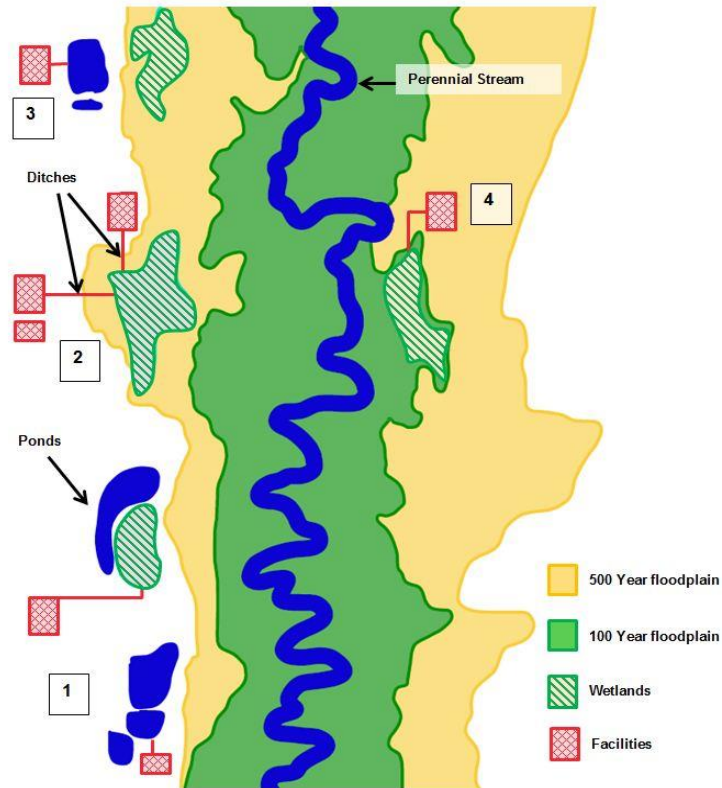
³³ 79 Fed. Reg. at 22,191 n.3.

order to determine the jurisdictional status of a particular water in question. If that cumulative impact is deemed to be “significant,” then individual waters that might be thought to be contributing in some fashion to that cumulative impact would be considered jurisdictional.³⁴ Under this approach, **every** small pond or other water feature that retains stormwater, arguably has a “significant nexus,” because each such feature, “in combination with” other waters in a broad region, regulates the flow of floodwaters, traps sediments and other pollutants, and recharges groundwater.

A larger water, or one nearer to a navigable-in-fact or interstate water, might represent the vast majority of the “cumulative” impact, and yet a smaller and/or more remote water would be pulled along into the web of federal jurisdiction. This not only expands CWA jurisdiction well beyond anything Congress could have intended to include in the term “navigable waters,” but it leaves land users with virtually no way to assess the status of their local water, short of undertaking a complex and costly watershed study.

The difficulties confronting businesses trying to determine whether the proposed WOTUS definition would impact them is illustrated by the diagram below. A facility may find itself in WOTUS for the first time because it is “adjacent” to a water, has one or more ditches that are a “tributary,” is located in a “floodplain,” a “watershed,” or a “riparian area,” or has a relationship to a navigable water as an “other” water:

³⁴ This ignores the fact that much of the cumulative impact thought to be “significant” would, in most instances, be attributable to a handful of waters, or even a single water, that is deemed to be among a larger group of “similarly situated” waters.



1. Stormwater from two facilities is conveyed by ditches and shallow subsurface flow to a wetland adjacent to a pond and another pond, both of which are located outside the 500-year floodplain. Other ponds are nearby. Are the wetlands and ponds “adjacent waters”? Are they “other waters” when considered cumulatively? Are the ditches WOTUS? Are the two facilities in the stream’s “watershed”?
2. Stormwater from three facilities is conveyed through ditches to a wetland located in the 500-year floodplain. Is the wetland an “adjacent water”? Are the ditches jurisdictional?
3. A business uses water from a pond for suppressing dust and for process water. The pond is located outside the 500-year floodplain in a depression that was created as a borrow pit when the nearby highway was constructed. The pond is located very near to wetlands that are within the 500-year floodplain. Are the pond and/or the wetlands jurisdictional?
4. Stormwater from a facility is conveyed via a ditch and shallow subsurface flow running from the 500-year floodplain to a wetland located near a navigable water in the 100-year floodplain. Are the wetland and/or ditch “adjacent waters” or otherwise jurisdictional? Is the wetland in the riparian area?

IV. THE PROPOSED RULE’S EXCLUSIONS ARE FAR TOO LIMITED AND AMBIGUOUS.

The Agencies have proposed several exclusions from the definition of “waters of the United States.” Without these exclusions, the proposed rule would produce even more irrational results. But the proposed exclusions are

too narrow and open to misinterpretation to cure the proposal's many defects and avoid significant impacts to the regulated community, as the following discussion demonstrates.

“Waste Treatment Systems”

The proposed rule excludes “waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.”³⁵ The agencies state that they do not propose any substantive changes to the exclusion for waste treatment systems,³⁶ but the proposed exclusion includes a punctuation change (the insertion of a comma after “lagoons”) that could be interpreted—or misinterpreted—as *narrowing* the scope of the exclusion. Equally important, the Agencies have missed an opportunity to delete long-suspended language included only in the NPDES version of the exclusion, and bring greater clarity and certainty to the interpretation and application of the exclusion.

First, although the exclusion itself is fairly straightforward, it has not always been applied consistently. As a result, the same type of feature may be treated as an excluded “waste treatment system” in one instance, but treated as a jurisdictional “water of the U.S.” in another instance.

Second, by adding a comma after the word “lagoons,” the proposed rule could be read to narrow the scope of the exclusion by requiring that **all** “waste treatment systems,” not just “treatment ponds or lagoons,” as under the current rules, be “designed to meet the requirements of the CWA” to qualify for the exclusion. This could be interpreted to mean, for instance, that features that were constructed for waste treatment prior to the CWA’s enactment in 1972 do not qualify for the waste treatment exclusion. This creates new interpretive issues, as “designed to meet the requirements of the CWA” can be construed narrowly or broadly. For example, features that were constructed for waste treatment prior to the CWA’s amendment in 1972 could not have been designed with CWA compliance in mind. Yet these features often play an important role in achieving compliance with current CWA requirements, and are now commonly excluded from regulation by virtue of the waste treatment system exclusion. The Agencies should avoid this interpretative minefield by deleting the new comma. If they decline to do so, they must acknowledge the change, explain their intentions, and provide public notice and an opportunity for comment.

³⁵ 79 Fed. Reg. at 22,263.

³⁶ *Id.* at 22,217. The Agencies propose to make one ministerial change to delete a cross-reference to an EPA regulation for cooling ponds that is no longer in the Code of Federal Regulations. The undersigned groups support this ministerial change, for the reasons the Agencies have acknowledged and explained.

Third, the agencies retain, in 40 C.F.R. § 122.2, “suspended” language limiting the applicability of the exclusion. Although the suspended language has no legal effect, retaining this language simply adds confusion rather than the certainty the Agencies say is their overarching goal.

In sum, despite the Agencies’ assurances that the waste treatment exclusion is unaffected by the proposal, the proposed punctuation change, in combination with a lengthy history of inconsistent application, would create significant new confusion and uncertainty for the regulated community.

“Ditches”

The proposed rule would exclude “ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.” We presume that the term “uplands” refers to areas that are not waters or wetlands. However, limiting the exclusion to those ditches excavated wholly in uplands (along the entire length of the ditch) and draining only uplands will ensure that most ditches are categorically deemed to be tributaries. Given that the essential purpose of ditches is to carry water, ditches will tend to develop wetland characteristics at some point along their length. In addition, many ditches will be excavated at least in part in areas that could be classified as “wetland” or as an “ephemeral.” These broad limitations on the so-called “upland ditch exclusion” render this exclusion meaningless. They also place an unacceptable burden on the regulated community to analyze the current and historical hydrology of the particular features in and around their property, and even beyond their own property line, in order to make an informed decision about the jurisdictional status of a ditch.

The Agencies also propose to exclude “ditches that do not contribute flow, either directly or through another water,” to navigable waters, interstate waters, the territorial seas or impoundments of those three waters or of tributaries. This exclusion is astoundingly narrow. To qualify, such a ditch must contribute **zero flow**, even indirectly, to any tributary, which itself is defined explicitly to include ditches and ponds even if they themselves contribute only minimal, occasional flows via indirect routes to downstream waters. Ditches conveying very small flows indirectly to minor waters represent most of the ditches in the country. For that reason, this exclusion is virtually useless.

“Artificial Lakes, Ponds, and Pools”

The Agencies further propose to exclude lakes, ponds and pools used exclusively for listed purposes: stock watering, irrigation, settling, rice

growing, reflecting, swimming and ornamentation. To qualify for the exclusion, these features must have been created by excavating and/or diking *dry land*. In other words, if a stock watering pond or a settling pond was excavated in a small wetland area that was *not* jurisdictional (maybe nothing more than a low spot), the resulting stock pond or settling pond is not excluded from jurisdiction and instead may be regulated. Given that ponds and pools tend to be dug in low spots, these proposed exclusions are wholly inadequate.

In addition, while the exclusions may theoretically benefit some uses, they do nothing for most industrial/commercial operations. Lakes, ponds and pools are used throughout the country for a wide variety of industrial uses, as well as for combinations of different uses. Examples include: storing storm water for use as a dust suppressant; storing storm water for use in industrial processes; storing storm water for use in fighting fires; creating conditions suitable for non-swimming recreation, such as fishing and duck hunting; and restricting the flow of storm water runoff to reduce peak flows so as to minimize down-slope erosion and turbidity.

“Water-Filled Depressions”

The Agencies propose to exclude “water-filled depressions created incidental to construction activity.” The language of the proposed exclusion is ambiguous. The Agencies do not clarify what is meant by “incidental to” or “construction activity.” Depressions are commonly created in the course of construction for various reasons, including borrow pits, retention basins, architectural landscaping, diversion of storm water run-off, creation of water storage features, etc. Are these and similar depressions excluded if they were created in the course of constructing something other than a structure or a facility? Also unclear is whether this exclusion applies for as long as a depression exists and continues to apply irrespective of whether it is “water-filled” at all times or whether a condition of “construction” ceases to exist. Depressions created incidental to construction activity may continue to exist, by design or happenstance, for indefinite periods—even beyond the life of the structure or facility with which their creation was associated. For instance earthen dikes around storage tanks often accumulate rain water over periods of time, particularly in areas of heavy rainfall.

V. THE PROPOSED RULE IS PROCEDURALLY FLAWED

The Agencies' proposed rule suffers from serious procedural defects. These defects are sufficient to require the Agencies to withdraw the current proposal and start the rulemaking process over from the beginning.

Administrative Procedure Act

Under the notice and comment rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553, in order to obtain “meaningful” participation from the public, courts have held that the Notice of Proposed Rulemaking (NPRM) must “fairly apprise interested persons” of the issues in the rulemaking.³⁷ The Agencies' proposal clearly fails to provide this adequate notice. Because of the vague and confusing nature of the new and existing definitions in the proposal, and the unknown ways these definitions will be applied in combination, even Clean Water Act experts are hard pressed to understand the full reach of this proposal. Major regulatory concepts are not explained. The Agencies provide no examples of how they would apply the new definitions, or real-world examples of how the exemptions would work. On the contrary, the Agencies simply assert that the proposal would have no regulatory effect. The NPRM is so vague and non-transparent that it does not ‘fairly apprise interested persons’ that they will be likely to face new federal regulatory requirements if the proposal were to be finalized. For this reason, the WOTUS rulemaking must be withdrawn.

Information Quality Act

The Agencies' WOTUS proposal neither complies with the Information Quality Act (IQA) as implemented under Office of Management and Budget (OMB) guidelines, nor EPA's own information quality guidelines.³⁸

The Agencies issued the proposed rule based upon EPA's Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. The Report purports to establish a

³⁷ *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980); see also *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977), *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995)(NPRM provides inadequate notice to interested parties when the only reference to a major new regulatory burden on an industry segment under proposal is mentioned only in a single footnote.).

³⁸ See Treasury & General Governmental Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554 § 515(a); 44 U.S.C. § 3516 (notes); EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency, EPA/260R-02-2008 (October 2002).

scientific basis for the connectivity of isolated, often evanescent “waters” to traditional “navigable” waters under the CWA. The Agencies argue that the hydrologic “connectivity” of these remote waters, which ultimately reach navigable waters, establishes federal jurisdiction over these waters. The information contained in the Agencies’ Report clearly meets the OMB definition of “information.” “Information’ means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic”³⁹

The information at issue also meets the OMB definition of “influential” information. “Influential” means “that the agency can reasonably determine that the dissemination of the information will have or does have a clear and substantial impact on important public policies”⁴⁰ The Agencies have directly relied upon the Report in making findings regarding the extent of hydrologic connectivity sufficient to support an assertion of federal jurisdiction. OMB has stated that “influential information” should be held to a heightened standard of quality.⁴¹ The Report clearly meets definition of “influential” information that needs to be of the highest quality.

On the date the Agencies published the proposed WOTUS rule, EPA’s Science Advisory Board had not completed its review of the Report. In fact, the SAB did not complete its review of the Report until September 30, 2014. Given the complex and controversial nature of the conclusions made in the Report, until the public is given the opportunity to fully evaluate peer reviewers’ comments on the Report—the quality of the information in the Report is of unknown quality and cannot be relied upon to make public policy.⁴² This is particularly true of such a significant policy as the scope of federal jurisdiction over water and land uses. The Agencies must withdraw their proposal until they are able to fully comply with the Information Quality Act.

Regulatory Flexibility Act

Despite clear indications that their revised definition will impose widespread impacts on small entities, the Agencies certified under the

³⁹ OMB Guidelines § V.5.

⁴⁰ OMB Guidelines § V.9

⁴¹ 67 Fed. Reg. 8,452 (February 22, 2002).

⁴² Significantly, on September 2, 2014, SAB panel members released a memorandum raising serious concerns about the definitions in EPA’s Report, such as “significant nexus,” and the extent to which hydrologically connected waters actually have any “significant nexus” to one another. Memorandum from Dr. Amanda Rodewald, Chair, Science Advisory Board for the Review of the EPA Water Body Connectivity Report, to Dr. David Allen, Chair, EPA Science Advisory Board, Comments to the chartered SAB on the adequacy of the scientific and technical basis of the proposed rule titled “definition of ‘waters of the United States’ under the Clean Water Act” (Sept. 2, 2014).

Regulatory Flexibility Act (RFA)⁴³ that the rule would **not** result in a significant economic impact on a substantial number of small entities. In making this certification, the Agencies avoided their RFA responsibility to (1) investigate the impacts the revised definition would directly impose on small entities and (2) to consider less burdensome regulatory alternatives.

The RFA covers three distinct types of small entities: small businesses, small not-for-profit organizations, and small governmental jurisdictions.⁴⁴ Before formally proposing a new rule, an agency must identify small entities that are likely to be impacted by the rule and estimate the magnitude of the impact. If this screening analysis indicates limited impacts to small entities, the RFA allows the agency to certify that there will not be “a significant economic impact on a substantial number of small entities.”⁴⁵ Significantly, if an agency lacks the factual data to support a certification, it may not certify the rule and must perform a detailed small entity impact analysis.⁴⁶

The Agencies did not follow these requirements, however. There is no evidence that **any** screening analysis was conducted at all. Instead, the Agencies published an RFA certification that simply asserts, without supporting facts, that “[t]he scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations . . . this action will not affect small entities to a greater degree than the existing regulation . . . [t]he proposed rule contemplated here is not designed to “subject” any entities of any size to any specific regulatory burden.”⁴⁷ The Agencies cite several cases, including *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001); *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985), and *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). The Agencies cite these cases to support their argument that because the revised WOTUS definition does not directly regulate small entities, they may properly certify the rule.

As discussed in detail above, however, the Agencies’ certification statement is not factually accurate. The proposed WOTUS definition rule would in fact have a significant negative effect on a wide variety of small entities. Because the Agencies lack any factual basis to support their RFA

⁴³ 5 U.S.C. §§ 601-612.

⁴⁴ 5 U.S.C. §§ 601(3)-(5).

⁴⁵ 5 U.S.C. § 605(b).

⁴⁶ 5 U.S.C. § 603. Moreover, the EPA is specifically required by the RFA to take the additional step of conducting a Small Business Advocacy Review (SBAR) Panel, in order to more formally consider the views of affected small entities and evaluate alternative regulatory approaches that could lessen the rule’s impact while still achieving the goal of the agency. 5 U.S.C. § 609(b).

⁴⁷ 79 Fed. Reg. 22,220 (April 21, 2014).

certification, the certification is invalid and the rulemaking is procedurally defective.⁴⁸

Recently, the U.S. Small Business Administration's Office of Advocacy agreed with this conclusion, publicly advising the Agencies that they improperly certified the WOTUS proposal under the RFA.⁴⁹ Even if the Agencies originally believed in good faith that the proposed rule would not have a significant economic impact on a substantial number of small entities, they subsequently received more than ample evidence that small entities believe the rule will harm them:⁵⁰

- Small business representatives from the ranching, homebuilding, and stone and gravel industries testified before the House Small Business Committee on May 29, 2014, and expressed their concerns about specific impacts of the rule.
- Small businesses and small governments testified in front of the House Transportation and Infrastructure Committee on June 11, 2014, and echoed these concerns.
- The Office of Advocacy held a Roundtable on July 21, 2014, at which the Agencies heard firsthand the concerns of small businesses and their frustration that EPA would not withdraw the rule and fully comply with the RFA.
- EPA conducted a small entity outreach meeting on October 15, 2014, which the Corps did not attend. EPA was unable to answer questions presented by small business representatives attending the meeting.

In light of the available evidence that the proposed WOTUS rule will in fact impose significant impacts on small entities, the Agencies need to withdraw the rule and start over. The Agencies' public outreach efforts are **not** legally or functionally equivalent to the steps required of the Agencies under the RFA. To make matters worse, concerns about the proposal expressed in good faith by small entities have either been ignored by the Agencies or dismissed as "silly" and "ludicrous."⁵¹

⁴⁸ *Southern Offshore Fishing Ass'n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998) ("Congress has not intended for administrative agencies to circumvent the fundamental purposes of the RFA by invocation of the certification provision.").

⁴⁹ Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Administrator, EPA and General John Peabody, Deputy Commanding General, Corps of Engineers, on Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014) at 4.

⁵⁰ Courts have held that an agency must account for the public comments it receives that challenge the agency's initial determination that no significant economic impact on small entities is likely. See *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998).

⁵¹ See Comments of Gina McCarthy, EPA Administrator, reported in *The Hill* online (July 8, 2014), available at: www.thehill.com/policy/energy-environment/211548-epa-promoting-water-rule-to-farmers-in-mo.

The Agencies have ample time to start again and write a rule that is clear, transparent, and narrowly tailored to accomplish its objective without causing collateral damage to small entities. Because the Agencies' certification is not valid, the Agencies remain obligated to comply with the RFA before the proposed WOTUS rule can be finalized.

Unfunded Mandates Reform Act

In the preamble to the proposal, the Agencies state that “[t]his proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA),⁵² for state, local or tribal governments or the private sector. This proposed rule does not directly regulate or affect any entity and, therefore, is not subject to the requirements of sections 202 and 205 of UMRA.”⁵³ In light of the wide variety of impacts on state and local governments discussed above—which will be imposed directly on these governments by the Agencies themselves—the Agencies had no valid basis to avoid meeting their obligations under UMRA. For this reason, the proposed rule should be withdrawn so that the Agencies can comply with their UMRA responsibilities.

Executive Order 13,132: Federalism

Executive Order 13,132 requires federal agencies to develop accountable processes for “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” Because the Clean Water Act is a federal statute that is currently primarily administered and enforced by the States, imposing new responsibilities on the States necessarily implicates federalism. Even before the WOTUS rule was formally proposed, groups representing State and local interests voiced loud concerns that the States were not being adequately consulted or involved in the rule development process. The U.S. House of Representatives recently passed, by a bipartisan 262-152 vote, H.R. 5078, the “Waters of the U.S. Overreach Protection Act of 2014,” which would require the Agencies to suspend the WOTUS proposal until they have done a better job of coordinating with the States. Because the Agencies have not consulted or coordinated adequately with the States, the Agencies must withdraw their proposal and not proceed to revise the WOTUS definition until they can fully comply with Executive Order 13,132.

⁵² 2 U.S.C. 1531-1538.

⁵³ 79 Fed. Reg. 22,220 (April 21, 2014).

VI. THE PROPOSED RULE IS LEGALLY FLAWED

The Agencies' rationale for their proposal rests upon a selective and biased reading of the principal Supreme Court precedents addressing jurisdiction under the CWA. It also ignores the clearly articulated Congressional design of the CWA and more than 40 years of its successful federal/State implementation. The proposal abandons key jurisdictional elements established in the *Riverside Bayview Homes* decision; ignores the clear restrictions imposed by the Court in *SWANCC*, including those articulated by Justice Kennedy; and distorts *Rapanos* by giving no weight to the plurality opinion while attributing to Justice Kennedy certain broad principles that are neither supported by his concurring opinion nor allowed within the jurisdictional bounds he helped clarify in *SWANCC*.

1. Clean Water Act historical context

From enactment of the landmark 1972 Clean Water Act, through its major amendments in 1977 and 1987, Congress clearly designed the Act to regulate the discharge of pollutants into waterways, **not** to regulate land uses. The CWA contains clear limitations on federal authority—and a corresponding preservation of traditional State and local authority—in the national effort to control water pollution while allowing beneficial land and water uses. CWA Section 101(b) provides that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and to] plan the development and use . . . of land and water resources...”⁵⁴ As a direct means of enforcing that policy, Congress also provided, in CWA Section 510, a rule for interpreting the Act when there is an issue as to the extent of federal authority within this sphere of State “rights and responsibilities”: “Except as expressly provided in this chapter, nothing in this chapter shall... (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters...of such States.”⁵⁵

Because the Agencies' proposal to define the extent of federal authority under the CWA presents a question of federal regulatory jurisdiction versus traditional State authority, CWA Section 510 requires an inquiry as to whether the statute “expressly provide[s]” the authority that the Agencies claim. The U.S. Supreme Court has held repeatedly that this analytical approach is central to the task of interpreting the CWA when the limits of federal jurisdiction are at issue.

⁵⁴ 33 U.S.C. §1251(b).

⁵⁵ 33 U.S.C. §1370.

2. Riverside Bayview Homes.

In *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court held that the CWA could be interpreted to cover some waters beyond traditionally navigable waters – specifically, wetlands that actually abut on navigable waterways.⁵⁶ While some of the Court’s language may suggest that it was considering a broader question of CWA jurisdiction over wetlands adjacent to “streams” and “other hydrographic features,” the Court was limited to the facts in the case, which pertained only to a wetland that “extended beyond the boundary of respondent’s property to Black Creek, a navigable waterway.”⁵⁷

Writing for a unanimous Court, Justice White explained that, “[i]n determining the limits of its power to regulate ... under the Act” where the wetlands in question physically abut on a navigable waterway, “the Corps must necessarily choose some point at which water ends and land begins.”⁵⁸ Recognizing the difficulty of that task, the Court found the Corps’ determination that “wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality ...” sufficient to support its decision to include such wetlands within the Act’s jurisdiction.⁵⁹ The Court concluded that “[w]e cannot say that the Corps’ conclusion that adjacent wetlands are inseparably bound up with ‘waters’ of the United States ... is unreasonable.”⁶⁰

3. SWANCC.

Fifteen years later, the Court decided *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). At issue in *SWANCC* were several ponds in a former gravel pit that had developed a “natural character” and were used as habitat by migratory birds. The ponds were physically isolated in the sense that they were not adjacent to open water, but they shared a biological connection with other waters given their well-established use by migratory water birds such as heron, geese, ducks and kingfishers. The Corps had concluded that the water areas were WOTUS because the migratory birds cross state lines, bird hunting is a significant economic activity, and the wetland, although isolated, functioned in interstate commerce and made it a water of the U.S., not a water of Illinois.

⁵⁶ *Id.* at 135.

⁵⁷ *Id.* at 131.

⁵⁸ *Id.* at 132.

⁵⁹ *Id.* at 133.

⁶⁰ *Id.* at 134.

After the case reached the U.S. Supreme Court, the *SWANCC* majority held that the CWA embodied Congress' explicit purpose of recognizing and preserving the "primary responsibilities and rights" of States to deal with water pollution and land uses.⁶¹ The Court noted that Congress does not "casually authorize" agencies to interpret their statutory jurisdiction in a manner that would "push the limit of congressional authority," especially where doing so "alters the federal-state framework by permitting federal encroachment upon a traditional state power."⁶² In such circumstances, the Court "expect[s] a clear indication that Congress intended that result."⁶³

The Court then reiterated its holding in *Riverside* that federal jurisdiction extends to wetlands that are actually abutting navigable waters because protection of these adjacent (actually abutting) wetlands was consistent with Congressional intent to regulate wetlands "inseparably bound up with 'waters of the United States.'"⁶⁴ The Court found that this "inseparability" is what produces a "significant nexus" between the wetlands and navigable waters.⁶⁵ Thus, nothing in *Riverside* or *SWANCC* suggests that the concept of a "significant nexus" justifies CWA jurisdiction over anything beyond wetlands that actually abut waters that qualify as traditional navigable waters in their own right. Justice Kennedy was a part of the majority making this key conclusion.

SWANCC held that the Corps' assertion of federal jurisdiction over "ponds that are not adjacent to open water" is not permitted under the plain language of the CWA.⁶⁶ Nothing in the legislative history of the Act persuaded the Court that Congress intended to cover more than navigable waters and their adjacent wetlands.⁶⁷ And the Court declined to give *Chevron*⁶⁸ deference to the Corps' interpretation of its own jurisdiction over isolated waters used by migratory birds because it found that the statute was unambiguous. In addition, deference was not justified because the Court found that the Corps' interpretation would infringe on States' authority to regulate land and water use without any clear indication that Congress intended that result.⁶⁹

⁶¹ 531 U.S. 159, 166-67 (quoting 33 U.S.C. § 1251(b)).

⁶² *Id.* at 172-73.

⁶³ *Id.* at 172.

⁶⁴ *Id.* (quoting *Riverside Bayview Homes*, 474 U.S. at 134).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 170-71. While the Court noted it is possible to argue that the 1977 amendments adding Section 404(g) to the statute demonstrate a Congressional intent to cover "non-navigable tributaries and streams," the Court did not address that question. *Id.* at 171.

⁶⁸ *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). 531 U.S. at 172.

⁶⁹ *Id.* at 172-74.

The Court's *SWANCC* and *Riverside* decisions continue to constrain the Agencies' discretion in interpreting the Act:

- The CWA cannot be read to confer jurisdiction over physically isolated, wholly intrastate waters. In *SWANCC* the Court said: “[i]n order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.”⁷⁰ The Court did not merely disagree with the Corps’ argument that use by migratory birds could justify extending CWA jurisdiction to isolated waters. It concluded that the statutory text cannot justify regulation of intrastate ponds that are not adjacent to open water ***under any rationale***;
- A water such as a pond is isolated (and therefore not jurisdictional) if it is not adjacent to open water. The Court understood adjacency as a limited concept, encompassing only those waters that actually abut on a navigable waterway.⁷¹ The concept of adjacency must be so limited in order to give some import to Congress’ use of the term “navigable” while at the same time recognizing that Congress intended to regulate “at least some waters” that are not navigable;⁷² and,
- The *Riverside* decision must be understood to mean that wetlands adjacent to (i.e., actually abutting) navigable waters, which are thus “inseparably bound up with” navigable waters, provide the “significant nexus” on which the decision in *Riverside* rested.⁷³

These were the jurisdictional boundaries drawn by the Court, including Justice Kennedy, prior to *Rapanos*. Neither the plurality opinion nor Justice Kennedy’s opinion in *Rapanos* repudiates ***any aspect*** of the *SWANCC* decision, including the *SWANCC* majority’s characterization of the rationale on which the outcome in *Riverside* rested.

4. ***Rapanos***.

The case involved four wetlands areas lying near ditches and man-made drains that eventually drained into traditional navigable waters. Developers had filled these wetlands without obtaining section 404 permits, assuming that the areas were not jurisdictional because they were many miles from navigable waters. Both the federal District Court and the Sixth Circuit

⁷⁰ *SWANCC* at 168.

⁷¹ *SWANCC* at 167. Note that in neither *Riverside* nor *SWANCC* was the Court called upon to decide whether the Corps’ regulatory definition of “adjacent” (i.e., “bordering, contiguous or neighboring”) was a reasonable interpretation of the Act.

⁷² *Id.*

⁷³ *Id.* Thus, conceptually there is little daylight between adjacency (meaning actually abutting) and the “significant nexus” that justifies extending CWA jurisdiction beyond navigable waters.

Court of Appeals found the wetlands areas to be jurisdictional waters of the U.S. The Supreme Court reversed. Five Justices found that federal jurisdiction did not exist or was not proven. Justice Kennedy concurred in the judgment but did not join the majority.

Instead, Justice Kennedy concluded that WOTUS jurisdiction could be established if there was a “significant nexus” between the four wetlands in question and the navigable water many miles away. In the case at hand, however, the elements necessary for the nexus had not been shown. The four wetlands did not “significantly affect the chemical, physical, or biological integrity” of the navigable water miles away. The effect of the four wetlands on the navigable water was only “speculative and insubstantial.” The test suggested by Justice Kennedy, is whether a water has a “significant nexus” to a navigable water that is substantial and not speculative (i.e., can be proven).

The Agencies’ proposed WOTUS rule relies extensively on language from the *Rapanos* opinions, particularly Justice Kennedy’s. Unfortunately, the Agencies ignore limitations on principles expressed by the Justices. In particular, the Agencies’ reliance on Justice Kennedy’s concept of “significant nexus” in *Rapanos* seems to completely ignore the limits on the concept that he himself articulated. Rather than staying within the contours of Justice Kennedy’s “significant nexus” concept that they rely so heavily upon, the Agencies’ proposal expands the concept to a virtually infinite, zen-like construct where every drop of water is intimately connected to every other drop.

Jurisdictional Limitations Delineated By Justice Kennedy

Justice Kennedy noted that both the plurality and the dissent would expand CWA jurisdiction beyond permissible limits. He wrote that the plurality’s coverage of “remote” wetlands with a surface connection to small streams would “permit application of the statute as far from traditional federal authority as are the waters it deems beyond the statute’s reach” (i.e., wetlands near to, but lacking a continuous surface connection with, navigable-in-fact waters).⁷⁴ This, he said, was “inconsistent with the Act’s text, structure, and purpose.”⁷⁵ As for the dissent, Justice Kennedy said the Act “does not extend so far” as to “permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.”⁷⁶ Justice Kennedy’s outright rejection of these jurisdictional theories—mere hydrologic

⁷⁴ *Rapanos* at 776-77.

⁷⁵ *Rapanos* at 776.

⁷⁶ *Rapanos* at 778-79.

connections to, and mere proximity to, navigable waters or features that drain into them—were not accounted for by the Agencies in their proposal.

Limitations on “Significant Nexus”

Justice Kennedy also acknowledged that the Court’s concept of a “significant nexus” was tied to *Riverside*, in which wetlands actually abutting navigable waters were deemed to be within the Act’s jurisdiction because they are “integral parts of the aquatic environment” that Congress expressly chose to regulate.⁷⁷ The *SWANCC* majority (including Justice Kennedy) had made the same point, and had concluded that ponds with no hydrologic connection, but with a very strong biological connection, to navigable waters were not subject to the Act’s jurisdiction.⁷⁸ Justice Kennedy concluded with the general statement that “the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”⁷⁹

Justice Kennedy maintained that, for jurisdiction over wetlands, the requisite nexus must be significant effects on “the chemical, physical and biological integrity of the covered waters more readily understood as ‘navigable’.”⁸⁰ He posits this standard in a factual vacuum, ignoring that this standard, adopted by the Court in *Riverside*, pertained to wetlands actually abutting navigable waters such that a demarcation between waters and wetlands could not easily be discerned. Divorced from that significant fact, Justice Kennedy’s standard is expansive. It could be applied to many isolated waters, including those held to be non-jurisdictional in *SWANCC*. It was the physical – i.e., hydrologic – connection that led the Court in *Riverside* to conclude that wetlands were “inseparably bound up with” navigable waters, and thus had a significant nexus to them. And it was the lack of such a connection that led the Court in *SWANCC* (including Justice Kennedy) to conclude that physically isolated ponds had no such significant nexus. Nothing in the facts before the Court in *Rapanos* could justify this departure

⁷⁷ *Rapanos* at 779 (quoting *Riverside*, 474 U.S. at 135).

⁷⁸ *SWANCC* at 172.

⁷⁹ *Id.* at 779. Elsewhere in his *Rapanos* opinion, Justice Kennedy mischaracterized the Court’s decision in *SWANCC*, saying the Court there had held that “to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’” *Id.* 759 (quoting *SWANCC*, 531 U.S. 159 at 167, 172). (emphasis added). The referenced passages in *SWANCC* refer to the prior holding in *Riverside* concerning wetlands inseparably bound up with navigable waters on which they abut. They mention nothing about a “water” (e.g., a pond or lake) having a “significant nexus” to navigable waters. The Agencies have mistakenly relied upon this incorrect assertion by Justice Kennedy to confer CWA jurisdiction over all manner of “waters” that are physically disconnected from navigable waters. 79 Fed. Reg. at 22259-60.

⁸⁰ *Id.* at 780.

from the Court's precedent or legitimize Justice Kennedy's broad overstatement of the significant nexus principle.

Justice Kennedy also creates out of whole cloth the notion that a wetland can be found to have a significant nexus with "covered waters" if it has the requisite effects on the integrity of those waters "in combination with similarly situated lands in the region."⁸¹ Nothing in the Court's jurisprudence or the statute suggests that Congress intended to enact a "cumulative impacts" standard for determining federal jurisdiction over a particular water body. Such a standard is unworkable in any event because the "in combination with" assessment allows certain wetlands – e.g., those directly abutting on navigable waters – to sweep into the Act's jurisdiction other wetlands in the region that contribute little to the "combined" impacts owing to the lack of any physical connection or proximity of those wetlands to navigable waters. Again, nothing in the facts of *Rapanos* even calls for consideration of this cumulative impacts principle.

Finally, Justice Kennedy offers his view of what is not a "significant nexus" – i.e. "wetlands' effects on water quality [that] are speculative or insubstantial."⁸² Justice Kennedy appears to mean that "speculative or insubstantial" effects **cannot be** deemed "significant," a proposition few would dispute. Justice Kennedy likely did not mean that effects which are shown to be non-speculative and/or somewhat more tangible than insubstantial should automatically rise to the level of "significant," as he offers no support for such a proposition. It is also worth remembering that Justice Kennedy was keenly interested in the factors that would strengthen or weaken any nexus between waters. These factors would include distance, volume of flow, and duration of flow. The Kennedy-type inquiry about whether a significant relationship truly exists between a given water and another water is largely absent in the Agencies' proposal. Under the proposed rule, the nexus is presumed to be both present and significant.

The Agencies' application of Justice Kennedy's views must respect the following boundaries:

- Justice Kennedy provided no guidance for distinguishing between "tributaries" and predominantly dry features that may occasionally convey rainwater. Instead, the plurality's views should control;
- Justice Kennedy provided no support for considering unconnected waters such as ponds to be tributaries;

⁸¹ *Id.*

⁸² *Id.*

- Justice Kennedy’s participation in the *SWANCC* majority indicates he would not consider an intrastate water to be jurisdictional unless it is adjacent to open water in the same sense that the Court discussed adjacency in *Riverside* (i.e. actually abutting);
- Remote wetlands with merely a surface connection to small streams are not jurisdictional;
- Wetlands that merely lie alongside a drain or ditch are not jurisdictional.

For the reasons discussed above, the Agencies’ reliance on the *Rapanos* case holding, and the “significant nexus” concept articulated by Justice Kennedy in particular, does not provide a valid legal justification for the overly expansive definition of WOTUS in the proposed rule. The Agencies’ proposal tortures the logic of *Rapanos* beyond the breaking point, making **any** theoretical effect of a wet area on distant navigable waters “significant” and completely abandoning Justice Kennedy’s determination that the relationship, if any, would only be “speculative or insubstantial.” For this reason, the Agencies’ proposed WOTUS rule is fatally legally flawed.

VII. CONCLUSION/RECOMMENDATIONS

In light of the overwhelming evidence that the proposed WOTUS rule would have a devastating impact on businesses of all sizes, States, and local governments without any real benefit to the environment, the Agencies should immediately withdraw the waters of the U.S. proposal and go back to the drawing board. The Agencies are not undertaking the WOTUS rulemaking under any court order or any court-issued deadline. They have sufficient time to start over, work with affected entities—including other federal, State, and local authorities—to develop consensus-based modifications that protect waters, encourage economic prosperity, and are legally defensible.

Any revision of this definition and its underlying components—which are critical to determining the extent of federal, versus state and local, control of land uses—must be written in a way that is clear and understandable. EPA must explain why such a revision is necessary, and what environmental benefits, if any, the revision would yield. EPA must also conduct a formal SBAR Panel and consider alternative regulatory approaches. Had EPA conducted a Panel on the current proposal, it would have known early on that the public considers this revised definition to be confusing, not well thought out, and an unprecedented assertion by a federal agency of sweeping authority over land uses across the country.

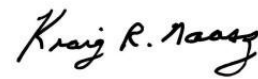
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On behalf of 375 organizations listed below:

60 Plus Association
African American Chamber of Commerce of New Jersey, Inc.
Alabama Cattlemen's Association
Alaska Chamber
Alaska Forest Association
Alaska Policy Forum
Albany Area Chamber of Commerce – OR
Albany-Colonie Regional Chamber – NY
American Association of Small Property Owners
American Coatings Association
American Coke and Coal Chemicals Institute
American Composites Manufacturers Association
American Concrete Pressure Pipe Association
American Exploration & Mining Association
American Farm Bureau Federation
American Feed Industry Association
American Foundry Society
American Frozen Food Institute
American Fruit and Vegetable Processors and Growers Coalition
American Fuel & Petrochemical Manufacturers
American Highway Users Alliance
American Land Title Association
American Loggers Council
American Meat Institute
American Petroleum Institute
American Rental Association
American Road & Transportation Builders Association
American Short Line and Regional Railroad Association

American Supply Association
AR State Chamber/ Associated Industries of AR
Arizona Chamber of Commerce and Industry
Arizona Pork Council
Arkansas Independent Producers & Royalty Owners Association
Arkansas Pork Producers Association
Associated Builders & Contractors, Inc. - Illinois Chapter
Associated Builders & Contractors, Rhode Island Chapter
Associated Builders & Contractors, Rocky Mountain Chapter
Associated Builders and Contractors
Associated Equipment Distributors
Associated General Contractors - Nebraska Chapter
Associated General Contractors of California
Associated General Contractors of Connecticut
Associated General Contractors of Georgia
Associated General Contractors of Iowa
Associated General Contractors of Maine
Associated General Contractors of Michigan
Associated General Contractors of New Hampshire
Associated General Contractors of North Dakota
Associated General Contractors of South Dakota/ Building Chapter
Associated General Contractors of South Dakota/ Highway Heavy Utilities
Chapter
Associated General Contractors of St. Louis
Associated General Contractors of Utah
Associated General Contractors of Vermont
Associated General Contractors of Western Kentucky
Associated Logging Contractors of Idaho
Associated Oregon Industries
Associated Oregon Loggers, Inc.
Association of American Railroads
Association of Equipment Manufacturers
Association of Montana Aerial Applicators
Association of Oil Pipe Lines
Association of Washington Business
Billings Chamber of Commerce – MT
Birmingham Business Alliance – AL
Bismarck-Mandan Chamber of Commerce – ND
Black Chamber of Commerce of New York City, Inc.
Bossier Chamber of Commerce – LA
Brick Industry Association
Buffalo Niagara Partnership – NY
Business and Industry Association of New Hampshire

Business Council of Alabama
Caesar Rodney Institute
Caldwell Chamber of Commerce
California Chamber of Commerce
California Retailers Association
Campbell County Chamber of Commerce – WY
Carolinas Food Industry Council
Carson Valley Chamber of Commerce – NV
Central Louisiana Chamber of Commerce
Charleston Metro Chamber of Commerce – SC
Chemical Industry Council of Illinois
Civitas Institute
Coal Operators and Associates, Inc.
Colorado Competitive Council
Colorado Mining Association
Colorado Petroleum Marketers Association
Colorado Timber Industry Association
Commerce Lexington, Inc. – KY
Composite Panel Association
Concrete Reinforcing Steel Institute
Connecticut Asphalt & Aggregate Producers Association
Connecticut Construction Industries Association
Connecticut Environmental & Utilities Contractors Association
Connecticut Ready Mixed Concrete Association
Connecticut Road Builders Association
Construction Industry Round Table
Construction Management Association of America
Dairy Producers of Utah
Davis Chamber of Commerce – UT
Delaware State Chamber of Commerce
Denver Metro Chamber of Commerce – CO
Erie Regional Chamber & Growth Partnership – PA
Fall River Area Chamber of Commerce and Industry – MA
Far West Equipment Dealers Association
Fargo Moorhead West Fargo Chamber of Commerce – MN-ND
Farm Equipment Manufacturers Association
Florida Chamber of Commerce
Florida Forestry Association
Forest Resources Association
Forward Janesville, Inc. – WI
Georgia Chamber of Commerce
Georgia Pork Producers
Global Cold Chain Alliance

Goleta Valley Chamber of Commerce – CA
Grain & Feed Association of Illinois
Great Falls Area Chamber of Commerce – MT
Greater Cedar Valley Alliance & Chamber – IA
Greater Conejo Valley Chamber of Commerce – CA
Greater Elkhart Chamber of Commerce – IN
Greater Fairbanks Chamber of Commerce – AK
Greater Houston Partnership – TX
Greater Louisville Inc. – KY
Greater North Dakota Chamber
Greater Oak Brook Chamber of Commerce – IL
Greater Omaha Chamber of Commerce – NE
Greater Pasco Area Chamber of Commerce – WA
Greater Phoenix Chamber of Commerce – AZ
Greater Raleigh Chamber of Commerce – NC
Greater Sandoval County Chamber of Commerce – NM
Greater Waco Chamber – TX
Greater Yakima Chamber of Commerce – WA
Harrisburg Regional Chamber & CREDC – PA
Hawaii Cattlemen’s Council
Healthcare Distribution Management Association
Houma-Terrebonne Chamber of Commerce – LA
Idaho Association of Commerce & Industry – ID
Idaho Mining Association
Illinois Association of Aggregate Producers
Illinois Chamber of Commerce
Illinois Chapter, Inc. – American Concrete Pavement Association
Illinois Coal Association
Illinois Farm Bureau
Illinois Fertilizer & Chemical Association
Illinois Petroleum Marketers Association/ Illinois Association of Convenience
Stores
Illinois Pork Producers Association
Independent Bakers Association
Independent Petroleum Association of America
Indiana Chamber of Commerce
Indiana Hardwood Lumbermen’s Association
Indiana Manufacturers Association
Indiana Pork
Indio Chamber of Commerce – CA
Industrial Minerals Association – North America
Indy Chamber – IN
Institute for Policy Innovation

Institute of Makers of Explosives
International Association of Amusement Parks and Attractions
International Association of Drilling Contractors
International Council of Shopping Centers
International Franchise Association
Iowa Association of Business and Industry – IA
Iowa Pork Producers Association
John Locke Foundation
Johnson City Chamber of Commerce – TN
Kalispell Area Chamber of Commerce – MT
Kansas Chamber of Commerce
Kansas Contractors Association, Inc.
Kansas Livestock Association
Kansas Pork Association
Kentucky Chamber of Commerce
Kentucky Coal Association
Kentucky Forest Industries Association
Kentucky Pork Producers
Klamath County Chamber of Commerce – OR
Land Improvement Contractors of America
Leavenworth Chamber of Commerce – WA
Lignite Energy Council
Lincoln Chamber of Commerce – NE
Long Beach Area Chamber of Commerce – CA
Longview Chamber of Commerce – TX
Los Angeles Area Chamber of Commerce – CA
Loudoun County Chamber of Commerce – VA
Louisiana Association of Business and Industry
Louisiana Landowners Association
Maine Energy Marketers Association
Manufacturer & Business Association
McLean County Chamber of Commerce – IL
Mesa Chamber of Commerce – AZ
Metals Service Center Institute
Metro Denver Economic Development Corporation – CO
Metro South Chamber of Commerce – MA
Michigan Association of Convenience Stores
Michigan Association of Timbermen
Michigan Chamber of Commerce
Michigan Oil Change Association
Michigan Petroleum Association
Michigan Pork Producers Association
Midwest Food Processors Association

Milk Producers Council
Minnesota Chamber of Commerce
Minnesota Pork Producers
Mississippi Asphalt Pavement Association
Mississippi Center for Public Policy
Mississippi Petroleum Marketers and Convenience Stores Association
Missouri Cattlemen's Association
Missouri Forest Products Association
Missouri Pork Association
Mobile Area Chamber of Commerce – AL
Montana Chamber of Commerce
Montana Contractors' Association (AGC)
Montana Equipment Dealers Association
Montana Logging Association
Montana Outfitters and Guides Association
Montana Restaurant Association
Montana Retail Association
Montana Tire Dealers Association
Morris County Chamber of Commerce – NJ
Moses Lake Chamber of Commerce – WA
Myrtle Beach Area Chamber of Commerce – SC
Naperville Area Chamber of Commerce – IL
Natchitoches Area Chamber of Commerce – LA
National Alliance of Independent Crop Consultants
National Apartment Association
National Asphalt Pavement Association
National Association for Surface Finishing
National Association of Chemical Distributors
National Association of Neighborhoods
National Association of REALTORS®
National Association of Wholesaler-Distributors
National Black Chamber of Commerce
National Cattlemen's Beef Association
National Club Association
National Council of Textile Organizations
National Electrical Contractors Association
National Federation of Independent Business
National Grain and Feed Association
National Industrial Sand Association
National Kitchen & Bath Association
National Marine Distributors Association
National Mining Association
National Multifamily Housing Council

National Pest Management Association
National Pork Producers Council
National Poultry & Food Distributors Association
National Ready Mixed Concrete Association
National Renderers Association
National Roofing Contractors Association
National Rural Electric Cooperative Association
National Small Business Association
National Stone, Sand, and Gravel Association
National Utility Contractors Association
National Waste & Recycling Association
National Wood Flooring Association
Nebraska Chamber of Commerce & Industry
Nebraska Pork Producers Association, Inc.
Nevada Manufacturers Association
New Hampshire Timberland Owners Association
New Jersey State Chamber of Commerce
New Mexico Association of Commerce & Industry
New Mexico Cattle Growers' Association
New Mexico Council of Outfitters and Guides
New York Construction Materials Association, Inc.
New York Pork Producers Cooperative, Inc.
Non-Ferrous Founders' Society
North American Equipment Dealers Association
North American Meat Association
North Carolina Chamber
North Carolina Pork Council
North Carolina Retail Merchants Association
North Country Chamber of Commerce – NY
North Dakota Grain Dealers Association
North Dakota Petroleum Marketers Association
North Dakota Propane Gas Association
North Dakota Retail Association
North Dakota Soybean Growers Association
Northeastern Loggers' Association
Northern Kentucky Chamber of Commerce
Nuclear Energy Institute
Ogden/Weber Chamber of Commerce – UT
Ohio Chamber of Commerce
Ohio Chemistry Technology Council
Ohio Coal Association
Ohio Pork Producers Council
Ohio Valley Chapter of the Associated Builders and Contractors

Oklahoma Cattlemen's Association
Oklahoma Independent Petroleum Association
Oklahoma Municipal Contractors Association
Oklahoma Pork Council
Orange County Business Council – CA
Oregon Dairy Farmers Association
Oregon State Chamber of Commerce
Oregonians for Food & Shelter
Orlando Regional Chamber of Commerce – FL
Outdoor Power Equipment and Engine Service Association
Oxnard Chamber of Commerce – CA
Palm Desert Area Chamber of Commerce – CA
Pennsylvania Chamber of Business and Industry
Petroleum Marketers Association of America
Plumbing-Heating-Cooling Contractors—National Association
Pocatello-Chubbuck Chamber of Commerce – ID
Portland Cement Association
Printing Industries of America
Professional Landcare Network
Professional Outfitters and Guides of America
Quad Cities Chamber of Commerce – IA-IL
Rancho Cordova Chamber of Commerce – CA
Retailers Association of Massachusetts
Rhode Island Center for Freedom and Prosperity
Rio Grande Foundation
Roanoke Valley Chamber of Commerce – NC
Sacramento Metropolitan Chamber of Commerce – CA
San Diego Regional Chamber of Commerce – CA
San Gabriel Valley Economic Partnership – CA
Santa Clara Chamber of Commerce and Convention-Visitors Bureau – CA
Santa Clarita Valley Chamber of Commerce – CA
Schuylkill Chamber of Commerce – PA
Shipbuilders Council of America
Silver City Grant County Chamber of Commerce – NM
Simi Valley Chamber of Commerce – CA
Small Business & Entrepreneurship Council
Society for Mining, Metallurgy and Exploration, Inc.
South Baldwin Chamber of Commerce – AL
South Bay Association of Chambers of Commerce – CA
South Carolina Asphalt Pavement Association
South Carolina Pork Board
South Carolina Retail Association
South Carolina Timber Producers Association

South Dakota Agri-Business Association
South Dakota Cattlemen's Association
South Dakota Grain & Feed Association
South Dakota Pork Producers Council
Southwest Indiana Chamber
SPI: The Plastics Industry Trade Association
St. Joseph County (South Bend), IN Chamber of Commerce
Tempe Chamber of Commerce – AZ
Tennessee Cattlemen's Association
Tennessee Chamber of Commerce & Industry
Tennessee Mining Association
Tennessee Pork Producers
Tennessee Road Builders Association
Texas Association of Business
Texas Forestry Association
Texas Wildlife Association
The Business Council of New York State, Inc.
The Chamber of Reno, Sparks, and Northern Nevada
The State Chamber of Oklahoma
Torrance Area Chamber of Commerce – CA
Treated Wood Council
Tri-City Regional Chamber of Commerce –WA
Tucson Metro Chamber – AZ
U.S. Chamber of Commerce
United Chambers – San Fernando Valley & Region – CA
Upstate Niagara Cooperative, Inc.
Utah Asphalt Pavement Association
Utah Mining Association
Utah Pork Producers Association
Vermont Independent Electrical Contractors Association
Virginia Chamber of Commerce
Virginia Forest Products Association
Virginia Forestry Association
Washington Contract Loggers Association, Inc.
West Virginia Chamber
West Virginia Forestry Association
West Virginia Manufacturers Association
West Virginia Oil and Natural Gas Association
White Pine Chamber of Commerce – NV
Wichita Independent Business Association
Wilsonville Area Chamber of Commerce – OR
Wisconsin Agri-Business Association
Wisconsin Grocers Association

Wisconsin Manufacturers & Commerce
Women's Mining Coalition
Wyoming Mining Association
Wyoming Petroleum Marketers Association
Wyoming Stock Growers Association